

# PROTECTED INNOCENCE CHALLENGE

STATE ACTION. NATIONAL CHANGE.

## 2015 ANALYSIS AND RECOMMENDATIONS TEXAS

### FRAMEWORK ISSUE 1: CRIMINALIZATION OF DOMESTIC MINOR SEX TRAFFICKING

#### *Legal Components:*

- 1.1 *The state human trafficking law addresses sex trafficking and clearly defines a human trafficking victim as any minor under the age of 18 used in a commercial sex act without regard to use of force, fraud, or coercion, aligning to the federal trafficking law.*
- 1.2 *Commercial sexual exploitation of children (CSEC) is identified as a separate and distinct offense from general sexual offenses, which may also be used to prosecute those who commit commercial sex offenses against minors.*
- 1.3 *Prostitution statutes refer to the sex trafficking statute to identify the commercially sexually exploited minor as a trafficking victim.*
- 1.4 *The state racketeering or gang crimes statute includes sex trafficking and commercial sexual exploitation of children (CSEC) offenses as predicate acts allowing the statute to be used to prosecute trafficking crimes.*

#### *Legal Analysis<sup>1</sup>:*

- 1.1 *The state human trafficking law addresses sex trafficking and clearly defines a human trafficking victim as any minor under the age of 18 used in a commercial sex act without regard to use of force, fraud, or coercion, aligning to the federal trafficking law.*

Tex. Penal Code Ann. § 20A.02(7), (8) (Trafficking of persons) makes the sex trafficking of minors under 18 a separate form of human trafficking, punishable by enhanced penalties. Tex. Penal Code Ann. § 20A.02(a) states,

A person commits an offense if the person knowingly:

(7) traffics<sup>2</sup> a child<sup>3</sup> and by any means causes the trafficked child to engage in, or become the victim of, conduct prohibited by:

<sup>1</sup> This report includes legislation enacted as of August 1, 2015.

<sup>2</sup> Pursuant to Tex. Penal Code Ann. § 20A.01(4), “‘Traffic’ means to transport, entice, recruit, harbor, provide, or otherwise obtain another person by any means.”

<sup>3</sup> Tex. Penal Code Ann. § 20A.01(1) defines a “child” as “a person younger than 18 years of age.”

- (A) Section 21.02 (Continuous Sexual Abuse of Young Child or Children);
  - (B) Section 21.11 (Indecency with a Child);
  - (C) Section 22.011 (Sexual Assault);
  - (D) Section 22.021 (Aggravated Sexual Assault);
  - (E) Section 43.02 (Prostitution);
  - (F) Section 43.03 (Promotion of Prostitution);
  - (G) Section 43.04 (Aggravated Promotion of Prostitution);
  - (H) Section 43.05 (Compelling Prostitution);
  - (I) Section 43.25 (Sexual Performance by a Child);
  - (J) Section 43.251 (Employment Harmful to Children); or
  - (K) Section 43.26 (Possession or Promotion of Child Pornography); or
- (8) receives a benefit from participating in a venture that involves an activity described by Subdivision (7) or engages in sexual conduct<sup>4</sup> with a child trafficked in the manner described in Subdivision (7).

A first conviction under Tex. Penal Code Ann. § 20A.02(a) is generally punishable as a second degree felony by imprisonment for 2–20 years<sup>5</sup> and a possible fine not to exceed \$10,000. Tex. Penal Code Ann.

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<sup>4</sup> Tex. Penal Code Ann. § 20A.01(3) states that the term “sexual conduct” has the same meaning used in Tex. Penal Code Ann. § 43.25. Pursuant to Tex. Penal Code Ann. § 43.25(a)(2), “‘Sexual conduct’ means sexual contact, actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sado-masochistic abuse, or lewd exhibition of the genitals, the anus, or any portion of the female breast below the top of the areola.”

<sup>5</sup> Texas Penal Code Sec. 3.03(b) (Sentences for offenses arising out of same criminal episode) states,

If the accused is found guilty of more than one offense arising out of the same criminal episode, the sentences may run concurrently or consecutively if each sentence is for a conviction of:

- . . . .
- (2) an offense:
  - (A) under . . . Section 21.02 [Continuous sexual abuse of a child or children] . . . committed against a victim younger than 17 years of age at the time of the commission of the offense regardless of whether the accused is convicted of violations of the same section more than once or is convicted of violations of more than one section; or
  - (B) for which a plea agreement was reached in a case in which the accused was charged with more than one offense listed in Paragraph (A) committed against a victim younger than 17 years of age at the time of the commission of the offense regardless of whether the accused is charged with violations of the same section more than once or is charged with violations of more than one section;
- (3) an offense:
  - (A) under Section . . . 43.26 [Possession or promotion of child pornography], regardless of whether the accused is convicted of violations of the same section more than once or is convicted of violations of both sections; or
  - (B) for which a plea agreement was reached in a case in which the accused was charged with more than one offense listed in Paragraph (A), regardless of whether the accused is charged with violations of the same section more than once or is charged with violations of both sections;
- . . . .
- (5) an offense:
  - (A) under Section 20A.02 [Trafficking of persons] or 43.05 [Compelling prostitution], regardless of whether the accused is convicted of violations of the same section more than once or is convicted of violations of both sections; or
  - (B) for which a plea agreement was reached in a case in which the accused was charged with more than one offense listed in Paragraph (A), regardless of whether the accused is charged with violations of the same section more than once or is charged with violations of both sections; or
- (6) an offense:

§§ 20A.02(b)(1), 12.33. A first conviction under Tex. Penal Code Ann. § 20A.02(a)(7) or § 20A.02(a)(8), however, is punishable, without regard to the use of force, fraud, or coercion, as a first degree felony by imprisonment “for life or for any term of not more than 99 years or less than 5 years” and a possible fine not to exceed \$10,000, while subsequent convictions are punishable by life imprisonment and a possible fine not to exceed \$10,000. Tex. Penal Code Ann. §§ 20A.02(b)(1), 12.32, 12.42(c)(2).<sup>6</sup>

Additionally, Tex. Penal Code Ann. § 20A.03<sup>7</sup> (Continuous trafficking of persons) states,

(a) A person commits an offense if, during a period that is 30 or more days in duration, the person engages two or more times in conduct that constitutes an offense under Section 20A.02 [Trafficking of persons] against one or more victims.

(b) If a jury is the trier of fact, members of the jury are not required to agree unanimously on which specific conduct engaged in by the defendant constituted an offense under Section 20A.02 or on which exact date the defendant engaged in that conduct. The jury must agree unanimously that the defendant, during a period that is 30 or more days in duration, engaged in conduct that constituted an offense under Section 20A.02.

(c) If the victim of an offense under Subsection (a) is the same victim as a victim of an offense under Section 20A.02, a defendant may not be convicted of the offense under Section 20A.02 in the same criminal action as the offense under Subsection (a), unless the offense under Section 20A.02:

(1) is charged in the alternative;

(2) occurred outside the period in which the offense alleged under Subsection (a) was committed; or

(3) is considered by the trier of fact to be a lesser included offense of the offense alleged under Subsection (a).

(d) A defendant may not be charged with more than one count under Subsection (a) if all of the conduct that constitutes an offense under Section 20A.02 is alleged to have been committed against the same victim.

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(A) under Section 22.04(a)(1) or (2) or Section 22.04(a-1)(1) or (2) that is punishable as a felony of the first degree, regardless of whether the accused is convicted of violations of the same section more than once or is convicted of violations of more than one section; or

(B) for which a plea agreement was reached in a case in which the accused was charged with more than one offense listed in Paragraph (A) and punishable as described by that paragraph, regardless of whether the accused is charged with violations of the same section more than once or is charged with violations of more than one section.

<sup>6</sup> Additional sentencing limitations may also be applicable. For example, a person convicted under Tex. Penal Code Ann. § 20A.02 [Trafficking of Persons] cannot be sentenced to community supervision. Tex. Code Crim. Proc. Ann. art. 42A.054(5). Also, a person convicted under Tex. Penal Code Ann. § 20A.02 [Trafficking of Persons] or Tex. Penal Code Ann. § 20A.03 [Continuous Trafficking of Persons] is not eligible for release to intensive supervision parole. Tex. Gov’t Code Ann. § 499.027(b)(2)(Z)–(AA) (First version). Additionally, if the offender has a prior conviction for certain crimes, including Tex. Penal Code Ann. § 20A.02(7) or (8), a second conviction is punishable by life imprisonment. Tex. Penal Code Ann. § 12.42(c)(2)(A).

The text of Tex. Code Crim. Proc. Ann. art. 42A.054 and Tex. Gov’t Code Ann. § 499.027 included here and elsewhere in this report includes amendments made by the enactment of House Bill 2299 during the 2015 regular session of the 84th Texas Legislature (effective January 1, 2017).

<sup>7</sup> The text of Tex. Penal Code Ann. § 20A.03 included here and elsewhere in this report includes amendments made by the enactment of House Bill 10 during the 2015 regular session of the 84th Texas Legislature (effective September 1, 2015).

A conviction under Tex. Penal Code Ann. § 20A.03 is punishable as a first degree felony by imprisonment for either 25–99 years<sup>8</sup> and a possible fine not to exceed \$10,000 or life and a possible fine not to exceed \$10,000.<sup>9</sup> Tex. Penal Code Ann. §§ 20A.03(e), 12.32.

1.2 *Commercial sexual exploitation of children (CSEC) is identified as a separate and distinct offense from general sexual offenses, which may also be used to prosecute those who commit commercial sex offenses against minors.*

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

1. Tex. Penal Code Ann. § 43.05(a)(2) (Compelling prostitution) makes it a crime if a person knowingly “causes by any means a child younger than 18 years to commit prostitution, regardless of whether the actor knows the age of the child at the time the actor commits the offense.” A conviction under Tex. Penal Code Ann. § 43.05(a)(2) is punishable as a first degree felony by imprisonment for either 5–99 years<sup>10</sup> and a possible fine not to exceed \$10,000 or life and a possible fine not to exceed \$10,000. Tex. Penal Code Ann. §§ 43.05(b), 12.32.
2. Tex. Penal Code Ann. § 43.03 (Promotion of prostitution) criminalizes soliciting “another to engage in sexual conduct with another person for compensation.” It is a “felony of the second degree if the actor engages in conduct described by Subsection (a)(1) or (2) involving a person younger than 18 years of age engaging in prostitution, regardless of whether the actor knows the age of the person at the time the actor commits the offense.” Tex. Penal Code Ann. § 43.03(a), (b).
3. Tex. Penal Code Ann. § 43.04(a) (Aggravated promotion of prostitution) is violated when a person “knowingly owns, invests in, finances, controls, supervises, or manages a prostitution enterprise that uses two or more prostitutes.” This offense is a first degree felony when “the prostitution enterprise uses as a prostitute one or more persons younger than 18 years of age, regardless of whether the actor knows the age of the person at the time the actor commits the offense.” Tex. Penal Code Ann. § 43.04(b).

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<sup>8</sup> See *supra* note 5.

<sup>9</sup> Pursuant to Tex. Gov’t Code Ann. § 508.145(d)(1)-(3) (Eligibility for release on parole; computation of parole eligibility date),

- (1) This subsection applies only to an inmate who is serving a sentence for:
  - (A) an offense described by Article 42A.054(a), Code of Criminal Procedure, other than an offense under Section 19.03, Penal Code;
  - (B) an offense . . . under Article 42A.054(c) or (d), Code of Criminal Procedure;
  - (C) an offense under Section 20A.03 [Continuous trafficking of persons], Penal Code;
  - (D) an offense under Section 71.02 [Engaging in organized criminal activity] or 71.023 [Directing activities of criminal street gangs], Penal Code.
- (2) An inmate described by Subdivision (1) is not eligible for release on parole until the inmate’s actual calendar time served, without consideration of good conduct time, equals one-half of the sentence or 30 calendar years, whichever is less, but in no event is the inmate eligible for release on parole in less than two calendar years.
- (3) Notwithstanding Subdivision (2), an inmate who is serving a sentence for an offense under Section 22.021 [Aggravated sexual assault], Penal Code, is not eligible for release on parole if the inmate is serving a sentence for an offense for which punishment was enhanced under Section 12.42(c)(4), Penal Code.

The text of Tex. Gov’t Code Ann. § 508.145 included here and elsewhere in this report includes amendments made by the enactment of House Bill 2299 during the 2015 regular session of the 84th Texas Legislature (effective January 1, 2017).

<sup>10</sup> See *supra* note 5.

4. Tex. Penal Code Ann. § 43.02b<sup>11</sup> (Prostitution) makes it a crime if a person, “in return for receipt of a fee or “based on the payment of a fee” (1) offers to engage, agrees to engage, or engages in sexual conduct; or (2) solicits another in a public place to engage with the actor in sexual conduct for hire.” A first conviction under this statute is generally punishable as a Class B misdemeanor by imprisonment in a county jail up to 180 days, a fine not to exceed \$2,000, or both. Tex. Penal Code Ann. §§ 43.02(c), (c-1), 12.22. However, pursuant to Tex. Penal Code Ann. §§ 43.02(c-1)(3), 12.33a conviction is punishable as a second degree felony by imprisonment for 2–20 years and a possible fine not to exceed \$10,000

if the person solicited is:

- (A) younger than 18 years of age, regardless of whether the actor knows the age of the person solicited at the time the actor commits the offense
  - (B) represented to the actor as being younger than 18 years of age; or
  - (C) believed by the actor to be younger than 18 years of age.
5. Tex. Penal Code Ann. § 15.031(b) (Criminal solicitation of a minor) states,

A person commits an offense if, with intent that an offense under Section 20A.02(a)(7) or (8) [Trafficking of persons], 21.02 [Continuous sexual abuse of young child or children], 21.11 [Indecency with a child], 22.011 [Sexual assault], 22.021 [Aggravated sexual assault], 43.02 [Prostitution], 43.05(a)(2) [Compelling prostitution], or 43.25 [Sexual performance by a child] be committed, the person by any means requests, commands, or attempts to induce a minor<sup>12</sup> or another whom the person believes to be a minor to engage in specific conduct that, under the circumstances surrounding the actor’s conduct as the actor believes them to be, would constitute an offense under one of those sections or would make the minor or other believed by the person to be a minor a party to the commission of an offense under one of those sections.

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<sup>11</sup> Tex. Penal Code Ann. § 43.02 states,

- (a) A person commits an offense if, in return for receipt of a fee,
  - (1) offers to engage, agrees to engage, or engages in sexual conduct; or
  - (2) solicits another in a public place to engage with the actor in sexual conduct for hire.
- (b) A person commits an offense if, based on the payment of a fee by the actor or another person on behalf of the actor, the person knowingly:
  - (1) offers to engage, agrees to engage, or engages in sexual conduct; or
  - (2) solicits another in a public place to engage with the actor in sexual conduct for hire.
- (b-1) An offense is established under Subsection (a) regardless of whether the actor is offered or actually receives the fee. An offense is established under Subsection (b) regardless of whether the actor or another person on behalf of the actor offers or actually pays the fee.

A second or third conviction under (a) or (b) is a Class A misdemeanor, punishable by up to one year’s imprisonment, a \$4,000 fine, or both, and a fourth conviction is a state jail felony. Tex. Penal Code Ann. §§ 43.02(c), (c-1); 12.21.

The text of Tex. Code Crim. Proc. Ann. § 43.02 included here and elsewhere in this report includes amendments made by the enactment of House Bill 10 and Senate Bill 825 during the 2015 regular session of the 84th Texas Legislature (both effective September 1, 2015).

<sup>12</sup> Pursuant to Tex. Penal Code Ann. § 15.031(f), “In this section, ‘minor’ means an individual younger than 17 years of age.”

Pursuant to Tex. Penal Code Ann. § 15.031(e), a conviction under Tex. Penal Code Ann. § 15.031(b) is punishable one category lower than committing the actual offense, but the punishment may be enhanced to the same category as the predicate offense if it is proven that the offender

- (1) was at the time of the offense 17 years of age or older and a member of a criminal street gang, as defined by Section 71.01 [Definitions];<sup>13</sup> and
  - (2) committed the offense with the intent to:
    - (A) further the criminal activities of the criminal street gang; or
    - (B) avoid detection as a member of a criminal street gang.
6. Tex. Penal Code Ann. § 43.251(b) (Employment harmful to children) states, “A person commits an offense if the person employs, authorizes, or induces a child<sup>14</sup> to work: (1) in a sexually oriented commercial activity;<sup>15</sup> or (2) in any place of business permitting, requesting, or requiring a child to work nude or topless.” Pursuant to Tex. Penal Code Ann. § 43.251(c) a conviction is punishable as a second degree felony by imprisonment for 2–20 years and a possible fine not to exceed \$10,000, but if the child is a minor under the age of 14, a conviction is punishable as a first degree felony by imprisonment for either 5–99 years and a possible fine not to exceed \$10,000 or life and a possible fine not to exceed \$10,000. Tex. Penal Code Ann. §§ 43.251(c), 12.33, 12.32.
7. Tex. Penal Code Ann. § 21.02(b), (c), (g) (Continuous sexual abuse of young child or children) states,
- (b) A person commits an offense if:
    - (1) during a period that is 30 or more days in duration, the person commits two or more acts of sexual abuse, regardless of whether the acts of sexual abuse are committed against one or more victims; and
    - (2) at the time of the commission of each of the acts of sexual abuse, the actor is 17 years of age or older and the victim is a child younger than 14 years of age.
  - (c) For purposes of this section, “act of sexual abuse” means any act that is a violation of one or more of the following penal laws:
    - (1) aggravated kidnapping under Section 20.04(a)(4), if the actor committed the offense with the intent to violate or abuse the victim sexually;
    - (2) indecency with a child under Section 21.11(a)(1), if the actor committed the offense in a manner other than by touching, including touching through clothing, the breast of a child;
    - (3) sexual assault under Section 22.011;
    - (4) aggravated sexual assault under Section 22.021;
    - ...
    - (6) sexual performance by a child under Section 43.25;
    - (7) trafficking of persons under Section 20A.02(a)(7) or (8); and
    - (8) compelling prostitution under Section 43.05(a)(2).
    - ....
  - (g) It is an affirmative defense to prosecution under this section that the actor:
    - (1) was not more than five years older than:

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<sup>13</sup> Tex. Penal Code Ann. § 71.01(d) defines “criminal street gang” as “three or more persons having a common identifying sign or symbol or an identifiable leadership who continuously or regularly associate in the commission of criminal activities.”

<sup>14</sup> Pursuant to Tex. Penal Code Ann. § 43.251(a)(1), “child” is defined as “a person younger than 18 years of age.”

<sup>15</sup> Tex. Penal Code Ann. § 43.251(a)(5) defines “sexually oriented commercial activity” as “a massage establishment, nude studio, modeling studio, love parlor, or other similar commercial enterprise the primary business of which is the offering of a service that is intended to provide sexual stimulation or sexual gratification to the customer.”

- (A) the victim of the offense, if the offense is alleged to have been committed against only one victim; or
- (B) the youngest victim of the offense, if the offense is alleged to have been committed against more than one victim;
- (2) did not use duress, force, or a threat against a victim at the time of the commission of any of the acts of sexual abuse alleged as an element of the offense; and
- (3) at the time of the commission of any of the acts of sexual abuse alleged as an element of the offense:
  - (A) was not required under Chapter 62, Code of Criminal Procedure, to register for life as a sex offender; or
  - (B) was not a person who under Chapter 62 had a reportable conviction or adjudication for an offense under this section or an act of sexual abuse as described by Subsection (c).

A conviction under this statute is punishable as a first degree felony by imprisonment for either 25–99 years<sup>16</sup> and a possible fine not to exceed \$10,000 or life and a possible fine not to exceed \$10,000. Tex. Penal Code Ann. §§ 21.02(h), 12.32.

8. Tex. Penal Code Ann. § 22.021(a) (Aggravated sexual assault) states,

A person commits an offense:

- (1) if the person:
  - ...
  - (B) intentionally or knowingly:
    - (i) causes the penetration of the anus or sexual organ of a child<sup>17</sup> by any means;
    - (ii) causes the penetration of the mouth of a child by the sexual organ of the actor;
    - (iii) causes the sexual organ of a child to contact or penetrate the mouth, anus, or sexual organ of another person, including the actor;
    - (iv) causes the anus of a child to contact the mouth, anus, or sexual organ of another person, including the actor; or
    - (v) causes the mouth of a child to contact the anus or sexual organ of another person, including the actor; and
- (2) if:
  - (A) the person:
    - ...
    - (vi) administers or provides flunitrazepam, otherwise known as rohypnol, gamma hydroxybutyrate, or ketamine to the victim of the offense with the intent of facilitating the commission of the offense; [or]
  - (B) the victim is younger than 14 years of age . . .
  - ...

A conviction under Tex. Penal Code Ann. § 22.021(a) is punishable as a first degree felony by imprisonment for either 5–99 years and a possible fine not to exceed \$10,000 or life and a possible fine not to exceed \$10,000. Tex. Penal Code Ann. §§ 22.021(e), 12.32. The minimum term of imprisonment is increased to 25 years, however, if the victim is younger than 6 years of age or is 13 years of age or younger and “the actor commits the offense in a manner described by Subsection (a)(2)(A).” Tex. Penal Code Ann. § 22.021(f).

<sup>16</sup> See *supra* note 5.

<sup>17</sup> Tex. Penal Code Ann. § 22.021(b)(1) defines “child” by referencing Tex. Penal Code Ann. § 22.011(c), which defines “child” as “a person younger than 17 years of age.” Tex. Penal Code Ann. § 22.011(c)(1).

9. Tex. Penal Code Ann. § 43.25(b) (Sexual performance by a child) states,

A person commits an offense if, knowing the character and content thereof, he employs, authorizes, or induces a child younger than 18 years of age to engage in sexual conduct<sup>18</sup> or a sexual performance.<sup>19</sup> A parent or legal guardian or custodian of a child younger than 18 years of age commits an offense if he consents to the participation by the child in a sexual performance.

A conviction under Tex. Penal Code Ann. § 43.25(b) is punishable as a second degree felony by imprisonment for 2–20 years and a possible fine not to exceed \$10,000. Tex. Penal Code Ann. §§ 43.25(c), 12.33. If the victim is under the age of 14, however, a conviction is punishable as a first degree felony by imprisonment for either 5–99 years and a possible fine not to exceed \$10,000 or life and a possible fine not to exceed \$10,000. Tex. Penal Code Ann. §§ 43.25(c), 12.32.

Other laws may be applicable to sexual exploitation of children although they do not specify commercial exchanges:

1. Tex. Penal Code Ann. § 22.011(a)(2) (Sexual assault) states,

A person commits an offense if the person:

...

(2) intentionally or knowingly:

- (A) causes the penetration of the anus or sexual organ of a child<sup>20</sup> by any means;
- (B) causes the penetration of the mouth of a child by the sexual organ of the actor;
- (C) causes the sexual organ of a child to contact or penetrate the mouth, anus, or sexual organ of another person, including the actor;
- (D) causes the anus of a child to contact the mouth, anus, or sexual organ of another person, including the actor; or
- (E) causes the mouth of a child to contact the anus or sexual organ of another person, including the actor.

A conviction under Tex. Penal Code Ann. § 22.011(a)(2) is punishable as a second degree felony by imprisonment for 2–20 years and a possible fine not to exceed \$10,000.<sup>21</sup> Tex. Penal Code Ann. §§ 22.011(f), 12.33.

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<sup>18</sup> Tex. Penal Code Ann. § 43.25(a)(2) defines “sexual conduct” as “sexual contact, actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sado-masochistic abuse, or lewd exhibition of the genitals, the anus, or any portion of the female breast below the top of the areola.”

<sup>19</sup> Tex. Penal Code Ann. § 43.25(a)(1) defines “sexual performance” as “any performance or part thereof that includes sexual conduct by a child younger than 18 years of age.” Tex. Penal Code Ann. § 43.25(a)(3) defines “performance” as “any play, motion picture, photograph, dance, or other visual representation that can be exhibited before an audience of one or more persons.”

<sup>20</sup> Tex. Penal Code Ann. § 22.011(c)(1) defines “child” as “a person younger than 17 years of age.”

<sup>21</sup> Tex. Penal Code Ann. § 22.011(e)(2) provides,

It is an affirmative defense to prosecution under Subsection (a)(2):

(1) . . . .

(2) that:

- (A) the actor was not more than three years older than the victim and at the time of the offense:
  - (i) was not required under Chapter 62 [Sex offender registration program], Code of Criminal Procedure, to register for life as a sex offender; or



2. Tex. Penal Code Ann. § 21.11(a), (b) (Indecency with a child) provides,

- (a) A person commits an offense if, with a child younger than 17 years of age, whether the child is of the same or opposite sex, the person:
  - (1) engages in sexual contact with the child or causes the child to engage in sexual contact; or
  - (2) with intent to arouse or gratify the sexual desire of any person:
    - (A) exposes the person’s anus or any part of the person’s genitals, knowing the child is present; or
    - (B) causes the child to expose the child’s anus or any part of the child’s genitals.
- (b) It is an affirmative defense to prosecution under this section that the actor:
  - (1) was not more than three years older than the victim and of the opposite sex;
  - (2) did not use duress, force, or a threat against the victim at the time of the offense; and
  - (3) at the time of the offense:
    - (A) was not required under Chapter 62, Code of Criminal Procedure, to register for life as a sex offender; or
    - (B) was not a person who under Chapter 62 had a reportable conviction or adjudication for an offense under this section.

A conviction under Tex. Penal Code Ann. § 21.11(a)(1) is punishable as a second degree felony by imprisonment for 2–20 years and a possible fine not to exceed \$10,000, while a conviction under Tex. Penal Code Ann. § 21.11(a)(2) is punishable as a third degree felony by imprisonment for 2–10 years and a possible fine not to exceed \$10,000. Tex. Penal Code Ann. §§ 21.11(d), 12.33, 12.34.

3. Tex. Penal Code Ann. § 33.021(b), (c)<sup>22</sup> (Online solicitation of a minor) states,

- (b) A person who is 17 years of age or older commits an offense if, with the intent to commit an offense listed in Article 62.001(5)(A) [§§ 21.02 (Continuous sexual abuse of young child or children), 21.11 (Indecency with a child), 22.011 (Sexual assault), 22.021 (Aggravated sexual assault), or 25.02 (Prohibited sexual conduct), (B) [§§ 43.05 (Compelling prostitution), 43.25 (Sexual performance by a child), or 43.26 (Possession or promotion of child pornography)], or (K) [20A.02(a)(3), (4), (7), or (8) (Trafficking of persons)], [Definitions] Code of Criminal Procedure, the person, over the Internet, by electronic mail or text message or other electronic message service or system, or through a commercial online service, intentionally:
  - (1) communicates in a sexually explicit<sup>23</sup> manner with a minor;<sup>24</sup> or

- 
- (ii) was not a person who under Chapter 62, Code of Criminal Procedure, had a reportable conviction or adjudication for an offense under this section; and
  - (B) the victim:
    - (i) was a child of 14 years of age or older; and
    - (ii) was not a person whom the actor was prohibited from marrying or purporting to marry or with whom the actor was prohibited from living under the appearance of being married under Section 25.01.

<sup>22</sup> The text of Tex. Pen. Code Ann. § 33.021 included here and elsewhere in this report includes amendments made by the enactment of Senate Bill 344 during the 2015 regular session of the 84th Texas Legislature (effective September 1, 2015).

<sup>23</sup> Pursuant to Tex. Penal Code Ann. § 33.021(a)(3), “‘Sexually explicit’ means any communication, language, or material, including a photographic or video image, that relates to or describes sexual conduct, as defined by Section 43.25.” *See supra* note 4 for the definition of “sexual conduct” according to Tex. Penal Code Ann. § 43.25.

- (2) distributes sexually explicit material to a minor.
- (c) A person commits an offense if the person, over the Internet, by electronic mail or text message or other electronic message service or system, or through a commercial online service, knowingly solicits a minor to meet another person, including the actor, with the intent that the minor will engage in sexual contact,<sup>25</sup> sexual intercourse, or deviate sexual intercourse with the actor or another person.

If the victim is under 17 years of age, a conviction under Tex. Penal Code Ann. § 33.021(b) is punishable as a third degree felony by imprisonment for 2–10 years and a possible fine not to exceed \$10,000. Tex. Penal Code Ann. §§ 33.021(f), 12.34. But, if the victim is younger than 14 years of age or the offender believes the victim to be younger than 14 years of age, however, a conviction under Tex. Penal Code Ann. § 33.021(b) is punishable as a second degree felony by imprisonment for 2–20 years and a possible fine not to exceed \$10,000. Tex. Penal Code Ann. §§ 33.021(f), 12.33. A conviction under Tex. Penal Code Ann. §§ 33.021(c) is punishable as a second degree felony by imprisonment for 2–20 years and a possible fine not to exceed \$10,000. Tex. Penal Code Ann. §§ 33.021(f), 12.33.

*1.3 Prostitution statutes refer to the sex trafficking statute to identify the commercially sexually exploited minor as a trafficking victim.*

Tex. Penal Code Ann. § 43.02(d)<sup>26</sup> (Prostitution) refers to Tex. Penal Code Ann. § 20A.02 (Trafficking of persons) by stating that “[i]t is a defense to prosecution for an offense under subsection (a) that the actor engaged in the conduct that constitutes the offense because the actor was the victim of conduct that constitutes an offense under Section 20A.02.”

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

Sex trafficking enterprises may face prosecution under Texas’s laws related to organized criminal activity. Tex. Penal Code Ann. § 71.02(a) (Engaging in organized criminal activity) states, in part,

A person commits an offense if, with the intent to establish, maintain, or participate in a combination<sup>27</sup> or in the profits of a combination or as a member of a criminal street gang,<sup>28</sup> the person commits or conspires to commit one or more of the following:

- (1) murder, capital murder, arson, aggravated robbery, robbery, burglary, theft, aggravated kidnapping, kidnapping, aggravated assault, aggravated sexual assault, sexual assault, continuous

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<sup>24</sup> Pursuant to Tex. Penal Code Ann. § 33.021(a)(1), “‘Minor’ means: (A) an individual who is younger than 17 years of age; or (B) an individual whom the actor believes to be younger than 17 years of age.” See *supra* note 22.

<sup>25</sup> Pursuant to Tex. Penal Code Ann. § 33.021(a)(2), “sexual contact” has the same meaning as assigned in Section 21.01. Tex. Penal Code Ann. § 21.01(2) defines “sexual contact” as “any touching of the anus, breast, or any part of the genitals of another person with intent to arouse or gratify the sexual desire of any person.”

<sup>26</sup> See *supra* note 11.

<sup>27</sup> Pursuant to Tex. Penal Code Ann. § 71.01(a),

(a) “Combination” means three or more persons who collaborate in carrying on criminal activities, although:

- (1) participants may not know each other’s identity;
- (2) membership in the combination may change from time to time; and
- (3) participants may stand in a wholesaler-retailer or other arm’s-length relationship in illicit distribution operations.

<sup>28</sup> See *supra* note 13 for the definition of “criminal street gang.”

- sexual abuse of young child or children, solicitation of a minor . . .
- . . .
- (3) promotion of prostitution, aggravated promotion of prostitution, or compelling prostitution;
- . . .
- (6) any unlawful wholesale promotion or possession of any obscene material or obscene device with the intent to wholesale promote the same;
- (7) any offense under Subchapter B [Obscenity], Chapter 43 [Public indecency], depicting or involving conduct by or directed toward a child younger than 18 years of age;
- . . .
- (12) any offense under Chapter 20A [Trafficking of persons];
- . . . .
- (18) any offense classified as a felony under the Tax Code.

Based on this definition of criminal activity, acts of commercial sexual exploitation of children and sex trafficking constitute predicate crimes under the racketeering law, making it available for combatting criminal enterprises that engage in domestic minor sex trafficking. Tex. Penal Code Ann. § 71.02(b)<sup>29</sup> further states,

(b) Except as provided in Subsections (c) and (d), an offense under this section is one category higher than the most serious offense listed in Subsection (a) that was committed, and if the most serious offense is a Class A misdemeanor, the offense is a state jail felony, except that the offense is a felony of the first degree punishable by imprisonment in the Texas Department of Criminal Justice for:

- (1) life without parole, if the most serious offense is an aggravated sexual assault and if at the time of that offense the defendant is 18 years of age or older and:
  - (A) the victim of the offense is younger than six years of age;
  - (B) the victim of the offense is younger than 14 years of age and the actor commits the offense in a manner described by Section 22.021(a)(2)(A); or
  - (C) the victim of the offense is younger than 17 years of age and suffered serious bodily injury as a result of the offense; or
- (2) life or for any term of not more than 99 years or less than 30 years if the most serious offense is an offense under Section 20.06 (Continuous smuggling of persons) that is punishable under Subsection (g) of that section; or
- (3) life or for any term of not more than 99 years or less than 15 years if the most serious offense is an offense punishable as a felony of the first degree, other than an offense described by Subdivision (1) or (2).

Texas also has a civil racketeering law targeted at human trafficking operations. Under Tex. Civ. Prac. & Rem. Code Ann § 140.002 (Civil racketeering):

A person or enterprise commits racketeering if, for financial gain, the person or enterprise commits an offense under Chapter 20A, Penal Code (Trafficking of persons), and the offense or an element of the offense:

- (1) occurs in more than one county in this state; or
- (2) is facilitated by the use of United States mail, e-mail, telephone, facsimile, or a wireless communication from one county in this state to another.

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<sup>29</sup> The text of Tex. Penal Code Ann. § 71.02 included here and elsewhere in this report includes amendments made by the enactment of House Bill 11 during the 2015 regular session of the 84th Texas Legislature (effective September 1, 2015).

The state's remedies against an instance of racketeering under this statute are significant. Under Tex. Civ. Prac. & Rem. Code Ann § 140.004 (Injunctive Relief; Other Remedies):

- (a) A court in which a proceeding is brought under this chapter may prevent, restrain, and remedy racketeering by issuing appropriate orders. The orders may include a temporary restraining order, a temporary or permanent injunction, the creation of a receivership, and the enforcement of a constructive trust in connection with any property or other interest, prejudgment writs of attachment under Chapter 61 for the purposes of freezing, preserving, and disgorging assets, or another order for a remedy or restraint the court considers proper.
- (b) Following a final determination of liability under this chapter, the court may issue an appropriate order, including an order that:
  - (1) requires a person to divest any direct or indirect interest in an enterprise;
  - (2) imposes reasonable restrictions on the future activities or investments of a person that affect the laws of this state, including prohibiting a person from engaging in the type of endeavor or enterprise that gave rise to the racketeering offense, to the extent permitted by the constitutions of this state and the United States;
  - (3) requires the dissolution or reorganization of an enterprise involved in the suit;
  - (4) orders the recovery of reasonable fees, expenses, and costs incurred in obtaining injunctive relief or civil remedies or in conducting investigations under this chapter, including court costs, attorney's fees, witness fees, and deposition fees;
  - (5) orders payment to the state of an amount equal to:
    - (A) the gain acquired or maintained through racketeering; or
    - (B) the amount for which a person is liable under this chapter;
  - (6) orders payment to the state of a civil penalty by a person or enterprise found liable for racketeering, in an amount not to exceed \$250,000 for each separately alleged and proven act of racketeering;
  - (7) orders payment of damages to the state for racketeering shown to have materially damaged the state; or
  - (8) orders that property attached under Chapter 61 be used to satisfy an award of the court, including damages, penalties, costs, and fees.
- (c) In determining the amount of a civil penalty ordered under Subsection (b)(6), the court shall consider:
  - (1) the seriousness of the racketeering offense and the consequent financial or personal harm to the state or to any identified victim; and
  - (2) the duration of the racketeering activity.
- (d) If any property attached under Chapter 61 is not necessary to satisfy an award of the court after a finding of liability for racketeering of the person or enterprise having an interest in the property, the court may order that the property be disgorged to the state to the extent of the person's or enterprise's interest. To be disgorged, the property must be acquired or maintained by the person or enterprise through racketeering.  
.....
- (g) This chapter is not intended to provide the exclusive remedy for the activity addressed by this chapter. A proceeding under this chapter may be brought in addition to or in the alternative of any other civil or criminal action available under the laws of this state.  
.....

Furthermore, any property "used or intended to be used in the commission of" Tex. Penal Code Ann. § 71.02(a) (Engaging in organized criminal activity) is subject to the forfeiture provisions outlined in Tex. Code Crim. Proc. Ann. art. 59.02(a) (Forfeiture of contraband). Tex. Code Crim. Proc. Ann. art. 59.01(2)(B)(xi).

Lastly, additional penalties are provided under Tex. Penal Code Ann. § 71.022(a) (Coercing, inducing, or soliciting membership in a criminal street gang) which states,

A person commits an offense if the person knowingly causes, enables, encourages, recruits, or solicits another person to become a member of a criminal street gang which, as a condition of initiation, admission, membership, or continued membership, requires the commission of any conduct which constitutes an offense punishable as a Class A misdemeanor or a felony.

A first conviction under this statute is punishable as a third degree felony by imprisonment for 2–10 years and a possible fine not to exceed \$10,000, while subsequent convictions are punishable as second degree felonies by imprisonment for 2–20 years and a possible fine not to exceed \$10,000. Tex. Penal Code Ann. §§ 71.022(b), (c), 12.34, 12.33.

**Legal Components:**

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

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**Legal Analysis:**

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

Tex. Penal Code Ann. § 20A.02(a)(8) (Trafficking of persons) applies to buyers who engage in sexual conduct with a domestic minor sex trafficking victim and expressly applies to a buyer who “engages in sexual conduct with a child trafficked in the manner described in Subdivision (7).” Additionally, Tex. Penal Code Ann. § 20A.03<sup>30</sup> (Continuous trafficking of persons) could apply to a buyer if the buyer “during a period that is 30 or more days in duration engages two or more times in conduct that constitutes an offense under Section 20A.02 against one or more victims.”

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

Texas’s CSEC laws specifically include the crime of buying sex with a minor. Tex. Penal Code Ann. § 43.02(b)<sup>31</sup> (Prostitution) makes it a crime if a person

based on the payment of a fee by the actor or another person on behalf of the actor, the person knowingly:

- (1) offers to engage, agrees to engage, or engages in sexual conduct; or
- (2) solicits another in a public place to engage with the actor in sexual conduct for hire.

A conviction under this statute is generally punishable as a Class B misdemeanor by imprisonment in a county jail up to 180 days, a fine not to exceed \$2,000, or both. Tex. Penal Code Ann. §§ 43.02(c), 12.22. “[I]f the

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<sup>30</sup> The text of Tex. Pen. Code Ann. 20A.03 included here and elsewhere in this report includes amendments made by the enactment of House Bill 10 during the 2015 regular session of the 84th Texas Legislature (effective September 1, 2015).

<sup>31</sup> See *supra* note 11.

person solicited is younger than 18 years of age, regardless of whether the actor knows the age of the person solicited, or if the person solicited is represented to the actor or believed by the actor to be under 18 years of age, a conviction is punishable as a second degree felony by imprisonment for 2–20 years and a possible fine not to exceed \$10,000. Tex. Penal Code Ann. §§ 43.02(c-1)(3), 12.33. Pursuant to Tex. Health & Safety Code Ann. § 126.002(b) (Authority to establish program; eligibility), however, a buyer convicted under Tex. Penal Code Ann. § 43.02 who has the consent of the prosecuting attorney and does not have a prior conviction under Tex. Penal Code Ann. § 20A.02 (Trafficking of persons), § 43.02 (Prostitution), § 43.03 (Promotion of prostitution), § 43.04 (Aggravated promotion of prostitution), or § 43.05 (Compelling prostitution), or certain other offenses, is eligible to participate in a commercially sexually exploited persons court program.<sup>32</sup>

Tex. Penal Code Ann. § 15.031(b) (Criminal solicitation of a minor) makes it illegal if a buyer “by any means requests, commands, or attempts to induce a minor<sup>33</sup> or another whom the person believes to be a minor to

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<sup>32</sup> Tex. Health & Safety Code Ann. § 126.001 (Commercially sexually exploited persons court program ; procedures for certain defendants) states,

In this chapter, “commercially sexually exploited persons court program” means a program that has the following essential characteristics:

- (1) the integration of services in the processing of cases in the judicial system;
- (2) the use of a nonadversarial approach involving prosecutors and defense attorneys to promote public safety, to reduce the demand for the commercial sex trade and trafficking of persons by educating offenders, and to protect the due process rights of program participants;
- (3) early identification and prompt placement of eligible participants in the program;
- (4) access to information, counseling, and services relating to sex addiction, sexually transmitted diseases, mental health, and substance abuse;
- (5) a coordinated strategy to govern program responses to participant compliance;
- (6) monitoring and evaluation of program goals and effectiveness;
- (7) continuing interdisciplinary education to promote effective program planning, implementation, and operations; and
- (8) development of partnerships with public agencies and community organizations.

Tex. Health & Safety Code Ann. § 126.001(b) further explains,

If a defendant successfully completes a commercially sexually exploited persons court program, regardless of whether the defendant was convicted of the offense for which the defendant entered the program or whether the court deferred further proceedings without entering an adjudication of guilt, after notice to the state and a hearing on whether the defendant is otherwise entitled to the petition, including whether the required time period has elapsed, and whether issuance of the order is in the best interest of justice, the court shall enter an order of nondisclosure under Section 411.081 [Application of Subchapter], Government Code, as if the defendant had received a discharge and dismissal under Article 42A.111 [Deferral of proceedings in cases appealed to county court], Code of Criminal Procedure, with respect to all records and files related to the defendant’s arrest for the offense for which the defendant entered the program if the defendant:

- (1) has not been previously convicted of a felony offense; and
- (2) is not convicted of any other felony offense before the second anniversary of the defendant’s successful completion of the program.

The text of Tex. Code Crim. Proc. Ann. §§ 126.001 – 126.002 included here and elsewhere in this report includes amendments made by the enactment of Senate Bill 536, House Bill 2299 during the 2015 regular session of the 84th Texas Legislature (effective June 16, 2015 and January 1, 2017 respectively).

The text of Tex. Code Crim. Proc. Ann. § 126.002 included here and elsewhere in this report includes amendments made by the enactment of Senate Bill 825 during the 2015 regular session of the 84th Texas Legislature (effective September 1, 2015).

<sup>33</sup> See *supra* note 12.

engage in specific conduct that, under the circumstances surrounding the actor's conduct as the actor believes them to be, would constitute an offense under" Tex. Penal Code Ann. § 20A.02(a)(8) (Trafficking of persons), § 21.02 (Continuous sexual abuse of young child or children), § 21.11 (Indecency with a child), § 22.011 (Sexual assault), § 22.021 (Aggravated sexual assault), § 43.02 (Prostitution), § 43.05(a)(2) (Compelling prostitution), or § 43.25 (Sexual performance by a child). Pursuant to Tex. Penal Code Ann. § 15.031(e), a conviction under Tex. Penal Code Ann. § 15.031(b) is punishable one category lower than committing the actual offense, but the punishment may be enhanced to the same category as the predicate offense if it is proven that the offender

- (1) was at the time of the offense 17 years of age or older and a member of a criminal street gang, as defined by Section 71.01 [Definitions];<sup>34</sup> and
- (2) committed the offense with the intent to:
  - (A) further the criminal activities of the criminal street gang; or
  - (B) avoid detection as a member of a criminal street gang.

A buyer may also be convicted under Tex. Penal Code Ann. § 21.02(b) (Continuous sexual abuse of young child or children) if the buyer is at least 17 years of age and commits "two or more acts of sexual abuse"<sup>35</sup> [against a child under the age of 14], regardless of whether the acts of sexual abuse are committed against one or more victims" and these acts occur "during a period that is 30 or more days in duration." A conviction under this statute is punishable as a first degree felony by imprisonment for either 25–99 years and a possible fine not to exceed \$10,000 or life and a possible fine not to exceed \$10,000. Tex. Penal Code Ann. §§ 21.02(h), 12.32.

Additionally, buyers may also be convicted under Tex. Penal Code Ann. § 22.021(a) (Aggravated sexual assault)<sup>36</sup> if the buyer either engages in specified sexual conduct with a child under 17 and, among other things, "threatens to cause any person to become the victim of an offense under Section 20A.02(a)(3), (4), (7), or (8) [Trafficking of persons]," or engages in specified sexual conduct with a minor under the age of 14. A conviction under Tex. Penal Code Ann. § 22.021(a) is punishable as a first degree felony by imprisonment for either 5–99 years and a possible fine not to exceed \$10,000 or life and a possible fine not to exceed \$10,000. Tex. Penal Code Ann. §§ 22.021(e), 12.32. The minimum term of imprisonment is increased to 25 years, however, if the victim is younger than 6 years of age or is 13 years of age or younger and "the actor commits the offense" by, among other things, threatening "to cause any person to become the victim of an offense under Section 20A.02(a)(3), (4), (7), or (8)." Tex. Penal Code Ann. § 22.021(f).

Tex. Penal Code Ann. § 43.25(b) (Sexual performance by a child) may apply to certain buyers.<sup>37</sup> Tex. Penal Code Ann. § 43.25(b) makes it a crime if a person "induces a child younger than 18 years of age to engage in sexual conduct."<sup>38</sup> A conviction under Tex. Penal Code Ann. § 43.25(b) is punishable as a second degree felony by imprisonment for 2–20 years and a possible fine not to exceed \$10,000. Tex. Penal Code Ann. §§ 43.25(c), 12.33. If the victim is under the age of 14, however, a conviction is

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<sup>34</sup> See *supra* note 13.

<sup>35</sup> See *supra* Section 1.2 for the definition of "sexual abuse."

<sup>36</sup> See *supra* Section 1.2 for the substantive provisions of Tex. Penal Code Ann. § 22.021(a).

<sup>37</sup> The Texas Court of Criminal Appeals has held that a school teacher "induced" a minor pursuant to Tex. Penal Code Ann. § 43.25(b) even though "she was not offered money, grades, or favors in exchange for consenting to oral sex." *Dornbusch v. State*, 156 S.W.3d 859, 868 (Tex. Crim. App. 2005). The court determined that the teacher's position of authority alone was enough to induce the minor. *Id.* Additionally, the Court stated, "Whether an offense has occurred under section 43.25(b) does not turn on who initially requests sex; it depends on whether an adult knowingly employed, induced, or authorized sexual conduct from a minor." *Id.* at 871. The Court, however, declined to state whether § 43.25(b) would apply if a minor initiated the sexual conduct. *Id.* Therefore, buyers may be convicted under this statute if a court determines that the minor has been "induced" into engaging in sexual conduct by the buyer.

<sup>38</sup> See *supra* note 18 for the definition of "sexual conduct."



punishable as a first degree felony by imprisonment for either 5–99 years and a possible fine not to exceed \$10,000 or life and a possible fine not to exceed \$10,000. Tex. Penal Code Ann §§ 43.25(c), 12.32.

Lastly, although it is not entirely clear, Tex. Penal Code Ann. § 43.05(a)(2) (Compelling prostitution) may apply to a buyer who knowingly “causes by any means a child younger than 18 years to commit prostitution, regardless of whether the actor knows the age of the child at the time the actor commits the offense.”<sup>39</sup> A conviction under Tex. Penal Code Ann. § 43.05(a)(2) is punishable as a first degree felony by imprisonment for either 5–99 years and a possible fine not to exceed \$10,000 or life and a possible fine not to exceed \$10,000. Tex. Penal Code Ann. §§ 43.05(b), 12.32.

Several other sexual offenses may also be used to prosecute buyers of commercial sex acts with a minor but do not specifically prohibit the commercial sexual exploitation of a child, and do not refer to Tex. Penal Code Ann. § 20A.02 (Trafficking of persons).

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

Tex. Penal Code Ann. § 43.02 (Prostitution) imposes heightened penalties if an adult solicits or purchases sex with a minor. A conviction under Tex. Penal Code Ann. § 43.02(b)<sup>40</sup> is generally punishable as a Class B misdemeanor by imprisonment in a county jail up to 180 days, a fine not to exceed \$2,000, or both. Tex. Penal Code Ann. §§ 43.02(c-1), 12.22. “[I]f the person solicited is younger than 18 years of age, regardless of whether the actor knows the age of the person solicited at the time the actor commits the offense,” or if the person solicited is represented to the actor or believed by the actor to be under 18 years of age, a conviction is punishable as a second degree felony by imprisonment for 2–20 years and a possible fine not to exceed \$10,000. Tex. Penal Code Ann. §§ 43.02(c-1)(3), 12.33.

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

A first conviction under Tex. Penal Code Ann. § 20A.02(a)(8) (Trafficking of persons) is punishable as a first degree felony by imprisonment “for life or for any term of not more than 99 years or less than 5 years” and a possible fine not to exceed \$10,000, while subsequent convictions are punishable by life imprisonment. Tex. Penal Code Ann. §§ 20A.02(b)(1), 12.32, 12.42(c)(2).<sup>41</sup> A buyer convicted under Tex. Penal Code Ann. § 43.02(b)<sup>42</sup> (Prostitution), “if the person solicited is younger than 18 years of age, regardless of whether the actor knows the age of the person solicited at the time the actor commits the offense,” or if the person solicited is represented to the actor or believed by the actor to be under 18 years of age, is punishable as a second degree felony by imprisonment for 2–20 years and a possible fine not to exceed \$10,000. Tex. Penal Code Ann. §§ 43.02(c-1)(3), 12.33.

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<sup>39</sup> Texas case law does not expressly state that Tex. Penal Code Ann. § 43.05(a)(2) (Compelling Prostitution) applies to buyers or patrons of prostitution. However, a Texas Court of Appeals has relied on an interpretation by the Oregon Court of Appeals regarding a similar Oregon compelling prostitution statute. *Waggoner v. State*, 897 S.W.2d 510, 512 (Tex. Crim. App. 1995) (citing *State v. Wood*, 579 P.2d 294, 296 (Or. Ct. App. 1978)). In a case decided after *Waggoner*, the Oregon Court of Appeals determined that its compelling prostitution statute did not apply to patrons or buyers. *State v. Vargas-Torres*, 242 P.3d 619, 626 (Or. Ct. App. 2010). Therefore, since Texas has previously relied on an opinion issued by an Oregon court interpreting a similar compelling prostitution statute, it is arguable that Texas courts may similarly restrict the applicability of Tex. Penal Code Ann. § 43.05(a)(2) against buyers, just as Oregon restricted the applicability of its prostitution statute against buyers in *Vargas-Torres*.

<sup>40</sup> See *supra* note 11.

<sup>41</sup> See *supra* note 6.

<sup>42</sup> See *supra* note 11.

Additionally, a buyer's conviction under Tex. Penal Code Ann. § 43.25(b) (Sexual performance by a child) is punishable as a second degree felony by imprisonment for 2–20 years and a possible fine not to exceed \$10,000. Tex. Penal Code Ann. §§ 43.25(c), 12.33. If the victim is under the age of 14, however, a conviction is punishable as a first degree felony by imprisonment for either 5–99 years and a possible fine not to exceed \$10,000 or life and a possible fine not to exceed \$10,000. Tex. Penal Code Ann. §§ 43.25(c), 12.32. A buyer's conviction under Tex. Penal Code Ann. § 21.02(b) (Continuous sexual abuse of young child or children) is punishable as a first degree felony by imprisonment for either 25–99 years and a possible fine not to exceed \$10,000 or life and a possible fine not to exceed \$10,000. Tex. Penal Code Ann. §§ 21.02(h), 12.32. Pursuant to Tex. Penal Code Ann. § 15.031(e), a conviction under Tex. Penal Code Ann. § 15.031(b) (Criminal solicitation of a minor) is punishable one category lower than committing the actual offense, but the punishment may be enhanced to the same category as the predicate offense if certain requirements are satisfied.<sup>43</sup>

A buyer's conviction under Tex. Penal Code Ann. § 22.021(a) (Aggravated sexual assault)<sup>44</sup> is punishable as a first degree felony by imprisonment for either 5–99 years and a possible fine not to exceed \$10,000 or life and a possible fine not to exceed \$10,000. Tex. Penal Code Ann. §§ 22.021(e), 12.32. The minimum term of imprisonment is increased to 25 years, however, if the victim is younger than 6 years of age or is 13 years of age or younger and “the actor commits the offense in a manner described by Subsection (a)(2)(A).” Tex. Penal Code Ann. § 22.021(f). Lastly, a buyer convicted under Tex. Penal Code Ann. § 43.05(a)(2) (Compelling prostitution)<sup>45</sup> is guilty of a first degree felony punishable by imprisonment for either 5–99 years and a possible fine not to exceed \$10,000 or life and a possible fine not to exceed \$10,000. Tex. Penal Code Ann. §§ 43.05(b), 12.32.

In comparison, if the victim is under the age of 14, a conviction under the Trafficking Victims Protection Act (TVPA)<sup>46</sup> for child sex trafficking is punishable by 15 years to life imprisonment and a fine not to exceed \$250,000. 18 U.S.C. §§ 1591(b)(1), 3559(a)(1), 3571(b)(3). If the victim is between the ages of 14–17, a conviction is punishable by 10 years to life imprisonment and a fine not to exceed \$250,000. 18 U.S.C. §§ 1591(b)(2), 3559(a)(1), 3571(b)(3). A conviction is punishable by mandatory life imprisonment, however, if the buyer has a prior conviction for a federal sex offense<sup>47</sup> against a minor. 18 U.S.C. § 3559(e)(1). To the extent buyers can be prosecuted under other federal CSEC laws,<sup>48</sup> a

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<sup>43</sup> See *supra* Section 1.2 for the substantive provisions of Tex. Penal Code Ann. § 15.031(e).

<sup>44</sup> See *supra* Section 1.2 for the substantive provisions of Tex. Penal Code Ann. § 22.021(a).

<sup>45</sup> See *supra* Section 2.2 for discussion on whether Tex. Penal Code Ann. § 43.05(a)(2) (Compelling prostitution) is applicable against buyers.

<sup>46</sup> Trafficking Victims Protection Act (TVPA) of 2000, Pub. L. No. 106-386, 114 Stat. 1464, 1466 (codified in scattered sections of 18 and 22 U.S.C.).

<sup>47</sup> Pursuant to 18 U.S.C. § 3559(e)(2), “federal sex offense” is defined as

an offense under section 1591 [18 USCS § 1591] (relating to sex trafficking of children), 2241 [18 USCS § 2241] (relating to aggravated sexual abuse), 2242 [18 USCS § 2242] (relating to sexual abuse), 2244(a)(1) [18 USCS § 2244(a)(1)] (relating to abusive sexual contact), 2245 [18 USCS § 2245] (relating to sexual abuse resulting in death), 2251 [18 USCS § 2251] (relating to sexual exploitation of children), 2251A [18 USCS § 2251A] (relating to selling or buying of children), 2422(b) [18 USCS § 2422(b)] (relating to coercion and enticement of a minor into prostitution), or 2423(a) [18 USCS § 2423(a)] (relating to transportation of minors).

<sup>48</sup> 18 U.S.C. §§ 2251A(b) (Selling or buying of children), 2251(a) (Sexual exploitation of children), 2423(a) (Transportation of a minor with intent for minor to engage in criminal sexual activity), 2422(a) (Coercion and enticement), 2252(a)(2), (a)(4) (Certain activities relating to material involving the sexual exploitation of minors).

conviction is punishable by penalties ranging from a fine not to exceed \$250,000 to life imprisonment and a fine not to exceed \$250,000.<sup>49</sup>

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

Although not expressly commercial, Tex. Penal Code Ann. § 33.021(b), (c)<sup>50</sup> (Online solicitation of a minor) makes it a crime for a person to use the Internet or electronic communications to lure, entice, or recruit commercial sex acts with a minor. Tex. Penal Code Ann. § 33.021(b), (c) states,

(b) A person who is 17 years of age or older commits an offense if, with the intent to commit an offense listed in Article 62.001(5)(A) [§§ 21.02 (Continuous sexual abuse of young child or children), 21.11 (Indecency with a child), 22.011 (Sexual assault), 22.021 (Aggravated sexual assault), or 25.02 (Prohibited sexual conduct), (B) [§§ 43.05 (Compelling prostitution), 43.25 (Sexual performance by a child), or 43.26 (Possession or promotion of child pornography)], or (K) [20A.02(a)(3), (4), (7), or (8) (Trafficking of persons)], [Definitions] Code of Criminal Procedure, the person, over the Internet, by electronic mail or text message or other electronic message service or system, or through a commercial online service, intentionally:

- (1) communicates in a sexually explicit<sup>51</sup> manner with a minor;<sup>52</sup> or
- (2) distributes sexually explicit material to a minor.

(c) A person commits an offense if the person, over the Internet, by electronic mail or text message or other electronic message service or system, or through a commercial online service, knowingly solicits a minor to meet another person, including the actor, with the intent that the minor will engage in sexual contact, sexual intercourse, or deviate sexual intercourse with the actor or another person.

If the victim is under 17 years of age, a conviction under Tex. Penal Code Ann. § 33.021(b) is punishable as a third degree felony by imprisonment for 2–10 years and a possible fine not to exceed \$10,000. Tex. Penal Code Ann. §§ 33.021(f), 12.34. If the victim is younger than 14 years of age or the offender believes the victim to be younger than 14 years of age, however, a conviction under Tex. Penal Code Ann. § 33.021(b) is punishable as a second degree felony by imprisonment for 2–20 years and a possible fine not to exceed \$10,000. Tex. Penal Code Ann. §§ 33.021(f), 12.33. A conviction under Tex. Penal Code Ann. §§ 33.021(c) is punishable as a second degree felony by imprisonment for 2–20 years and a possible fine not to exceed \$10,000. Tex. Penal Code Ann. §§ 33.021(f), 12.33.

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

Tex. Penal Code Ann. § 20A.02(b)(1) (Trafficking of persons) specifically eliminates the use of a mistake of age defense by a defendant charged under Tex. Penal Code Ann. § 20A.02(a)(8), which may include certain buyers.<sup>53</sup> Tex. Penal Code Ann. § 20A.02(b)(1) states, in part,

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<sup>49</sup> 18 U.S.C. §§ 2251A(b) (conviction punishable by imprisonment for 30 years to life and a fine), 2251(e) (conviction punishable by imprisonment for 15–30 years and a fine), 2423(a) (conviction punishable by imprisonment for 10 years to life and a fine), 2422(a) (conviction punishable by a fine, imprisonment up to 20 years, or both), 2252(a)(2), (4) (stating that a conviction under subsection (a)(2) is punishable by imprisonment for 5–20 years and a fine, while a conviction under subsection (a)(4) is punishable by imprisonment up to 10 years, a fine, or both); *see also* 18 U.S.C. §§ 3559(a)(1) (classifying all of the above listed offenses as felonies), 3571(b)(3) (providing a fine up to \$250,000 for any felony conviction).

<sup>50</sup> *See supra* note 22.

<sup>51</sup> *See supra* note 23.

<sup>52</sup> *See supra* note 24.

An offense under this section is a felony of the first degree if:

- (1) the applicable conduct constitutes an offense under Subsection (a)(5), (6), (7), or (8), regardless of whether the actor knows the age of the child at the time the actor commits the offense . . .

Tex. Penal Code Ann. § 43.02(c-1)(3)<sup>54</sup> (Prostitution), prohibits a mistake of age defense by providing that when a person solicits or offers to engage in sexual conduct “based on the payment of a fee by the actor or another person on behalf of the actor,” it is

a felony of the second degree if the person solicited is:

- (A) younger than 18 years of age, regardless of whether the actor knows the age of the person solicited at the time the actor commits the offense;
- (B) represented to the actor as being younger than 18 years of age; or
- (C) believed by the actor to be younger than 18 years of age

Tex. Penal Code Ann. § 15.031(b) (Criminal solicitation of a minor), § 21.02(b) (Continuous sexual abuse of young child or children), and § 43.25(b) (Sexual performance by a child), however, do not specifically eliminate a mistake of age defense.

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

Tex. Penal Code Ann. § 20A.02(a)(8) (Trafficking of persons) and Tex. Penal Code Ann. § 43.02(c-1)<sup>55</sup> (Prostitution) do not stagger penalties based on the age of the minor victim. A first conviction under Tex. Penal Code Ann. § 20A.02(a)(8) is punishable as a first degree felony by imprisonment “for life or for any term of not more than 99 years or less than 5 years” and a possible fine not to exceed \$10,000, while subsequent convictions are punishable by life imprisonment and a possible fine not to exceed \$10,000. Tex. Penal Code Ann. §§ 20A.02(b)(1), 12.32, 12.42(c)(2).<sup>56</sup> “[I]f the person solicited is younger than 18 years of age, regardless of whether the actor knows the age of the person solicited at the time the actor commits the offense,” a conviction under Tex. Penal Code Ann. § 43.02(c-1) (Prostitution) is punishable as a second degree felony by imprisonment for 2–20 years and a possible fine not to exceed \$10,000. Tex. Penal Code Ann. §§ 43.02(c-1)(3), 12.33.

Some of Texas’ CSEC laws, however, do stagger penalties based on the age of the minor-victim. Tex. Penal Code Ann. § 15.031(f) (Criminal solicitation of a minor) defines “minor” as a person younger than 17 years of age. Pursuant to Tex. Penal Code Ann. § 15.031(e), a conviction under Tex. Penal Code Ann. § 15.031(b) is punishable one category lower than committing the actual offense, but the punishment may be enhanced to the same category as the predicate offense if certain requirements are satisfied. Thus, if the predicate offense has penalties staggered based on the victim’s age, then the penalties pursuant Tex. Penal Code Ann. § 15.031(e) will also be staggered based on age.

Tex. Penal Code Ann. § 21.02 (Continuous sexual abuse of young child or children) and § 22.021 (Aggravated sexual assault) only apply if the victim is a minor under the age of 14<sup>57</sup> leaving minors between the ages of 14–

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<sup>53</sup> See *supra* Section 2.1 for discussion on how Tex. Penal Code Ann. § 20A.02(a)(7), (8) may be applicable to buyers.

<sup>54</sup> See *supra* note 11.

<sup>55</sup> See *supra* note 11.

<sup>56</sup> See *supra* note 6.

<sup>57</sup> Tex. Penal Code Ann. § 22.021 does include minors under the age of 17 in certain instances, but it is highly unlikely that these instances are applicable to buyers.

17 unprotected. Convictions under Tex. Penal Code Ann. § 21.02(b), (c) and § 22.021(a) are punishable as first degree felonies by life or 25–99 years imprisonment and a possible fine up to \$10,000. Tex. Penal Code Ann. §§ 21.02(h), 22.021(e), 12.32.

Tex. Penal Code Ann. § 43.25(b) (Sexual performance by a child) enhances the penalty for younger minor victims, but still provides a substantial base penalty applicable to offenses against older minor victims. If the minor-victim is under the age of 18, a violation of Tex. Penal Code Ann. § 43.25(b) is punishable as a second degree felony by imprisonment for 2–20 years and a possible fine not to exceed \$10,000, and if the minor-victim is under the age of 14, a conviction is punishable as a first degree felony by imprisonment for either 5–99 years and a possible fine not to exceed \$10,000 or life and a possible fine not to exceed \$10,000. Tex. Penal Code Ann. §§ 43.25(c), 12.33, 12.32.

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

Pursuant to Tex. Penal Code Ann. §§ 12.32–.34, all felony convictions are subject to a possible fine not to exceed \$10,000. Therefore, a buyer convicted under Tex. Penal Code Ann. § 20A.02(a)(8) (Trafficking of persons), § 43.02(c-1)<sup>58</sup> (Prostitution), § 21.02(b) (Continuous sexual abuse of young child or children), § 22.021(a) (Aggravated sexual assault), § 43.25(b) (Sexual performance by a child), or § 15.031(b) (Criminal solicitation of a minor) is subject to a possible fine not to exceed \$10,000. Tex. Penal Code Ann. §§ 20A.02(b)(1), 43.02(c-1)(3), 21.02(h), 22.021(e), 43.25(c).

Pursuant to Tex. Code Crim. Proc. Ann. art. 42.0372 (Mandatory restitution for child victims of trafficking of persons or compelling prostitution), buyers convicted under Tex. Penal Code Ann. § 20A.02(a)(8) (Trafficking of persons) are required to make restitution to their victims. Tex. Code Crim. Proc. Ann. art. 42.0372 states,

- (a) The court shall order a defendant convicted of an offense under Section 20A.02 [Trafficking of persons] or 43.05(a)(2) [Compelling prostitution], Penal Code, to pay restitution in an amount equal to the cost of necessary rehabilitation, including medical, psychiatric, and psychological care and treatment, for any victim of the offense who is younger than 18 years of age.
- (b) The court shall, after considering the financial circumstances of the defendant, specify in a restitution order issued under Subsection (a) the manner in which the defendant must pay the restitution.
- (c) A restitution order issued under subsection (a) may be enforced by the state, or by a victim named in the order to receive the restitution, in the same manner as a judgment in a civil action.
- (d) The court may hold a hearing, make findings of fact, and amend a restitution order issued under Subsection (a) if the defendant fails to pay the victim name in the order in the manner specified by the court.

Buyers convicted of other crimes may also be required to make restitution at the discretion of the court, pursuant to Tex. Code Crim. Proc. Ann. art. 42.037(a), (b), (r)<sup>59</sup> (Restitution), which states,

- (a) In addition to any fine authorized by law, the court that sentences a defendant convicted of an offense may order the defendant to make restitution to any victim of the offense or to the compensation to victims of crime fund established under Subchapter B [Crime Victims' Compensation], Chapter 56

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<sup>58</sup> See *supra* note 11.

<sup>59</sup> The text of Tex. Code Crim. Proc. Ann. art. 42.037 included here and elsewhere in this report includes amendments made by the enactment of House Bill 2291 during the 2015 regular session of the 84th Texas Legislature (effective September 1, 2015).

[Rights of Crime Victims], to the extent that fund has paid compensation to or on behalf of the victim. . . .

(b)(1) If the offense results in damage to or loss or destruction of property of a victim of the offense, the court may order the defendant:

(A) to return the property to the owner of the property or someone designated by the owner; or

(B) if return of the property is impossible or impractical or is an inadequate remedy, to pay an amount equal to the greater of:

(i) the value of the property on the date of the damage, loss, or destruction; or

(ii) the value of the property on the date of sentencing, less the value of any part of the property that is returned on the date the property is returned.

(2) If the offense results in personal injury to a victim, the court may order the defendant to make restitution to:

(A) the victim for any expenses incurred by the victim as a result of the offense; or

(B) the compensation to victims of crime fund to the extent that fund has paid compensation to or on behalf of the victim.

. . . .

(r) The court may order a defendant convicted of an offense under Section 43.26 [Possession or promotion of child pornography], Penal Code, to make restitution to an individual who as a child younger than 18 years of age was depicted in the visual material, in an amount equal to the expenses incurred by the individual as a result of the offense, including:

(1) medical services relating to physical, psychiatric, or psychological care;

(2) physical and occupational therapy or rehabilitation;

(3) necessary transportation, temporary housing, and child care expenses;

(4) lost income; and

(5) attorney's fees.

Additionally, buyers may be subject to criminal asset forfeiture. Pursuant to Tex. Code Crim. Proc. Ann. art. 59.02(a) "(a) Property that is contraband is subject to seizure and forfeiture under this chapter." Tex. Code Crim. Proc. Ann. art. 59.01(2)<sup>60</sup> states,

(2) "Contraband" means property of any nature, including real, personal, tangible, or intangible, that is:

(A) used in the commission of:

(i) any first or second degree felony under the Penal Code;

(ii) any felony under Section 15.031(b) [Criminal solicitation of a minor], 20.05 [Smuggling of persons], 20.06 [Continuous Smuggling of Persons], 21.11 [Indecency with a child], 38.04 [Evading arrest or detention], or Chapter 43 [Public indecency], 20A [Trafficking of persons], 29 [Robbery], 30 [Burglary and criminal trespass], 31 [Theft], 32 [Fraud], 33 [Computer crimes] [which includes Tex. Penal Code Ann. § 33.021 (Online Solicitation of a Minor)], 33A [Telecommunications crimes], or 35 [Insurance fraud], Penal Code;

. . . .

(C) the proceeds gained from the commission of a felony listed in Paragraph (A) . . . of this subdivision . . .

(D) acquired with proceeds gained from the commission of a felony listed in Paragraph (A) . . . of this subdivision . . .

. . . .

(F) used to facilitate or intended to be used to facilitate the commission of a felony under Section 20A.02 [Trafficking of Persons] or Chapter 43, Penal Code.

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<sup>60</sup> See *supra* note 29.

Tex. Code Crim. Proc. Ann. art. 59.03 (Seizure of contraband) governs the seizure of forfeitable property and states, in relevant part:

- (a) Property subject to forfeiture under this chapter, other than property described by Article 59.12, may be seized by any peace officer under authority of a search warrant.
- (b) Seizure of property subject to forfeiture may be made without warrant if:
  - (1) the owner, operator, or agent in charge of the property knowingly consents;
  - (2) the seizure is incident to a search to which the owner, operator, or agent in charge of the property knowingly consents;
  - (3) the property subject to seizure has been the subject of a prior judgment in favor of the state in a forfeiture proceeding under this chapter; or
  - (4) the seizure was incident to a lawful arrest, lawful search, or lawful search incident to arrest.

Additionally, Tex. Code Crim. Proc. Ann. art. 18.18(a) (Disposition of gambling paraphernalia, prohibited weapon, criminal instrument, and other contraband) provides for the destruction or forfeiture of, among other things, any “obscene device or material” or “child pornography” for any offense that involves an obscene device or material or child pornography.

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

Tex. Penal Code Ann. § 43.26(a)<sup>61</sup> (Possession or promotion of child pornography) makes it illegal for a person to possess child pornography. Tex. Penal Code Ann. § 43.26(a) states,

A person commits an offense if:

- (1) the person knowingly or intentionally possesses, or knowingly or intentionally accesses with a view, visual material<sup>62</sup> that visually depicts a child younger than 18 years of age at the time the image of the child was made who is engaging in sexual conduct,<sup>63</sup> including a child who engages in sexual conduct as a victim of an offense under Section 20A.02(a)(5), (6), (7), or (8) [Trafficking of Persons]; and
- (2) the person knows that the material depicts the child as described by Subdivision (1).

A first conviction under Tex. Penal Code Ann. § 43.26(a) is punishable as a third degree felony by imprisonment for 2–10 years<sup>64</sup> and a possible fine not to exceed \$10,000. Tex. Penal Code Ann. §§ 43.26(d), 12.34 However, a second violation of Tex. Penal Code Ann. § 43.26(a) is punishable as a second degree felony by imprisonment for 2–20 years and a possible fine not to exceed \$10,000. Tex. Penal Code Ann. §§ 43.26(d),

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<sup>61</sup> The text of Tex. Penal Code Ann. § 43.26 included here and elsewhere in this report includes amendments made by the enactment of House Bill 2291 during the 2015 regular session of the 84th Texas Legislature (effective September 1, 2015).

<sup>62</sup> Tex. Penal Code Ann. § 43.26(b)(3) defines “visual material” as

- (A) any film, photograph, videotape, negative, or slide or any photographic reproduction that contains or incorporates in any manner any film, photograph, videotape, negative, or slide; or
- (B) any disk, diskette, or other physical medium that allows an image to be displayed on a computer or other video screen and any image transmitted to a computer or other video screen by telephone line, cable, satellite transmission, or other method.

<sup>63</sup> Tex. Penal Code Ann. § 43.26(b)(2) defines “sexual conduct” as having “the meaning assigned by Section 43.25.” See *supra* note 4 for the applicable definition of “sexual conduct.”

<sup>64</sup> See *supra* note 5.

12.33. And a third offense is punishable as a first degree felony with imprisonment “for life or for any term of not more than 99 years or less than 5 years” and a possible fine not to exceed \$10,000. Tex. Penal Code Ann. §§ 43.26(d), 12.32. Also, a defendant convicted of multiple accounts of possession of child pornography may serve more than ten years, if the sentencing court exercises its option to impose consecutive, rather than concurrent sentences. Under Tex. Penal Code Ann. §3.03(b), “If the accused is found guilty of more than one offense arising out of the same criminal episode, the sentences may run concurrently or consecutively” for violations of Tex. Penal Code Ann. §43.26. Tex. Penal Code Ann. §3.03(b)(3).

Under Tex. Code Crim. Proc. Ann. Art. 42.037,<sup>65</sup>

(r) The court may order a defendant convicted of an offense under Section 43.26 [Possession or promotion of child pornography], to make restitution to an individual who as a child younger than 18 years of age was depicted in the visual material, in an amount equal to the expenses incurred by the individual as a result of the offense, including:

- (1) medical services relating to physical, psychiatric, or psychological care;
- (2) physical and occupational therapy or rehabilitation;
- (3) necessary transportation, temporary housing, and child care expenses;
- (4) lost income; and
- (5) attorney’s fees.

In comparison, a federal conviction for possession of child pornography<sup>66</sup> is generally punishable by imprisonment for 5–20 years and a fine not to exceed \$250,000.<sup>67</sup> Subsequent convictions, however, are punishable by imprisonment up to 40 years and a fine not to exceed \$250,000.<sup>68</sup>

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

Tex. Code Crim. Proc. Ann. art. 62.051(a) (Registration: general) states, “A person who has a reportable conviction or adjudication . . . shall register . . . with the local law enforcement authority in any municipality where the person resides or intends to reside for more than seven days.” Pursuant to Tex. Code Crim. Proc. Ann. art. 62.001(5)(A), (B), (B-1), (J), (K)<sup>69</sup> (Definitions), the definition of “reportable conviction or

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<sup>65</sup> See *supra* note 59.

<sup>66</sup> 18 U.S.C. §§ 2252(a)(2), (a)(4) (Certain activities relating to material involving the sexual exploitation of minors), 2252A(a)(2)–(3) (Certain activities relating to material constituting or containing child pornography), 1466A(a), (b) (Obscene visual representations of the sexual abuse of children).

<sup>67</sup> 18 U.S.C. §§ 2252(b) (stating that a conviction under subsection (a)(2) is punishable by imprisonment for 5–20 years and a fine, while a conviction under subsection (a)(4) is punishable by imprisonment up to 10 years, a fine, or both), 2252A(b)(1) (a conviction is punishable by imprisonment for 5–20 years and a fine), 1466A(a), (b) (stating that a conviction under subsection (a) is “subject to the penalties provided in section 2252A(b)(1),” imprisonment for 5–20 years and a fine, while a conviction under subsection (b) is “subject to the penalties provided in section 2252A(b)(2),” imprisonment up to 10 years, a fine, or both); see also 18 U.S.C. §§ 3559(a)(1) (classifying all of the above listed offenses as felonies), 3571(b)(3) (providing a fine up to \$250,000 for any felony conviction).

<sup>68</sup> 18 U.S.C. §§ 2252(b) (stating if a person has a prior conviction under subsection (a)(2), or a list of other statutes, a conviction is punishable by a fine and imprisonment for 15–40 years, but if a person has a prior conviction under subsection (a)(4), or a list of other statutes, a conviction is punishable by a fine and imprisonment for 10–20 years), 2252A(b)(1) (stating if a person has a prior conviction under subsection (a)(2), (a)(3), or a list of other statutes, a conviction is punishable by a fine and imprisonment for 15–40 years), 1466A(a), (b) (stating that the penalty scheme for section 2252A(b) applies); see also 18 U.S.C. §§ 3559(a)(1) (classifying all of the above listed offenses as felonies), 3571(b)(3) (providing a fine up to \$250,000 for any felony conviction).

<sup>69</sup> The text of Tex. Code Crim. Proc. Ann. art. 62.001 included here and elsewhere in this report includes amendments made by the enactment of House Bill 10 during the 2015 regular session of the 84th Texas Legislature (effective September 1, 2015).



adjudication” expressly includes convictions under Tex. Penal Code Ann. § 20A.02(a)(7),(8) (Trafficking of persons), § 43.02(c-1)(3) (Prostitution)<sup>70</sup>, § 21.02 (Continuous sexual abuse of young child or children), § 22.021(a) (Aggravated sexual assault), § 43.26 (Possession or promotion of child pornography), § 43.25(b) (Sexual performance by a child), or § 33.021(b), (c) (Online solicitation of a minor). Convictions under Tex. Penal Code Ann. § 15.031(b) (Criminal solicitation of a minor), however, are not included within the definition of “reportable conviction or adjudication,” and, therefore, do not require registration.

Tex. Code Crim. Proc. Ann. art. 62.101(a)(2) (Expiration of duty to register) further imposes a lifetime registration requirement on offenders convicted under Tex. Penal Ann. Code § 20A.02(a)(8).

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<sup>70</sup> See *supra* note 11.

**Legal Components:**

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

**Legal Analysis:**

- 3.1 Penalties for trafficking a child for sexual exploitation are as high as federal penalties.

Tex. Penal Code Ann. § 20A.02(b)(1) (Trafficking of persons) imposes enhanced penalties for the sex trafficking of a minor under Tex. Penal Code Ann. § 20A.02(a)(7), (8).<sup>71</sup> A first conviction under Tex. Penal Code Ann. § 20A.02(a) is generally punishable as a second degree felony by imprisonment for 2–20 years and a possible fine not to exceed \$10,000. Tex. Penal Code Ann. §§ 20A.02(b)(1), 12.33. A first conviction under Tex. Penal Code Ann. § 20A.02(a)(7) or § 20A.02(a)(8), however, is punishable as a first degree felony by imprisonment “for life or for any term of not more than 99 years or less than 5 years” and a possible fine not to exceed \$10,000, while subsequent convictions are punishable by life imprisonment and a possible fine not to exceed \$10,000. Tex. Penal Code Ann. §§ 20A.02(b)(1), 12.32, 12.42(c)(2).<sup>72</sup> Additionally, a trafficker who “during a period that is 30 or more days in duration, . . . engages two or more times in conduct that constitutes an offense under Section 20A.02 [Trafficking of persons] against one or more victims,” may be convicted under Tex. Penal Code Ann. § 20A.03 (Continuous trafficking of persons).<sup>73</sup> A conviction under Tex. Penal Code Ann. § 20A.03 is punishable as a first degree felony by imprisonment for either 25–99 years and a possible fine not to exceed \$10,000 or life and a possible fine not to exceed \$10,000.<sup>74</sup> Tex. Penal Code Ann. §§ 20A.03(e), 12.32.

Several of Texas’s CSEC laws may also be used to convict traffickers. A trafficker’s conviction under Tex. Penal Code Ann. § 43.05(a)(2) (Compelling prostitution)<sup>75</sup> is punishable as a first degree felony by imprisonment for either 5–99 years and a possible fine not to exceed \$10,000 or life and a possible fine not to exceed \$10,000. Tex. Penal Code Ann. §§ 43.05(b), 12.32. Tex. Penal Code Ann. § 43.03 (Promotion of Prostitution), punishes soliciting “another to engage in sexual conduct with another person for compensation” as a second degree felony if the prostituted person is a minor, “regardless of whether the actor knows the age of the person at the time the actor commits the offense.” Tex. Penal Code Ann. § 43.03(a), (b). Traffickers may also be convicted under Tex. Penal Code Ann. § 15.031(b) (Criminal solicitation of a minor),<sup>76</sup> which, pursuant

<sup>71</sup> See *supra* Section 1.1 for the provisions of Tex. Penal Code Ann. § 20A.02(a)(7), (8).

<sup>72</sup> See *supra* note 6.

<sup>73</sup> See *supra* Section 1.1 for the provisions of Tex. Penal Code Ann. § 20A.03. See *supra* note 7.

<sup>74</sup> See *supra* note 9.

<sup>75</sup> See *supra* Section 1.2 for the provisions of Tex. Penal Code Ann. § 43.05(a)(2).

<sup>76</sup> See *supra* Section 1.2 for the provisions of Tex. Penal Code Ann. § 15.031(b).

to Tex. Penal Code Ann. § 15.031(e), is punishable one category lower than committing the actual offense, but the punishment may be enhanced to the same category as the predicate offense if certain requirements are satisfied.<sup>77</sup>

A trafficker who “employs, authorizes, or induces a child to work . . . in a sexually oriented commercial activity; or . . . in any place of business permitting, requesting, or requiring a child to work nude or topless” may be convicted under Tex. Penal Code Ann. § 43.251 (Employment harmful to children).<sup>78</sup> A conviction under Tex. Penal Code Ann. § 43.251(b) is punishable as either a first or second degree felony. Pursuant to Tex. Penal Code Ann. § 43.251(c), a conviction is punishable as a second degree felony by imprisonment for 2–20 years and a fine not to exceed \$10,000, but if the child is a minor under the age of 14, a conviction is punishable as a first degree felony by imprisonment for either 5–99 years and a possible fine not to exceed \$10,000 or life and a possible fine not to exceed \$10,000. Tex. Penal Code Ann. §§ 43.251(c), 12.33, 12.32.

A trafficker’s conviction under Tex. Penal Code Ann. § 43.25(b) (Sexual performance by a child)<sup>79</sup> is punishable as a second degree felony by imprisonment for 2–20 years and a possible fine not to exceed \$10,000. Tex. Penal Code Ann. §§ 43.25(c), 12.33. If the victim is under the age of 14, however, a conviction is punishable as a first degree felony by imprisonment for either 5–99 years and a possible fine not to exceed \$10,000 or life and a possible fine not to exceed \$10,000. Tex. Penal Code Ann. §§ 43.25(c), 12.32.

Additionally, traffickers may face prosecution under Texas’s laws related to organized criminal activity. Tex. Penal Code Ann. § 71.02(a) (Engaging in organized criminal activity) states, in part,

A person commits an offense if, with the intent to establish, maintain, or participate in a combination<sup>80</sup> or in the profits of a combination or as a member of a criminal street gang,<sup>81</sup> the person commits or conspires to commit one or more of the following:

- (1) murder, capital murder, arson, aggravated robbery, robbery, burglary, theft, aggravated kidnapping, kidnapping, aggravated assault, aggravated sexual assault, sexual assault, continuous sexual abuse of young child or children, solicitation of a minor, . . .
- . . .
- (3) promotion of prostitution, aggravated promotion of prostitution, or compelling prostitution;
- . . .
- (6) any unlawful wholesale promotion or possession of any obscene material or obscene device with the intent to wholesale promote the same;
- (7) any offense under Subchapter B [Obscenity], Chapter 43 [Public indecency], depicting or involving conduct by or directed toward a child younger than 18 years of age;
- . . .
- (12) any offense under Chapter 20A [Trafficking of persons];
- . . . .
- (18) any offense classified as a felony under the Tax Code.

Tex. Penal Code Ann. § 71.02(b) states,

(b) Except as provided in Subsections (c) and (d), an offense under this section is one category higher than the most serious offense listed in Subsection (a) that was committed, and if the most

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<sup>77</sup> See *supra* Section 1.2 for the substantive provisions of Tex. Penal Code Ann. § 15.031(e).

<sup>78</sup> See *supra* Section 1.2 for the provisions of Tex. Penal Code Ann. § 43.251.

<sup>79</sup> See *supra* Section 1.2 for the provisions of Tex. Penal Code Ann. § 43.25(b).

<sup>80</sup> See *supra* note 27.

<sup>81</sup> See *supra* note 13.

serious offense is a Class A misdemeanor, the offense is a state jail felony, except that the offense is a felony of the first degree punishable by imprisonment in the Texas Department of Criminal Justice for:

(1) life without parole, if the most serious offense is an aggravated sexual assault and if at the time of that offense the defendant is 18 years of age or older and:

(A) the victim of the offense is younger than six years of age;

(B) the victim of the offense is younger than 14 years of age and the actor commits the offense in a manner described by Section 22.021(a)(2)(A); or

(C) the victim of the offense is younger than 17 years of age and suffered serious bodily injury as a result of the offense; or

....

....

(3) life or for any term of not more than 99 years or less than 15 years if the most serious offense is an offense punishable as a felony of the first degree, other than an offense described by Subdivision (1).

Traffickers commit an offense under Tex. Penal Code Ann. § 43.04(a) (Aggravated promotion of prostitution) when “he knowingly owns, invests in, finances, controls, supervises, or manages a prostitution enterprise that uses two or more prostitutes.” This offense is a first degree felony when “the prostitution enterprise uses as a prostitute one or more persons younger than 18 years of age, regardless of whether the actor knows the age of the person at the time the actor commits the offense.” Tex. Penal Code Ann. § 43.04(b).

In comparison, if the victim is under the age of 14, a conviction under the Trafficking Victims Protection Act (TVPA)<sup>82</sup> for child sex trafficking is punishable by 15 years to life imprisonment and a fine not to exceed \$250,000. 18 U.S.C. §§ 1591(b)(1), 3559(a)(1), 3571(b)(3). If the victim is between the ages of 14–17, a conviction is punishable by 10 years to life imprisonment and a fine not to exceed \$250,000. 18 U.S.C. §§ 1591(b)(2), 3559(a)(1), 3571(b)(3). A conviction is punishable by mandatory life imprisonment, however, if the trafficker has a prior conviction for a federal sex offense<sup>83</sup> against a minor.

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

Tex. Penal Code Ann. § 43.25(b) (Sexual performance by a child) prohibits the creation of child pornography by making it a crime if a trafficker “employs, authorizes, or induces a child younger than 18 years of age to engage in sexual conduct<sup>84</sup> or a sexual performance.”<sup>85</sup> A conviction under Tex. Penal Code Ann. § 43.25(b) is punishable as a second degree felony by imprisonment for 2–20 years and a possible fine not to exceed \$10,000. Tex. Penal Code Ann. §§ 43.25(c), 12.33. If the victim is under the age of 14, however, a conviction is punishable as a first degree felony by imprisonment for either 5–99 years and a possible fine not to exceed \$10,000 or life and a possible fine not to exceed \$10,000. Tex. Penal Code Ann. §§ 43.25(c), 12.32. Tex. Penal Code Ann. § 43.25(d) further provides, “A person commits an offense if, knowing the character and content of the material, he produces,<sup>86</sup> directs, or promotes<sup>87</sup> a performance that includes sexual conduct by a child

<sup>82</sup> See *supra* note 46.

<sup>83</sup> See *supra* note 47.

<sup>84</sup> See *supra* note 18.

<sup>85</sup> See *supra* note 19.

<sup>86</sup> Pursuant to Tex. Penal Code Ann. § 43.25(a)(4), “‘Produce’ with respect to a sexual performance includes any conduct that directly contributes to the creation or manufacture of the sexual performance.”

<sup>87</sup> Tex. Penal Code Ann. § 43.25(a)(5) defines “promote” as “to procure, manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmit, publish, distribute, circulate, disseminate, present, exhibit, or advertise or to offer or agree to do any of the above.”

younger than 18 years of age.” A conviction under Tex. Penal Code Ann. § 43.25(d) is punishable as a third degree felony by imprisonment for 2–10 years and a possible fine up to \$10,000, but if the victim is under the age of 14, a conviction is punishable as a second degree felony by imprisonment for 2–20 years and a possible fine not to exceed \$10,000. Tex. Penal Code Ann. §§ 43.25(e), 12.34, 12.33.

Additionally, Tex. Penal Code Ann. § 43.26<sup>88</sup> (Possession or promotion of child pornography) makes it a crime for a person to promote child pornography. Tex. Penal Code Ann. § 43.26(e), (f) states,

(e) A person commits an offense if:

- (1) the person knowingly or intentionally promotes<sup>89</sup> or possesses with intent to promote material described by Subsection (a)(1);<sup>90</sup> and
  - (2) the person knows that the material depicts the child as described by Subsection (a)(1).
- (f) A person who possesses visual material<sup>91</sup> that contains six or more identical visual depictions of a child as described by Subsection (a)(1) is presumed to possess the material with the intent to promote the material.

A first conviction under Tex. Penal Code Ann. § 43.26(e) is punishable as a second degree felony by imprisonment for 2–20 years and a possible fine not to exceed \$10,000. Tex. Penal Code Ann. §§ 43.26(g), 12.33. However, if the individual “has been previously convicted” of Tex. Penal Code Ann. § 43.26(e), then the offense is a felony of the first degree punishable by imprisonment “for life or for any term of not more than 99 years or less than 5 years” and a possible fine not to exceed \$10,000. Tex. Penal Code Ann. §§ 43.26(g), 12.32.

Under Tex.Code Crim. Proc. Ann. Art. 42.037,<sup>92</sup>

- (r) The court may order a defendant convicted of an offense under Section 43.26 [Possession or promotion of child pornography], Penal Code, to make restitution to an individual who as a child younger than 18 years of age was depicted in the visual material, in an amount equal to the expenses incurred by the individual as a result of the offense, including:
- (1) medical services relating to physical, psychiatric, or psychological care;
  - (2) physical and occupational therapy or rehabilitation;
  - (3) necessary transportation, temporary housing, and child care expenses;
  - (4) lost income; and
  - (5) attorney’s fees.

In comparison, if the victim is under the age of 14, a conviction under the TVPA for child sex trafficking is punishable by 15 years to life imprisonment and a fine not to exceed \$250,000. 18 U.S.C. §§ 1591(b)(1), 3559(a)(1), 3571(b)(3). If the victim is between the ages of 14–17, a conviction is punishable by 10 years to life imprisonment and a fine not to exceed \$250,000. 18 U.S.C. §§ 1591(b)(2), 3559(a)(1), 3571(b)(3). A conviction is punishable by mandatory life imprisonment, however, if the trafficker has a prior conviction for a federal sex offense<sup>93</sup> against a minor. Additionally, a federal conviction for distribution of child pornography<sup>94</sup>

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<sup>88</sup> See *supra* note 61.

<sup>89</sup> Tex. Penal Code Ann. § 43.26(b)(1) defines “promote” as having “the meaning assigned by Section 43.25.” See *supra* note 87 for the applicable definition of “promote.”

<sup>90</sup> See *supra* Section 2.9 for the substantive provisions of Tex. Penal Code Ann. § 43.26(a).

<sup>91</sup> See *supra* note 62.

<sup>92</sup> See *supra* note 59.

<sup>93</sup> See *supra* note 47.

is generally punishable by imprisonment for 5–20 years and a fine not to exceed \$250,000.<sup>95</sup> Subsequent convictions, however, are punishable by imprisonment up to 40 years and a fine not to exceed \$250,000.<sup>96</sup>

3.3 *Using the Internet or electronic communications to lure, entice, recruit or sell commercial sex acts with a minor is a separate crime or results in an enhanced penalty for traffickers.*

Although not expressly commercial, Tex. Penal Code Ann. § 33.021(c) (Online solicitation of a minor) makes it illegal for a trafficker to use the Internet or electronic communications to lure, entice, or recruit commercial sex acts with a minor. Tex. Penal Code Ann. § 33.021(c) provides,

A person commits an offense if the person, over the Internet, by electronic mail or text message or other electronic message service or system, or through a commercial online service, knowingly solicits a minor<sup>97</sup> to meet another person, including the actor, with the intent that the minor will engage in sexual contact,<sup>98</sup> sexual intercourse, or deviate sexual intercourse with the actor or another person.

A conviction under Tex. Penal Code Ann. §§ 33.021(c) is punishable as a second degree felony by imprisonment for 2–20 years and a possible fine not to exceed \$10,000. Tex. Penal Code Ann. §§ 33.021(f), 12.33. However, a “minor” is defined as an individual under 17 years of age only. Tex. Penal Code Ann. § 33.021(a).<sup>99</sup>

Additionally, Tex. Penal Code Ann. § 33.021 (b) expressly includes CSEC and trafficking offenses by providing that an individual over the age of 17 commits online solicitation of a minor if the person “intentionally (1) communicates in a sexually explicit manner with a minor; or (2) distributes sexually explicit material to a minor” “over the Internet, by electronic mail or text message or other electronic message service or system, or through a commercial online service,” “with the intent to commit one of the following offenses: Tex. Penal Code §§ 21.02 (Continuous sexual abuse of young child or children), 21.11 (Indecency with a child), 22.011 (Sexual assault), 22.021 (Aggravated sexual assault), or 25.02 (Prohibited sexual conduct), 43.05 (Compelling prostitution), 43.25 (Sexual performance by a child), or 43.26 (Possession or promotion of child pornography) 20A.02(a)(3), (4), (7), or (8) (Trafficking of persons).

If the victim is under 17 years of age, a conviction under Tex. Penal Code Ann. § 33.021(b) is punishable as a third degree felony by imprisonment for 2–10 years and a possible fine not to exceed \$10,000. Tex. Penal Code

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<sup>94</sup> 18 U.S.C. §§ 2252(a)(1), (a)(2), (a)(3) (Certain activities relating to material involving the sexual exploitation of minors), 2252A(a)(2), (a)(3) (Certain activities relating to material constituting or containing child pornography), 1466A(a) (Obscene visual representations of the sexual abuse of children).

<sup>95</sup> 18 U.S.C. §§ 2252(b) (stating that a conviction under subsection (a)(1), (a)(2), or (a)(3) is punishable by imprisonment for 5–20 years and a fine), 2252A(b)(1) (a conviction is punishable by imprisonment for 5–20 years and a fine), 1466A(a), (b) (stating that a conviction under subsection (a) is “subject to the penalties provided in section 2252A(b)(1),” imprisonment for 5–20 years and a fine, while a conviction under subsection (b) is “subject to the penalties provided in section 2252A(b)(2),” imprisonment up to 10 years, a fine, or both); *see also* 18 U.S.C. §§ 3559(a)(1) (classifying all of the above listed offenses as felonies), 3571(b)(3) (providing a fine up to \$250,000 for any felony conviction).

<sup>96</sup> 18 U.S.C. §§ 2252(b) (stating if a person has a prior conviction under subsection (a)(1), (a)(2), or (a)(3) or a list of other statutes, a conviction is punishable by a fine and imprisonment for 15–40 years), 2252A(b)(1) (stating if a person has a prior conviction under subsection (a)(2), (a)(3), or a list of other statutes, a conviction is punishable by a fine and imprisonment for 15–40 years), 1466A(a), (b) (stating that the penalty scheme for section 2252A(b) applies); *see also* 18 U.S.C. §§ 3559(a)(1) (classifying all of the above listed offenses as felonies), 3571(b)(3) (providing a fine up to \$250,000 for any felony conviction).

<sup>97</sup> *See supra* note 24.

<sup>98</sup> *See supra* note 25.

<sup>99</sup> *See supra* note 22.

Ann. §§ 33.021(f), 12.34. But, if the victim is younger than 14 years of age or the offender believes the victim to be younger than 14 years of age, a conviction under Tex. Penal Code Ann. § 33.021(b) is punishable as a second degree felony by imprisonment for 2–20 years and a possible fine not to exceed \$10,000. Tex. Penal Code Ann. §§ 33.021(f), 12.33.

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

Pursuant to Tex. Penal Code Ann. §§ 12.32–.34, all felony convictions are subject to a possible fine not to exceed \$10,000. Therefore, a trafficker convicted under Tex. Penal Code Ann. § 20A.02(a)(7), (8) (Trafficking of persons), § 20A.03 (Continuous trafficking of persons), § 43.03 (Promotion of Prostitution, where the prostituted person is a minor), §§ 43.04 (Aggravated Promotion of Prostitution, where the prostituted person is a minor) § 43.05(a)(2) (Compelling prostitution), § 15.031(b) (Criminal solicitation of a minor), § 43.251 (Employment harmful to children), § 43.25(b) (Sexual performance by a child), § 71.02 (Engaging in organized criminal activity), or § 71.022(a) (Coercing, inducing, or soliciting membership in a criminal street gang) is subject to a possible fine not to exceed \$10,000. Tex. Penal Code Ann. §§ 20A.02(b)(1), 20A.03(e), 43.05(b), 15.031(e), 43.251(c), 43.25(e), 71.02(b), 71.022(b).

Pursuant to Tex. Code Crim. Proc. Ann. art. 42.0372 (Mandatory restitution for child victims of trafficking of persons or compelling prostitution), traffickers convicted under Tex. Penal Code Ann. § 20A.02 (Trafficking of persons) or § 43.05(a)(2) (Compelling prostitution) are required to make restitution to their victims. Tex. Code Crim. Proc. Ann. art. 42.0372 states,

- (a) The court shall order a defendant convicted of an offense under Section 20A.02 [Trafficking of persons] or 43.05(a)(2) [Compelling prostitution], Penal Code, to pay restitution in an amount equal to the cost of necessary rehabilitation, including medical, psychiatric, and psychological care and treatment, for any victim of the offense who is younger than 18 years of age.
- (b) The court shall, after considering the financial circumstances of the defendant, specify in a restitution order issued under Subsection (a) the manner in which the defendant must pay the restitution.
- (c) A restitution order issued under subsection (a) may be enforced by the state, or by a victim named in the order to receive the restitution, in the same manner as a judgment in a civil action.
- (d) The court may hold a hearing, make findings of fact, and amend a restitution order issued under Subsection (a) if the defendant fails to pay the victim name in the order in the manner specified by the court.

Traffickers convicted of other crimes may also be required to make restitution at the discretion of the court, pursuant to Tex. Code Crim. Proc. Ann. art. 42.037<sup>100</sup> (Restitution), which states,

- (a) In addition to any fine authorized by law, the court that sentences a defendant convicted of an offense may order the defendant to make restitution to any victim of the offense or to the compensation to victims of crime fund established under Subchapter B [Crime Victims' Compensation], Chapter 56 [Rights of Crime Victims], to the extent that fund has paid compensation to or on behalf of the victim. . . .
- (b)(1) If the offense results in damage to or loss or destruction of property of a victim of the offense, the court may order the defendant:
  - (A) to return the property to the owner of the property or someone designated by the owner; or
  - (B) if return of the property is impossible or impractical or is an inadequate remedy, to pay an amount equal to the greater of:
    - (i) the value of the property on the date of the damage, loss, or destruction; or

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<sup>100</sup> See *supra* note 59.

- (ii) the value of the property on the date of sentencing, less the value of any part of the property that is returned on the date the property is returned.
- (2) If the offense results in personal injury to a victim, the court may order the defendant to make restitution to:
  - (A) the victim for any expenses incurred by the victim as a result of the offense; or
  - (B) the compensation to victims of crime fund to the extent that fund has paid compensation to or on behalf of the victim.

- ....
- (r) The court may order a defendant convicted of an offense under Section 43.26 [Possession or promotion of child pornography], Penal Code, to make restitution to an individual who as a child younger than 18 years of age was depicted in the visual material, in an amount equal to the expenses incurred by the individual as a result of the offense, including:
    - (1) medical services relating to physical, psychiatric, or psychological care;
    - (2) physical and occupational therapy or rehabilitation;
    - (3) necessary transportation, temporary housing, and child care expenses;
    - (4) lost income; and
    - (5) attorney’s fees.

Additionally, traffickers are subject to criminal asset forfeiture. Tex. Code Crim. Proc. Ann. art. 59.02(a) (Forfeiture of contraband) states, “Property that is contraband is subject to seizure and forfeiture under this chapter.” Tex. Code Crim. Proc. Ann. art. 59.01(2)<sup>101</sup> (Definition)<sup>102</sup> states,

- (2) “Contraband” means property of any nature, including real, personal, tangible, or intangible, that is:
  - (A) used in the commission of:
    - (i) any first or second degree felony under the Penal Code;
    - (ii) any felony under Section 15.031(b) [Criminal solicitation of a minor], 20.05 [Smuggling of persons], 20.06 [Continuous Smuggling of Persons], 21.11 [Indecency with a child] . . . or Chapter 43 [Public indecency], 20A [Trafficking of persons] . . . 33 [Computer crimes] [which includes Tex. Penal Code Ann. § 33.021 (Online Solicitation of a Minor)]
  - ....
  - ....
  - (C) the proceeds gained from the commission of a felony listed in Paragraph (A) or (B) of this subdivision, a misdemeanor listed in Paragraph (B)(vii), (ix), (x), or (xi) of this subdivision, or a crime of violence;
  - (D) acquired with proceeds gained from the commission of a felony listed in Paragraph (A) or (B) of this subdivision, a misdemeanor listed in Paragraph (B)(vii), (ix),(x), or (xi) of this subdivision, or a crime of violence;
  - ...
  - (F) used to facilitate or intended to be used to facilitate the commission of a felony under Section 20A.02 [Trafficking of Persons] or Chapter 43, Penal Code.

Tex. Code Crim. Proc. Ann. art. 59.03 (Seizure of contraband) governs the seizure of forfeitable property and states, in relevant part:

- (a) Property subject to forfeiture under this chapter, other than property described by Article 59.12, may be seized by any peace officer under authority of a search warrant.
- (b) Seizure of property subject to forfeiture may be made without warrant if:

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<sup>101</sup> See *supra* note 29.

<sup>102</sup> See *supra* section 2.8 for the provisions of Tex. Code Crim. Proc. Ann. art. 59.01(2).



- (1) the owner, operator, or agent in charge of the property knowingly consents;
- (2) the seizure is incident to a search to which the owner, operator, or agent in charge of the property knowingly consents;
- (3) the property subject to seizure has been the subject of a prior judgment in favor of the state in a forfeiture proceeding under this chapter; or
- (4) the seizure was incident to a lawful arrest, lawful search, or lawful search incident to arrest.

Tex. Code Crim. Proc. Ann. art. 18.18(a) (Disposition of gambling paraphernalia, prohibited weapon, criminal instrument, and other contraband) provides for the destruction or forfeiture of, among other things, any “obscene device or material” or “child pornography” for any offense that involves an “obscene device or material” or child pornography.

Additionally, Tex. Civ. Prac. & Rem. Code Ann. § 125.002(b) (Suit to abate common nuisance; bond) authorizes a person to “bring a suit [to enjoin and abate a common nuisance] against any person who maintains, owns, uses, or is a party to the use of a place for purposes constituting a nuisance under this subchapter and may bring an action in rem against the place itself.” Tex. Civ. Prac. & Rem. Code Ann. § 125.0015(a) (Common nuisance) states,

A person who maintains a place to which persons habitually go for the following purposes and who knowingly tolerates the activity and furthermore fails to make reasonable attempts to abate the activity maintains a common nuisance:

- ...
- (6) prostitution, promotion of prostitution, or aggravated promotion of prostitution as prohibited by the Penal Code;
- (7) compelling prostitution as prohibited by the Penal Code;
- ...
- (19) trafficking of persons described by Section 20A.02, Penal Code;
- ....

Under Tex. Civ. Prac. & Rem. Code Ann. § 125.002(f-1),

If the defendant required to execute the bond is a hotel, motel, or similar establishment that rents overnight lodging to the public and the alleged common nuisance is under Section 125.0015(a)(6) or (7) [Common nuisance], the bond must also be conditioned that the defendant will, in each of the defendant’s lodging units on the premises that are the subject of the suit, post in a conspicuous place near the room rate information required to be posted under Section 2155.001 [Room rate information], Occupations Code, an operating toll-free telephone number of a nationally recognized information and referral hotline for victims of human trafficking.

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

Tex. Code Crim. Proc. Ann. art. 62.051(a) (Registration: general) states, “A person who has a reportable conviction or adjudication . . . shall register . . . with the local law enforcement authority in any municipality where the person resides or intends to reside for more than seven days.” Pursuant to Tex. Code Crim. Proc. Ann. art. 62.001(5)(B), (B-1) ( (J), (K)<sup>103</sup> (Definitions), the definition of “reportable conviction or adjudication” expressly includes convictions under Tex. Pen. Code Ann. § 20A.02(a)(7), (8) (Trafficking of persons), § 43.05

<sup>103</sup> The text of Tex. Code Crim. Proc. Ann. art. 62.001 included here and elsewhere in this report includes amendments made by the enactment of House Bill 10 during the 2015 regular session of the 84th Texas Legislature (effective April 2, 2015).

(Compelling prostitution), § 43.02(c-1)(3) (Prostitution), § 43.26 (Possession or promotion of child pornography), § 43.25(b) (Sexual performance by a child), or § 33.021(b), (c) (Online solicitation of a minor). However, convictions under Tex. Penal Code Ann. § 20A.03 (Continuous trafficking of persons), § 15.031(b) (Criminal solicitation of a minor), § 43.251 (Employment harmful to children), § 71.02 (Engaging in organized criminal activity), and § 71.022(a) (Coercing, inducing, or soliciting membership in a criminal street gang) are not included within the definition of “reportable conviction or adjudication,” and, therefore, do not require registration.

Tex. Code Crim. Proc. art. 62.101(a)(2) (Expiration of duty to register) further imposes a lifetime registration requirement on offenders convicted under Tex. Penal Code Ann. § 20A.02(a)(7) or (8).

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

Tex. Fam. Code Ann. § 161.001(1)(L)(xv), (xvi)<sup>104</sup> (Involuntary termination of parent-child relationship) expressly includes convictions under Tex. Penal Code Ann. § 20(a)(7), (8) (Trafficking of persons) and § 43.05(a)(2) (Compelling prostitution) as grounds for terminating parental rights. Specifically, Tex. Fam. Code Ann. § 161.001 states,

(b) The court may order termination of the parent-child relationship if the court finds by clear and convincing evidence:

(1) that the parent has:

...

(L) been convicted or has been placed on community supervision, including deferred adjudication community supervision, for being criminally responsible for the death or serious injury of a child under the following sections of the Penal Code, or under a law of another jurisdiction that contains elements that are substantially similar to the elements of an offense under one of the following Penal Code sections . . . :

...

(iv) Section 21.11 (indecent with a child);

...

(vi) Section 22.011 (sexual assault);

...

(viii) Section 22.021 (aggravated sexual assault);

...

(xii) Section 43.25 (sexual performance by a child);

(xiii) Section 43.26 (possession or promotion of child pornography);

(xiv) Section 21.02 (continuous sexual abuse of young child or children);

(xv) Section 20A.02(a)(7) or (8) (trafficking of persons); and

(xvi) Section 43.05(a)(2) (compelling prostitution);

... and

(2) that termination is in the best interest of the child.

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<sup>104</sup> The text of Tex. Fam. Code Ann. § 161.001 included here and elsewhere in this report includes amendments made by the enactment of Senate Bill 219 during the 2015 regular session of the 84th Texas Legislature (effective April 2, 2015).

Additionally, Tex. Fam. Code Ann. § 262.2015(a), (b)(3)(N), (b)(3)(O)<sup>105</sup> (Aggravated circumstances) allows the court to waive the requirement regarding making reasonable efforts to return a child to the child's parents and instead schedule a permanency hearing and a trial on the merits if the court determines that the child's "parent has engaged in conduct against the child that would constitute an offense under" Tex. Penal Code Ann. § 20A.02 (Trafficking of persons) or § 43.05(a)(2) (Compelling prostitution), among other offenses.

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<sup>105</sup> The text of Tex. Fam. Code Ann. § 262.2015 included here and elsewhere in this report includes amendments made by the enactment of Senate Bill 206 during the 2015 regular session of the 84th Texas Legislature (effective September 1, 2015).

***Legal Components:***

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

***Legal Analysis:***

- 4.1 *The acts of assisting, enabling, or financially benefitting from child sex trafficking are included as criminal offenses in the state sex trafficking statute.*

Tex. Penal Code Ann. § 20A.02(a)(8) (Trafficking of persons) makes it a crime if a person “receives a benefit from participating in a venture that involves an activity described by Subdivision (7).”<sup>106</sup> A first conviction under Tex. Penal Code Ann. § 20A.02(a) is generally punishable as a second degree felony by imprisonment for 2–20 years and a possible fine not to exceed \$10,000. Tex. Penal Code Ann. §§ 20A.02(b)(1), 12.33. A first conviction under Tex. Penal Code Ann. § 20A.02(a)(8), however, is punishable as a first degree felony by imprisonment “for life or for any term of not more than 99 years or less than 5 years” and a possible fine not to exceed \$10,000, while subsequent convictions are punishable by life imprisonment and a possible fine not to exceed \$10,000. Tex. Penal Code Ann. §§ 20A.02(b)(1), 12.32, 12.42(c)(2).<sup>107</sup> Additionally, a facilitator who, “during a period that is 30 or more days in duration, . . . engages two or more times in conduct that constitutes an offense under Section 20A.02 against one or more victims,” may be convicted under Tex. Penal Code Ann. § 20A.03 (Continuous trafficking of persons).<sup>108</sup> A conviction under Tex. Penal Code Ann. § 20A.03 is punishable as a first degree felony by imprisonment for 25–99 years and a possible fine not to exceed \$10,000, or life and a possible fine not to exceed \$10,000.<sup>109</sup> Tex. Penal Code Ann. §§ 20A.03(e), 12.32.

Texas’s CSEC laws do not expressly prohibit conduct that is generally indicative of facilitators, except that a facilitator may be convicted under Tex. Penal Code Ann. § 43.25(d) (Sexual performance by a child) if the facilitator “promotes<sup>110</sup> a performance<sup>111</sup> that includes sexual conduct<sup>112</sup> by a child younger than 18 years of age.” A conviction under Tex. Penal Code Ann. § 43.25(d) is punishable as a third degree felony by imprisonment for 2–10 years and a possible fine up to \$10,000, but if the victim is under the age of 14, a conviction is punishable as a second degree felony by imprisonment for 2–20 years and a possible fine not to exceed \$10,000. Tex. Penal Code Ann. §§ 43.25(e), 12.34, 12.33.

<sup>106</sup> See *supra* Section 1.1 for the provisions of Tex. Penal Code Ann. § 20A.02(a)(7), (8).

<sup>107</sup> See *supra* note 6.

<sup>108</sup> See *supra* Section 1.1 for the provisions of Tex. Penal Code Ann. § 20A.03. See *supra* note 7.

<sup>109</sup> See *supra* note 9.

<sup>110</sup> See *supra* note 87.

<sup>111</sup> See *supra* note 19 for the definition of “performance.”

<sup>112</sup> See *supra* note 18 for the definition of “sexual conduct.”

4.2 *Financial penalties, including asset forfeiture laws, are in place for those who benefit financially from or aid and assist in committing domestic minor sex trafficking.*

Pursuant to Tex. Penal Code Ann. §§ 12.32–34, all felony convictions are subject to a possible fine not to exceed \$10,000. Therefore, a facilitator convicted under Tex. Penal Code Ann. § 20A.02(8) (Trafficking of persons), § 20A.03 (Continuous trafficking of persons), § 43.25(d) (Sexual performance by a child), or § 71.02(a) (Engaging in organized criminal activity) is subject to a possible fine not to exceed \$10,000. Tex. Penal Code Ann. §§ 20A.02(b)(1), 20A.03(e), 43.25(e), 71.02(b).

Pursuant to Tex. Code Crim. Proc. Ann. art. 42.0372 (Mandatory restitution for child victims of trafficking of persons or compelling prostitution), facilitators convicted under Tex. Penal Code Ann. § 20A.02 (Trafficking of persons) are required to make restitution to their victims. Tex. Code Crim. Proc. Ann. art. 42.0372 states,

- (a) The court shall order a defendant convicted of an offense under Section 20A.02 [Trafficking of persons] or 43.05(a)(2) [Compelling prostitution], Penal Code, to pay restitution in an amount equal to the cost of necessary rehabilitation, including medical, psychiatric, and psychological care and treatment, for any victim of the offense who is younger than 18 years of age.
- (b) The court shall, after considering the financial circumstances of the defendant, specify in a restitution order issued under Subsection (a) the manner in which the defendant must pay the restitution.
- (c) A restitution order issued under subsection (a) may be enforced by the state, or by a victim named in the order to receive the restitution, in the same manner as a judgment in a civil action.
- (d) The court may hold a hearing, make findings of fact, and amend a restitution order issued under Subsection (a) if the defendant fails to pay the victim name in the order in the manner specified by the court.

Facilitators convicted of other crimes may also be required to make restitution pursuant to Tex. Code Crim. Proc. Ann. art. 42.037<sup>113</sup> (Restitution), which states

- (a) In addition to any fine authorized by law, the court that sentences a defendant convicted of an offense may order the defendant to make restitution to any victim of the offense or to the compensation to victims of crime fund established under Subchapter B [Crime Victims' Compensation], Chapter 56 [Rights of Crime Victims], to the extent that fund has paid compensation to or on behalf of the victim. . . .
- (b)(1) If the offense results in damage to or loss or destruction of property of a victim of the offense, the court may order the defendant:
  - (A) to return the property to the owner of the property or someone designated by the owner; or
  - (B) if return of the property is impossible or impractical or is an inadequate remedy, to pay an amount equal to the greater of:
    - (i) the value of the property on the date of the damage, loss, or destruction; or
    - (ii) the value of the property on the date of sentencing, less the value of any part of the property that is returned on the date the property is returned.
- (2) If the offense results in personal injury to a victim, the court may order the defendant to make restitution to:
  - (A) the victim for any expenses incurred by the victim as a result of the offense; or
  - (B) the compensation to victims of crime fund to the extent that fund has paid compensation to or on behalf of the victim.
- . . . .

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<sup>113</sup> See *supra* note 59.

(r) The court may order a defendant convicted of an offense under Section 43.26 [Possession or promotion of child pornography], Penal Code, to make restitution to an individual who as a child younger than 18 years of age was depicted in the visual material, in an amount equal to the expenses incurred by the individual as a result of the offense, including:

- (1) medical services relating to physical, psychiatric, or psychological care;
- (2) physical and occupational therapy or rehabilitation;
- (3) necessary transportation, temporary housing, and child care expenses;
- (4) lost income; and
- (5) attorney's fees.

Additionally, facilitators are subject to criminal asset forfeiture. Tex. Code Crim. Proc. Ann. art. 59.02(a) (Forfeiture of contraband) states, "Property that is contraband is subject to seizure and forfeiture under this chapter." Tex. Code Crim. Proc. Ann. art. 59.01(2)<sup>114</sup> (Definitions) states

- (2) "Contraband" means property of any nature, including real, personal, tangible, or intangible, that is:
- (A) used in the commission of:
    - (i) any first or second degree felony under the Penal Code;
    - (ii) any felony under Section 15.031(b) [Criminal solicitation of a minor], 20.05 [Smuggling of persons], 20.06 [Continuous Smuggling of Persons], 21.11 [Indecency with a child], 38.04 [Evading arrest or detention], or Chapter 43 [Public indecency], 20A [Trafficking of persons], 29 [Robbery], 30 [Burglary and criminal trespass], 31 [Theft], 32 [Fraud], 33 [Computer crimes] [which includes Tex. Penal Code Ann. § 33.021 (Online Solicitation of a Minor)], 33A [Telecommunications crimes], or 35 [Insurance fraud], Penal Code;
    - ...
  - (C) the proceeds gained from the commission of a felony listed in Paragraph (A) or (B) of this subdivision, a misdemeanor listed in Paragraph (B)(vii), (ix), (x), or (xi) of this subdivision, or a crime of violence;
  - (D) acquired with proceeds gained from the commission of a felony listed in Paragraph (A) or (B) of this subdivision, a misdemeanor listed in Paragraph (B)(vii), (ix),(x), or (xi) of this subdivision, or a crime of violence;
  - ...
  - (F) used to facilitate or intended to be used to facilitate the commission of a felony under Section 20A.02 [Trafficking of Persons] or Chapter 43, Penal Code.

Tex. Code Crim. Proc. Ann. art. 59.03 (Seizure of contraband) governs the seizure of forfeitable property and states, in relevant part:

- (a) Property subject to forfeiture under this chapter, other than property described by Article 59.12, may be seized by any peace officer under authority of a search warrant.
- (b) Seizure of property subject to forfeiture may be made without warrant if:
  - (1) the owner, operator, or agent in charge of the property knowingly consents;
  - (2) the seizure is incident to a search to which the owner, operator, or agent in charge of the property knowingly consents;
  - (3) the property subject to seizure has been the subject of a prior judgment in favor of the state in a forfeiture proceeding under this chapter; or
  - (4) the seizure was incident to a lawful arrest, lawful search, or lawful search incident to arrest.

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<sup>114</sup> See *supra* note 29.

Additionally, Tex. Civ. Prac. & Rem. Code Ann. § 98.0025<sup>115</sup> renders

a shareholder or member of [a legal legal entity governed by Title 2, 3, or 7, Business Organizations Code] is jointly and severally liable with the entity to the person trafficked for damages arising from the trafficking of that person if the person demonstrates that the shareholder or member caused the entity to be used for the purpose of trafficking that person and did traffic that person for the direct personal benefit of the shareholder or member.

Also, Tex. Civ. Prac. & Rem. Code Ann. § 125.002(b) (Suit to abate common nuisance; bond) authorizes a person to “bring a suit [to enjoin and abate a common nuisance] against any person who maintains, owns, uses, or is a party to the use of a place for purposes constituting a nuisance under this subchapter and may bring an action in rem against the place itself.” Tex. Civ. Prac. & Rem. Code Ann. § 125.0015(a) (Common nuisance) states,

A person who maintains a place to which persons habitually go for the following purposes and who knowingly tolerates the activity and furthermore fails to make reasonable attempts to abate the activity maintains a common nuisance:

...

(6) prostitution, promotion of prostitution, or aggravated promotion of prostitution as prohibited by the Penal Code;

(7) compelling prostitution as prohibited by the Penal Code;

...

(19) trafficking of persons described by Section 20A.02, Penal Code;

....

Under Tex. Civ. Prac. & Rem. Code Ann. § 125.002(f-1),

If the defendant required to execute the bond is a hotel, motel, or similar establishment that rents overnight lodging to the public and the alleged common nuisance is under Section 125.0015(a)(6) or (7) [Common Nuisance], the bond must also be conditioned that the defendant will, in each of the defendant’s lodging units on the premises that are the subject of the suit, post in a conspicuous place near the room rate information required to be posted under Section 2155.001 [Room Rate Information], Occupations Code, an operating toll-free telephone number of a nationally recognized information and referral hotline for victims of human trafficking.

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

Texas has no specific provision prohibiting the promoting or selling of child sex tourism in Texas.

- 4.3.1 Recommendation: Enact a law that prohibits selling or offering to sell travel services in Texas that include or facilitate travel for the purpose of engaging in commercial sexual exploitation of a minor either in or outside of Texas.

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<sup>115</sup> The text of Tex. Civ. Prac. & Rem. Code Ann. § 98.0025 included here and elsewhere in this report includes amendments made by the enactment of House Bill 968 during the 2015 regular session of the 84th Texas Legislature (effective June 1, 2015).

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

Tex. Penal Code Ann. § 43.25(d) (Sexual performance by a child) makes it a crime if a person “knowing the character and content of the material, . . . promotes<sup>116</sup> a performance<sup>117</sup> that includes sexual conduct<sup>118</sup> by a child younger than 18 years of age.” A conviction under Tex. Penal Code Ann. § 43.25(d) is punishable as a third degree felony by imprisonment for 2–10 years and a possible fine up to \$10,000, but if the victim is under the age of 14, a conviction is punishable as a second degree felony by imprisonment for 2–20 years and a possible fine not to exceed \$10,000. Tex. Penal Code Ann. §§ 43.25(e), 12.34, 12.33.

Additionally, Tex. Penal Code Ann. § 43.26(e), (f)<sup>119</sup> (Possession or promotion of child pornography)<sup>120</sup> specifically prohibits the promotion<sup>121</sup> of child pornography. A first conviction under Tex. Penal Code Ann. § 43.26(e) is punishable as a second degree felony by imprisonment for 2–20 years and a possible fine not to exceed \$10,000. Tex. Penal Code Ann. §§ 43.26(g), 12.33. However, if the individual “has been previously convicted” of Tex. Penal Code Ann. § 43.26(e), then the offense is a felony of the first degree punishable by imprisonment “for life or for any term of not more than 99 years or less than 5 years” and a possible fine not to exceed \$10,000. Tex. Penal Code Ann. §§ 43.26(g), 12.32.

Under Tex. Code Crim. Proc. Ann. Art. 42.037<sup>122</sup> (Restitution),

(r) The court may order a defendant convicted of an offense under Section 43.26 [Possession or promotion of child pornography], Penal Code, to make restitution to an individual who as a child younger than 18 years of age was depicted in the visual material, in an amount equal to the expenses incurred by the individual as a result of the offense, including:

- (1) medical services relating to physical, psychiatric, or psychological care;
- (2) physical and occupational therapy or rehabilitation;
- (3) necessary transportation, temporary housing, and child care expenses;
- (4) lost income; and
- (5) attorney’s fees.

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<sup>116</sup> See *supra* note 87.

<sup>117</sup> See *supra* note 19 for the definition of “performance.”

<sup>118</sup> See *supra* note 18 for the definition of “sexual conduct.”

<sup>119</sup> See *supra* note 61.

<sup>120</sup> See *supra* Section 3.2 for the provisions of Tex. Penal Code Ann. § 43.26(e), (f).

<sup>121</sup> See *supra* note 87 for the applicable definition of “promote.”

<sup>122</sup> See *supra* note 59.



**Legal Components:**

- 5.1 *Statutorily-mandated victim services define “victim” to specifically include victims of domestic minor sex trafficking or commercial sexual exploitation of children (CSEC) to ensure prompt identification and access to victims’ rights and services.*
- 5.2 *The state sex trafficking statute expressly prohibits a defendant from raising consent of the minor to the commercial sex acts as a defense.*
- 5.3 *Prostitution laws apply only to adults, preventing criminalization of minors under 18 for prostitution offenses.*
- 5.4 *State law provides a non-punitive avenue to specialized services through one or more points of entry.*
- 5.5 *Commercial sexual exploitation is identified as a type of abuse and neglect within child protection statutes.*
- 5.6 *The definition of “caregiver” or another related term in the child welfare statutes is not a barrier to a sex trafficked child accessing the protection of child welfare.*
- 5.7 *Crime victims’ compensation is specifically available to a child victim of sex trafficking or commercial sexual exploitation of children (CSEC) without regard to ineligibility factors.*
- 5.8 *Victim-friendly procedures and protections are provided in the trial process for minors under 18.*
- 5.9 *Expungement or sealing of juvenile delinquency records resulting from arrests or adjudications for prostitution-related offenses committed as a result of, or in the course of, the commercial sexual exploitation of a minor is available within a reasonable time after turning 18.*
- 5.10 *Victim restitution and civil remedies for victims of domestic minor sex trafficking or commercial sexual exploitation of children (CSEC) are authorized by law.*
- 5.11 *Statutes of limitations for civil and criminal actions for child sex trafficking or commercial sexual exploitation of children (CSEC) offenses are eliminated or lengthened sufficiently to allow prosecutors and victims a realistic opportunity to pursue criminal action and legal remedies.*

**Legal Analysis:**

- 5.1 *Statutorily-mandated victim services define “victim” to specifically include victims of domestic minor sex trafficking or commercial sexual exploitation of children (CSEC) to ensure prompt identification and access to victims’ rights and services.*

Tex. Code Crim. Proc. Ann. art. 56.01(3) (Definitions), which provides definitions applicable to Chapter 56 (Rights of crime victims), expressly includes a trafficking victim within its definition of “victim.” Specifically, Tex. Code Crim. Proc. Ann. art. 56.01(3) states, “‘Victim’ means a person who is the victim of the offense of sexual assault, kidnapping, aggravated robbery, trafficking of persons, or injury to a child, elderly individual, or disabled individual or who has suffered personal injury or death as a result of the criminal conduct of another.”

Additionally, Tex. Code Crim. Proc. Ann. art. 56.32(a) (Definitions), which provides definitions regarding crime victims’ compensation, also defines “victim.” While the definition of “victim” in Tex. Code Crim. Proc. Ann. art. 56.32(a)(11), does not specifically reference domestic minor sex trafficking victims. Tex. Code Crim. Proc. Ann. art. 56.32(a)(11)(A) states,

- (11) “Victim” means, except as provided by Subsection (c):
  - (A) an individual who:
    - (i) suffers personal injury or death as a result of criminally injurious conduct or as a result of actions taken by the individual as an intervenor, if the conduct or actions occurred in this state; and
    - (ii) is a resident of this state, another state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or a possession or territory of the United States.

However, Tex. Code Crim. Proc. Ann. art. 56.32(a)(14)<sup>123</sup> implies that victims of human trafficking will be eligible for crime victims compensation. The statute defines trafficking of persons as “any offense that results in a person engaging in forced labor or services, including sexual conduct, and that may be prosecuted under Section 20A.02 [Trafficking of Persons], 20A.03 [Continuous Trafficking of Persons], 43.03 [Promotion of Prostitution], 43.04 [Aggravated Promotion of Prostitution], 43.05 [Compelling Prostitution], 43.25 [Sexual Performance by a Child], 43.251 [Employment Harmful to Children], or 43.26 [Possession or Promotion of Child Pornography], Penal Code.” Tex. Code Crim. Proc. Ann. art. 56.42(d)<sup>124</sup> states that in addition to generally available forms of crime victims compensation, human trafficking victims who were victimized where they live are also eligible for \$2,000 for relocation expenses as well as \$1,800 for housing rental expenses.

Further, Tex. Code Crim. Proc. Ann. art. 56.42(d) specifically lists victims eligible for compensation as “a victim of stalking, family violence, or trafficking of persons, or a victim of sexual assault who is assaulted in the victim's place of residence.”

5.2 *The state sex trafficking statute expressly prohibits a defendant from raising consent of the minor to the commercial sex acts as a defense.*

Tex. Penal Code Ann. § 20A.02 (Trafficking of persons) and § 20A.03 (Continuous trafficking of persons) do not expressly prohibit a minor’s consent as a defense to the crime. Additionally, Texas’s CSEC laws are not abundantly clear regarding whether a consent defense may apply.

For example, Tex. Penal Code Ann. § 43.05(a)(2) (Compelling prostitution), § 43.02(c-1)<sup>125</sup> (Prostitution), § 15.031(b) (Criminal solicitation of a minor), and § 43.251(b) (Employment harmful to children) are silent regarding the effect of the consent of the minor to a commercial sex act. Several of the other CSEC laws, however, include defenses that rest, to some degree, on the issue of consent. For instance, Tex. Penal Code Ann. § 33.021(e)<sup>126</sup> (Online solicitation of a minor) states, “It is a defense to prosecution under this section that at the time conduct described by Subsection (c) was committed: . . . (2) the actor was not more than three years older than the minor and the minor consented to the conduct.” Lastly, although Tex. Penal Code Ann. § 22.021(a) (Aggravated sexual assault)<sup>127</sup> states that in order for a crime to be committed it must occur “without that person’s consent,” Tex. Penal Code Ann. § 22.021(b), the minor-specific provision, does not include this language, and, thus, it is arguable that a consent defense is inapplicable if the crime is against a minor under the age of 17.<sup>128</sup>

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<sup>123</sup> The text of Tex. Code Crim. Proc. Ann. art. 56.43(a)(14) included here and elsewhere in this report includes amendments made by the enactment of House Bill 10 during the 2015 regular session of the 84th Texas Legislature (effective September 1, 2015).

<sup>124</sup> The text of Tex. Code Crim. Proc. Ann. art. 56.42 included here and elsewhere in this report includes amendments made by the enactment of House Bill 1446 during the 2015 regular session of the 84th Texas Legislature (effective September 1, 2015).

<sup>125</sup> See *supra* note 11.

<sup>126</sup> See *supra* note 22.

<sup>127</sup> See *supra* Section 1.2 for the substantive provisions of Tex. Penal Code Ann. § 22.021.

<sup>128</sup> In discussing the issue regarding a minor’s consent, however, the Texas Supreme Court has stated,

In enacting the sexual assault statute, section 22.011 of the Texas Penal Code, the Legislature made it a crime to intentionally or knowingly have non-consensual sex with an adult, or sex under any circumstances with a child (a person under seventeen). There are defenses available if the child is at least fourteen, such as when the accused is no more than three years older than the child, or when the accused is the child’s spouse. In those instances, the child’s subjective agreement or assent becomes the main issue in determining whether or not a crime has been committed. There are no such defenses, however, when the

5.2.1 Recommendation: Amend the human trafficking and CSEC laws to expressly provide that a minor’s consent to commercial sex acts is not a defense to the crime.

5.3 *Prostitution laws apply only to adults, preventing criminalization of minors under 18 for prostitution offenses.*

Although there is nothing in Tex. Penal Code Ann. § 43.02<sup>129</sup> (Prostitution) that completely protects sex trafficked minors from being prosecuted under Tex. Penal Code Ann. § 43.02, Tex. Penal Code Ann. § 43.02(d) provides “a defense to prosecution for an offense under subsection (a) that the actor engaged in the conduct that constitutes the offense because the actor was the victim of conduct that constitutes an offense under Section 20A.02 [Trafficking of persons] or 43.05 [Compelling Prostitution].” Tex. Penal Code Ann. § 43.02(d) grants a commercially sexually exploited child a defense to prosecution for such an offense where the minor can prove that she was a victim of Tex. Penal Code Ann. §§ 20A.02 or § 43.05.<sup>130</sup>

When a court of joint jurisdiction<sup>131</sup> finds that “the child may be the victim of conduct that constitutes an offense under 20A.02, Penal Code,” the court can transfer the case to “a juvenile court or alternative juvenile court.” Tex. Fam. Code §§ 51.0413(a)-(b). The court “may defer adjudication proceedings . . . until the child’s 18<sup>th</sup> birthday and require [the] child to participate in a program established under Section 152.0016.” Tex. Fam. Code § 54.0326. If the court requires a child to participate in a “trafficked persons program” pursuant to Tex. Fam. Code § 54.04011 and the child successfully completes the program, the case is dismissed and “the court may order the sealing of the records of the case in the manner provided by Sections 58.003(c-7) and (c-8).”

Tex. Fam. Code § 54.0326 (Deferral of adjudication and dismissal of certain cases on completion of trafficked persons program) states,

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child is under fourteen, irrespective of the child’s purported willingness. Thus, in Texas, “a child under fourteen cannot legally consent to sex.”

In re B.W., 313 S.W.3d 818, 821 (Tex. 2010) (citations omitted).

<sup>129</sup> See *supra* note 11.

<sup>130</sup> In discussing the applicability of Tex. Penal Code Ann. § 43.02 (Prostitution) against minors under the age of 17, the Texas Supreme Court stated,

The statute proscribing prostitution is found in the Texas Penal Code, which does not generally apply to juveniles under the age of seventeen. Instead, the Legislature made a blanket adoption of the Penal Code into the Texas Family Code, which provides that the juvenile justice courts have jurisdiction in all cases involving delinquent conduct of children between the ages of ten and seventeen. The Family Code defines “[d]elinquent conduct” as “conduct, other than a traffic offense, that violates a penal law of this state or of the United States punishable by imprisonment or by confinement in jail.” One of the purposes of placing such jurisdiction in civil courts under the Family Code is to “provide for the care, the protection, and the wholesome moral, mental, and physical development of children coming within its provisions.”

In re B.W., 313 S.W.3d 818, 819–20 (Tex. 2010) (citations omitted).

<sup>131</sup> Tex. Fam. Code §§ 51.0413 (Jurisdiction Over and Transfer of Combination of Proceedings), 52.032 (Informal disposition guidelines), 54.0326 (Deferral of adjudication and dismissal of certain cases on completion of trafficked persons program), 54.04011 (Trafficked persons program), § 58.003 (Sealing of records) provides for joint jurisdiction between dependency and delinquency court for conduct committed because a child was in need of supervision or a trafficking victim.

- a) This section applies to a juvenile court or to an alternative juvenile court exercising simultaneous jurisdiction over proceedings under this title and Subtitle E, Title 5, in the manner authorized by Section 51.0413.
- (b) A juvenile court may defer adjudication proceedings under Section 54.03 until the child's 18th birthday and require a child to participate in a program established under Section 152.0016, Human Resources Code, if the child:
  - (1) is alleged to have engaged in delinquent conduct or conduct indicating a need for supervision and may be a victim of conduct that constitutes an offense under Section 20A.02, Penal Code; and
  - (2) presents to the court an oral or written request to participate in the program.
- (c) Following a child's completion of the program, the court shall dismiss the case with prejudice at the time the child presents satisfactory evidence that the child successfully completed the program.

Within the Chapter 20A (Trafficking in Persons) Tex. Penal Code § 20A.04<sup>132</sup> (Accomplice witness; testimony and immunity) states,

- (a) A party to an offense under this chapter may be required to provide evidence or testify about the offense.
- (b) A party to an offense under this chapter may not be prosecuted for any offense about which the party is required to provide evidence or testify, and the evidence and testimony may not be used against the party in any adjudicatory proceeding except a prosecution for aggravated perjury. For purposes of this subsection, "adjudicatory proceeding" means a proceeding before a court or any other agency of government in which the legal rights, powers, duties, or privileges of specified parties are determined.
- (c) A conviction under this chapter may be had on the uncorroborated testimony of a party to the offense.

5.3.1 Recommendation: Amend Tex. Penal Code Ann. § 43.02 (Prostitution) to eliminate liability for prostitution offenses for all minors under 18.

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

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

Pursuant to Tex. Fam. Code Ann. § 261.001(1), a sexually exploited child is likely to be identified as abused or neglected. If a child is identified as abused or neglected under Tex. Fam. Code Ann. § 261.001(1), the definition of "custodian" under Tex. Fam. Code Ann. § 51.02(3) is sufficiently broad to involve Child Protective Services in investigations where the child is in the custody or control of a non-family trafficker.

#### *I. Initial Custody*

- a. Authority for initial custody

Tex. Fam. Code Ann. § 261.301(a)<sup>133</sup> (Investigation of report) states, in part, that "[w]ith assistance from the appropriate state or local law enforcement agency as provided by this section, the [Department of Family and

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<sup>132</sup> The text of Tex. Penal Code §. 20A.04 included here and elsewhere in this report includes amendments made by the enactment of House Bill 10 during the 2015 regular session of the 84th Texas Legislature (effective September 1, 2015).

Protective Services] shall make a prompt and thorough investigation of a report of child abuse or neglect allegedly committed by a person responsible for a child’s care, custody, or welfare.”<sup>134</sup> Pursuant to Tex. Fam. Code Ann. § 261.301(c), however, “The department is not required to investigate a report that alleges child abuse or neglect by a person other than a person responsible for a child’s care, custody, or welfare. The appropriate state or local law enforcement agency shall investigate that report if the agency determines an investigation should be conducted.”

Pursuant to Tex. Fam. Code Ann. § 262.101 (Filing petition before taking possession of child), a child may be taken into custody without prior notice or a hearing under certain circumstances. Tex. Fam. Code Ann. § 262.101 states,

An original suit filed by a governmental entity that requests permission to take possession of a child without prior notice and a hearing must be supported by an affidavit sworn to by a person with personal knowledge and stating facts sufficient to satisfy a person of ordinary prudence and caution that:

- (1) there is an immediate danger to the physical health or safety of the child or the child has been a victim of neglect or sexual abuse and that continuation in the home would be contrary to the child’s welfare;
- (2) there is no time, consistent with the physical health or safety of the child, for a full adversary hearing under Subchapter C; and
- (3) reasonable efforts, consistent with the circumstances and providing for the safety of the child, were made to prevent or eliminate the need for the removal of the child.

Tex. Fam. Code Ann. § 262.102(a)<sup>135</sup> (Emergency order authorizing possession of child) explains,

(a) Before a court may, without prior notice and a hearing, issue a temporary order for the conservatorship of a child under section 105.001(a)(1) [Temporary orders before final order] or a temporary restraining order or attachment of a child authorizing a governmental agency to take possession of a child in a suit brought by a governmental entity, the court must find that:

- (1) there is an immediate danger to the physical health<sup>136</sup> or safety of the child or the child has been a victim of neglect or sexual abuse and that continuation in the home would be contrary to the child’s welfare;

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<sup>133</sup> The text of Tex. Fam. Code Crim. Proc. Ann. § 261.301 included here and elsewhere in this report includes amendments made by the enactment of Senate Bill 219 during the 2015 regular session of the 84th Texas Legislature (effective April 2, 2015).

<sup>134</sup> Tex. Fam. Code Ann. § 261.001(5) (Definitions) defines “person responsible for a child’s care, custody, or welfare” as

a person who traditionally is responsible for a child’s care, custody, or welfare, including:

- (A) a parent, guardian, managing or possessory conservator, or foster parent of the child;
- (B) a member of the child’s family or household as defined by Chapter 71 [Definitions];
- (C) a person with whom the child’s parent cohabits;

....

Tex. Fam. Code Ann. § 71.005 (Household) defines “household” as “a unit composed of persons living together in the same dwelling, without regard to whether they are related to each other.”

<sup>135</sup> The text of Tex. Code Crim. Proc. Ann. art. 262.102(a), (c), (d) included here and elsewhere in this report includes amendments made by the enactment of Senate Bill 219 during the 2015 regular session of the 84th Texas Legislature (effective September 1, 2015).

<sup>136</sup> Tex. Fam. Code Ann. § 262.102(b) states,

In determining whether there is an immediate danger to the physical health or safety of a child, the court may consider whether the child’s household includes a person who has:

- (2) there is no time, consistent with the physical health or safety of the child and the nature of the emergency, for a full adversary hearing under Subchapter C; and
- (3) reasonable efforts, consistent with the circumstances and providing for the safety of the child, were made to prevent or eliminate the need for removal of the child.

If the court determines that “child abuse or neglect has occurred and that the child requires protection from family violence by a member of the child’s family or household, the court shall render a temporary order under Title 4 for the protection of the child.” Tex. Fam. Code Ann. § 262.102(c).

Under Tex. Fam. Code Ann. § 262.104(a)<sup>137</sup> (Taking possession of a child in emergency without a court order), however, “If there is no time to obtain a temporary order, temporary restraining order, or attachment under Section 262.102(a) before taking possession of a child consistent with the health and safety of that child, an authorized representative of the Department of Family and Protective Services, a law enforcement officer, or a juvenile probation officer may take possession of a child without a court order . . . .” A person acting under this section may only do so under certain circumstances, such as, the person has “personal knowledge of facts that would lead a person of ordinary prudence and caution to believe that the child has been the victim of sexual abuse or of trafficking” or “information furnished by another that has been corroborated by personal knowledge of facts and all of which taken together would lead a person of ordinary prudence and caution to believe that the child has been the victim of sexual abuse or of trafficking . . . .” Tex. Fam. Code Ann. § 262.104(a)(3), (4).

#### b. Placement

Upon taking a child into custody under Tex. Fam. Code Ann. § 262.102(a) or § 262.104(a), Tex. Fam. Code Ann. § 262.1041(a) (Release of child by law enforcement or juvenile probation officer) allows the detaining officer to release the child to a child-placing agency, the Department of Family and Protective Services, or “any other person authorized by law to take possession of the child.”

## II. Placement process pending adjudication/investigation

Tex. Fam. Code Ann. § 262.106(a) (Initial hearing after taking possession of child in emergency without court order) states that the court must hold an initial hearing within one working day of when the child was taken into custody. Pursuant to Tex. Fam. Code Ann. § 262.107(a)(1)<sup>138</sup> (Standard for decision at initial hearing after taking possession of child without a court order in emergency),

- (a) The court shall order the return of the child at the initial hearing regarding a child taken in possession without a court order by a governmental entity unless the court is satisfied that:
  - (1) there is a continuing danger to the physical health or safety of the child if the child is returned to the parent, managing conservator, possessory conservator, guardian, caretaker, or custodian who is presently entitled to possession of the child or the evidence shows that the child has been the victim of sexual abuse or of trafficking under [Tex. Penal Code §] 20A.02 or 20A.03, . . . on one or more occasions and that there is a substantial risk that the child will be the victim of sexual abuse or of trafficking in the future;

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(1) abused or neglected another child in a manner that caused serious injury to or the death of the other child; or

(2) sexually abused another child.

<sup>137</sup> The text of Tex. Fam. Code § 262.104 included here and elsewhere in this report includes amendments made by the enactment of House Bill 418 and Senate Bill 219 during the 2015 regular session of the 84th Texas Legislature (effective September 1, 2015 and April 2, 2015 respectively).

<sup>138</sup> The text of Tex. Fam. Code Ann. § 262.107 included here and elsewhere in this report includes amendments made by the enactment of House Bill 418 during the 2015 regular session of the 84th Texas Legislature (effective September 1, 2015).

If a child is taken into custody, Tex. Fam. Code § 262.108 (Unacceptable facilities for housing child) prohibits the child from being “held in isolation or in a jail, juvenile detention facility, or other secure detention facility.” Additionally, Tex. Fam. Code Ann. § 32.201(a), (c) (Emergency shelter or care for minors) states that an “emergency shelter facility may provide shelter and care to a minor and the minor’s child or children” for up to 15 days, with some exception. Such care, however, can only be provided “during an emergency constituting an immediate danger to the physical health or safety of the minor or the minor’s child or children.” Tex. Fam. Code § 32.201(b). However, Tex. Fam. Code § 262.011<sup>139</sup> (Placement in secure agency foster home or secure agent foster group home) provides that

A court in an emergency, initial, or full adversary hearing conducted under this chapter may order that the child who is the subject of the hearing be placed in a secure agency foster home or secure agency foster group home verified in accordance with Section 42.0531, Human Resources Code, if the court finds that:

- (1) the placement is in the best interest of the child; and
- (2) the child’s physical health or safety is in danger because the child has been recruited, harbored, transported, provided, or obtained for forced labor or commercial sexual activity, including any child subjected to an act specified in [Tex. Penal Code §] 20A.02 or 20A.03 (Trafficking of persons).

### *III. Adjudication or referral to alternate process*

Pursuant to Tex. Fam. Code Ann. § 262.201(a) (Full adversary hearing; findings of the court), if the child has not been returned to the child’s parent, guardian, caretaker, etc., the court will hold a full adversary hearing within 14 days of the date the child was taken into custody.

### *IV. Outcomes*

Tex. Fam. Code Ann. § 262.201(b)<sup>140</sup> requires the court to return the child to the child’s parent, guardian, caretaker, etc., unless the court finds all of the following:

- (1) there was a danger to the physical health or safety of the child, including a danger that the child would be a victim of trafficking under [Tex Penal Code §] 20A.02 or 20A.03 [Trafficking of Persons], . . . , which was caused by an act or failure to act of the person entitled to possession and for the child to remain in the home is contrary to the welfare of the child;
- (2) the urgent need for protection required the immediate removal of the child and reasonable efforts, consistent with the circumstances and providing for the safety of the child, were made to eliminate or prevent the child's removal; and
- (3) reasonable efforts have been made to enable the child to return home, but there is a substantial risk of a continuing danger if the child is returned home.

Accordingly, Tex. Fam. Code § 262.011<sup>141</sup> (Placement in secure agency foster home or secure agent foster group home) provides that

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<sup>139</sup> The text of Tex. Fam. Code § 262.011 included here and elsewhere in this report includes amendments made by the enactment of House Bill 418 during the 2015 regular session of the 84th Texas Legislature (effective September 1, 2015).

<sup>140</sup> The text of Tex. Fam. Code § 262.201(b) included here and elsewhere in this report includes amendments made by the enactment of House Bill 418 during the 2015 regular session of the 84th Texas Legislature (effective September 1, 2015).

<sup>141</sup> The text of Tex. Fam. Code § 262.011 included here and elsewhere in this report includes amendments made by the enactment of House Bill 418 during the 2015 regular session of the 84th Texas Legislature (effective September 1, 2015).

A court in an emergency, initial, or full adversary hearing conducted under this chapter may order that the child who is the subject of the hearing be placed in a secure agency foster home or secure agency foster group home verified in accordance with Section 42.0531, Human Resources Code, if the court finds that:

- (1) the placement is in the best interest of the child; and
- (2) the child's physical health or safety is in danger because the child has been recruited, harbored, transported, provided, or obtained for forced labor or commercial sexual activity, including any child subjected to an act specified in [Tex. Penal Code §] [20A.02](#) or [20A.03](#) (Trafficking of persons).

Additionally, Tex. Fam. Code Ann. § 262.2015<sup>142</sup> (Aggravated circumstances) allows the court to waive the requirements regarding making reasonable efforts to return the child to the child's parents and to instead schedule a permanency hearing and a trial on the merits if the court finds that the child's "parent has engaged in conduct against the child that would constitute an offense under" Tex. Penal Code Ann. § 20A.02 (Trafficking of persons), § 43.25 (Sexual performance by a child), § 43.26 (Possession or promotion of child pornography), or § 43.05(a)(2) (Compelling prostitution), among other offenses. Included as possible permanency goals under Tex. Fam. Code Ann. § 263.3026(a) (Permanency goals; limitation) are the following options for the final placement of the child:

- (1) the reunification of the child with a parent or other individual from whom the child was removed;
- (2) the termination of parental rights and adoption of the child by a relative or other suitable individual;
- (3) the award of permanent managing conservatorship of the child to a relative or other suitable individual; or
- (4) another planned, permanent living arrangement for the child.

Pursuant to Tex. Hum. Res. Code §. 42.0531<sup>143</sup> (Secure agency foster homes and secure agency foster group homes) "a municipality may contract with a child-placing agency to verify a secure agency foster home or secure agency foster group home to provide a safe and therapeutic environment tailored to the needs of children who are victims of trafficking." Homes verified accordingly must provide an array of services including mental health, behavioral health, counseling, treatment for sexual assault, treatment for substance abuse, life skills, mentoring, 24 hour services, and "individualize services based on the trauma endured by a child." Tex. Human Resources Code §. 42.0531(c)(1).

### **Child Identified as CHINS**

Tex. Fam. Code Ann. § 51.03(b)(1), (2), (3) defines "conduct indicating a need for supervision" to include conduct that violates "the penal laws of this state of the grade of misdemeanor that are punishable by fine only," truancy for 10 or more days within certain time periods, when a child runs away from home, "conduct described by Section 43.02(a)(1) or (2)], Penal Code [Prostitution]," or "conduct that violates Section 43.261, Penal Code [Electronic transmission of certain visual material depicting minor]." Tex. Fam. Code Ann. § 51.03(b)(7)-(8).

A child may be eligible for services, even if the child is allegedly delinquent. Tex. Fam. Code Ann. § 51.0413(a). Under that section, the juvenile court will have simultaneous jurisdiction if the child is identified as abused or neglected and "engaged in delinquent conduct or conduct indicating a need of supervision and cause

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<sup>142</sup> See *supra* note 105.

<sup>143</sup> The text of Tex. Hum. Res. Code §. 42.0531 included here and elsewhere in this report includes amendments made by the enactment of House Bill 418 during the 2015 regular session of the 84th Texas Legislature (effective September 1, 2015).



to believe that the child may be a victim of conduct that constitutes an offense under Section 20A.02, Penal Code.<sup>144</sup> When a court of joint jurisdiction finds that “the child may be the victim of conduct that constitutes an offense under 20A.02, Penal Code,” the court can transfer the case to “a juvenile court or alternative juvenile court.” Tex. Fam. Code §§ 51.0413(a)-(b).

Tex. Fam. Code §§ 51.0413 (Jurisdiction Over and Transfer of Combination of Proceedings), 52.032 (Informal disposition guidelines), 54.0326 (Deferral of adjudication and dismissal of certain cases on completion of trafficked persons program) 54.04011 (Trafficked persons program), § 58.003 (Sealing of records) provides for joint jurisdiction between dependency and delinquency court for conduct committed because a child was in need of supervision or trafficking victim.

## *I. Initial Custody*

### *a. Authority for initial custody*

Tex. Fam. Code Ann. § 52.01(a)(3)(A), (B) (Taking into custody; issuance of warning notice) authorizes law enforcement to take a child into custody if “there is probable cause to believe that the child has engaged in: (A) conduct that violates a penal law of this state . . . ; [or] (B) delinquent conduct or conduct indicating a need for supervision.”

### *b. Placement*

Once detained pursuant to Tex. Fam. Code Ann. § 52.01(a), the child may, among other alternatives, be released to the child’s parent, guardian, custodian, etc., brought to a detention facility or a secured detention facility, or brought before an office or official designated by the juvenile board. Tex. Fam. Code Ann. § 52.02(a). Pursuant to Tex. Fam. Code Ann. § 52.03(a) (Disposition without referral to court), the law enforcement officer may dispose of the case without referring it to juvenile court and without filing a criminal complaint if all of the following criteria are met:

- (1) guidelines for such disposition have been adopted by the juvenile board of the county in which the disposition is made as required by Section 52.032 [Informal disposition guidelines];
- (2) the disposition is authorized by the guidelines; and
- (3) the officer makes a written report of the officer’s disposition to the law-enforcement agency, identifying the child and specifying the grounds for believing that the taking into custody was authorized.

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

Some children may be eligible to participate in a first offender program, established under Tex. Fam. Code Ann. § 52.031 (First offender program). A child who fails to complete the first offender program or is taken into custody within 90 days after completion of the program for an unrelated offense will be referred to juvenile court or a complaint will be filed with a criminal court. Tex. Fam. Code Ann. § 52.031(j).

## *III. Adjudication or referral to alternate process*

For children identified as trafficking victims, the court “may defer adjudication proceedings . . . until the child’s 18<sup>th</sup> birthday and require [the] child to participate in a program established under Section 152.0016.” Tex. Fam. Code § 54.0326. If the court requires a child to participate in a “trafficked persons program” pursuant to Tex.

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<sup>144</sup> Tex. Penal Code Ann. § 20A.02 relates to the crime of human trafficking.

Fam. Code § 54.04011 and if the child successfully completes the program, the case is dismissed and “the court may order the sealing of the records of the case in the manner provided by Sections 58.003(c-7) and (c-8).”

Tex. Fam. Code § 54.0326 (Deferral of adjudication and dismissal of certain cases on completion of trafficked persons program) states,

- a) This section applies to a juvenile court or to an alternative juvenile court exercising simultaneous jurisdiction over proceedings under this title and Subtitle E, Title 5, in the manner authorized by Section 51.0413.
- (b) A juvenile court may defer adjudication proceedings under Section 54.03 until the child's 18th birthday and require a child to participate in a program established under Section 152.0016, Human Resources Code, if the child:
  - (1) is alleged to have engaged in delinquent conduct or conduct indicating a need for supervision and may be a victim of conduct that constitutes an offense under Section 20A.02, Penal Code; and
  - (2) presents to the court an oral or written request to participate in the program.
- (c) Following a child's completion of the program, the court shall dismiss the case with prejudice at the time the child presents satisfactory evidence that the child successfully completed the program.

If the child is not released, a detention hearing must be held “not later than the second working day after the child is taken into custody.” Tex. Fam. Code Ann. § 54.01(a). At the detention hearing, pursuant to Tex. Fam. Code Ann. § 54.01(e) (Detention hearing), the court must release the child unless it determines that

- (1) he is likely to abscond or be removed from the jurisdiction of the court;
- (2) suitable supervision, care, or protection for him is not being provided by a parent, guardian, custodian, or other person;
- (3) he has no parent, guardian, custodian, or other person able to return him to the court when required;
- (4) he may be dangerous to himself or may threaten the safety of the public if released; or
- (5) he has previously been found to be a delinquent child or has previously been convicted of a penal offense punishable by a term in jail or prison and is likely to commit an offense if released.

### **Child Identified as Delinquent**

Tex. Fam. Code Ann. § 51.03(a)(1) (Delinquent conduct; conduct indicating a need for supervision) defines “delinquent conduct” to include “conduct, other than a traffic offense, that violates a penal law of this state or of the United States punishable by imprisonment or by confinement in jail,” which would include a violation of Tex. Penal Code Ann. § 43.02 (Prostitution).

A child may be eligible for services, even if the child is allegedly delinquent. Tex. Fam. Code Ann. § 51.0413(a). Under that section, the juvenile court will have simultaneous jurisdiction if the child is identified as abused or neglected and “engaged in delinquent conduct or conduct indicating a need of supervision and cause to believe that the child may be a victim of conduct that constitutes an offense under Section 20A.02, Penal Code.”<sup>145</sup> When a court of joint jurisdiction finds that “the child may be the victim of conduct that constitutes an offense under 20A.02, Penal Code,” the court can transfer the case to “a juvenile court or alternative juvenile court.” Tex. Fam. Code §§ 51.0413(a)-(b).

Tex. Fam. Code §§ 51.0413 (Jurisdiction Over and Transfer of Combination of Proceedings), 52.032 (Informal disposition guidelines), 54.0326 (Deferral of adjudication and dismissal of certain cases on completion of

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<sup>145</sup> Tex. Penal Code Ann. § 20A.02 relates to the crime of human trafficking.

trafficked persons program) 54.04011 (Trafficked persons program), § 58.003 (Sealing of records) provides for joint jurisdiction between dependency and delinquency court for conduct committed because a child was in need of supervision or trafficking victim. After completing the Trafficking Persons Program, the case is dismissed, and the court may order record sealed upon completion of Program.

### *I. Initial Custody*

#### a. Authority for initial custody

Tex. Fam. Code Ann. § 52.01(a)(3)(A), (B) (Taking into custody; issuance of warning notice) authorizes law enforcement to take a child into custody if “there is probable cause to believe that the child has engaged in: (A) conduct that violates a penal law of this state . . . ; [or] (B) delinquent conduct or conduct indicating a need for supervision.”

#### b. Placement

Once detained pursuant to Tex. Fam. Code Ann. § 52.01(a), the child may, among other alternatives, be released to the child’s parent, guardian, custodian, etc., brought to a detention facility or a secured detention facility, or brought before an office or official designated by the juvenile board. Tex. Fam. Code Ann. § 52.02(a). Pursuant to Tex. Fam. Code Ann. § 52.03(a) (Disposition without referral to court), the law enforcement officer may dispose of the case without referring it to juvenile court and without filing a criminal complaint if all of the following criteria are met:

- (1) guidelines for such disposition have been adopted by the juvenile board of the county in which the disposition is made as required by Section 52.032 [Informal disposition guidelines];
- (2) the disposition is authorized by the guidelines; and
- (3) the officer makes a written report of the officer’s disposition to the law-enforcement agency, identifying the child and specifying the grounds for believing that the taking into custody was authorized.

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

Some children may be eligible to participate in a first offender program, established under Tex. Fam. Code Ann. § 52.031 (First offender program). A child who fails to complete the first offender program or is taken into custody within 90 days after completion of the program for an unrelated offense will be referred to juvenile court or a complaint will be filed with a criminal court. Tex. Fam. Code Ann. § 52.031(j).

### *III. Adjudication or referral to alternate process*

For children identified as trafficking victims, the court “may defer adjudication proceedings . . . until the child’s 18<sup>th</sup> birthday and require [the] child to participate in a program established under Section 152.0016.” Tex. Fam. Code § 54.0326.

Tex. Fam. Code § 54.0326 (Deferral of adjudication and dismissal of certain cases on completion of trafficked persons program) states,

- a) This section applies to a juvenile court or to an alternative juvenile court exercising simultaneous jurisdiction over proceedings under this title and Subtitle E, Title 5, in the manner authorized by Section 51.0413.

(b) A juvenile court may defer adjudication proceedings under Section 54.03 until the child's 18th birthday and require a child to participate in a program established under Section 152.0016, Human Resources Code, if the child:

(1) is alleged to have engaged in delinquent conduct or conduct indicating a need for supervision and may be a victim of conduct that constitutes an offense under Section 20A.02, Penal Code; and

(2) presents to the court an oral or written request to participate in the program.

(c) Following a child's completion of the program, the court shall dismiss the case with prejudice at the time the child presents satisfactory evidence that the child successfully completed the program.

If the child is not released, a detention hearing must be held “not later than the second working day after the child is taken into custody.” Tex. Fam. Code Ann. § 54.01(a). At the detention hearing, pursuant to Tex. Fam. Code Ann. § 54.01(e) (Detention hearing), the court must release the child unless it determines that

(1) he is likely to abscond or be removed from the jurisdiction of the court;

(2) suitable supervision, care, or protection for him is not being provided by a parent, guardian, custodian, or other person;

(3) he has no parent, guardian, custodian, or other person able to return him to the court when required;

(4) he may be dangerous to himself or may threaten the safety of the public if released; or

(5) he has previously been found to be a delinquent child or has previously been convicted of a penal offense punishable by a term in jail or prison and is likely to commit an offense if released.

#### *IV. Outcomes*

If the court requires a child to participate in a “trafficked persons program” pursuant to Tex. Fam. Code § 54.04011 and if the child successfully completes the program, the case is dismissed and “the court may order the sealing of the records of the case in the manner provided by Sections 58.003(c-7) and (c-8).”

According to Tex. Fam. Code Ann. § 54.04 (c) (Disposition hearing), if the child is adjudicated to have committed delinquent conduct and the court determines that the “child is in need of rehabilitation or the protection of the public or the child requires that disposition be made,” the court may order a disposition. Otherwise, “the court shall dismiss the child and enter a final judgment without any disposition.” If the court does order a disposition, it may order the child placed on probation in the home of the child, a relative, a foster home, a residential treatment facility, or a secure correctional facility, or, in certain circumstances, order the child placed in the custody of the Texas Juvenile Justice Department. Tex. Fam. Code Ann. § 54.04(d).

A child that has been identified as a victim of human trafficking may be able to have the delinquency petition dismissed with prejudice. Tex. Fam. Code Ann. § 54.0326 (Deferral of adjudication and dismissal of certain cases on completion of trafficked persons program). Under subsection b, the court may defer adjudication until the child is 18 years of age, if the child

(1) is alleged to have engaged in delinquent conduct or conduct indicating a need for supervision and may be a victim of conduct that constitutes an offense under Section 20A.02, Penal Code; and

(2) presents to the court an oral or written request to participate in the program.

Once the child completes the program, “the court shall dismiss the case with prejudice at the time the child presents satisfactory evidence that the child completes the program.” Tex. Fam. Code Ann. § 54.0326(c).

Additionally, a child that has completed the trafficked persons program, the records related to the delinquency proceedings may be sealed. Tex. Fam. Code Ann. § 58.003(c-7) (Sealing of records).

Tex. Fam. Code Ann. § 51.12 (Place and conditions of detention) establishes requirements for where a child may be detained. For example, under Tex. Fam. Code Ann. § 51.12(f), a child held in a facility that includes “a jail, lockup, or other place of secure confinement . . . shall be separated by sight and sound from adults detained in the same building.” Specifically, under Tex. Fam. Code Ann. § 51.12(a) child may only be held in a

- (1) juvenile processing office. . .
- (2) place of nonsecure custody. . .
- (3) certified juvenile detention facility. . .
- (4) secure detention facility. . .
- (5) county jail or other facility. . . ; or
- (6) nonsecure correctional facility. . . .

The Child Sex Trafficking Prevention Unit within the criminal justice division, established by Tex. Gov’t Code § 772.0062,<sup>146</sup> must facilitate inter-agency collaboration to prevent and respond to child sex trafficking victims by placing them in “suitable short-term and long-term housing” The Child Sex Trafficking Prevention Unit must also “refer victims of child sex trafficking to available rehabilitation programs and other resources [and] provide support for child sex trafficking prosecutions” among other things.

Tex. Gov’t Code §. 772.0063 establishes the Governor’s Program for Victims of Child Sex Trafficking:

- (a) The governor shall establish and implement a program to provide comprehensive, individualized services to address the rehabilitation and treatment needs of child victims of an offense under [Tex Penal Code § 20A.02(a)(7) or (8)].
- (b) The governor shall appoint a director of the program to serve at the pleasure of the governor.
- (c) The director of the program shall coordinate with state and local law enforcement agencies, state agencies, and service providers to identify victims of child sex trafficking who are eligible to receive services under the program.
- (d) For each victim of child sex trafficking identified by the director, the program shall immediately facilitate the assignment of a caseworker to the victim to coordinate with local service providers to create a customized package of services to fit the victim’s immediate and long-term rehabilitation and treatment needs. Services provided under the program must address all aspects of the medical, psychiatric, psychological, safety, and housing needs of victims.

5.4.1 Recommendation: Enact a mandatory protective response for juvenile sex trafficking victims that provides an avenue to specialized services outside detention.

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<sup>146</sup> The text of Tex. Gov’t Code § 772.0062 included here and elsewhere in this report includes amendments made by the enactment of House Bill 10 during the 2015 regular session of the 84th Texas Legislature (effective September 1, 2015).

Agencies listed within Tex. Gov’t Code § 772.0062(d)(1) include:

- (A) the office of the attorney general;
- (B) the Health and Human Services Commission;
- (C) the Department of Family and Protective Services;
- (D) the Texas Juvenile Justice Department;
- (E) the Department of State Health Services;
- (F) the Texas Alcoholic Beverage Commission; and
- (G) the Department of Public Safety;

5.5 *Commercial sexual exploitation is identified as a type of abuse and neglect within child protection statutes.*

Tex. Fam. Code Ann. § 261.001(1)(F), (G), (H), (K), (L)<sup>147</sup> (Definitions) identifies commercial sexual exploitation as a type of abuse. Tex. Fam. Code Ann. § 261.001(1) defines “abuse,” in part, as follows:

(1) “Abuse” includes the following acts or omissions by a person:

...

(F) failure to make a reasonable effort to prevent sexual conduct harmful to a child;

(G) compelling or encouraging the child to engage in sexual conduct as defined by Section 43.01 [Definitions], Penal Code, including compelling or encouraging the child in a manner that constitutes an offense of trafficking of persons under Section 20A.02(a)(7) or (8), Penal Code, prostitution under Section 43.02, Penal Code, or compelling prostitution under 43.05(a)(2), Penal Code;

(H) causing, permitting, encouraging, engaging in, or allowing the photographing, filming, or depicting of the child if the person knew or should have known that the resulting photograph, film, or depiction of the child is obscene as defined by Section 43.21 [Definitions], Penal Code, or pornographic;

...

(K) causing, permitting, encouraging, engaging in, or allowing a sexual performance by a child as defined by Section 43.25, Penal Code; or

(L) knowingly causing, permitting, encouraging, engaging in, or allowing a child to be trafficked in a manner punishable as an offense under Section 20A.02(a)(5), (6), (7), or (8) [Trafficking of persons], Penal Code, or the failure to make a reasonable effort to prevent a child from being trafficked in a manner punishable as an offense under any of those sections.

Tex. Fam. Code Ann. § 261.001(4)<sup>148</sup> defines “neglect,” in part, as follows:

(4) “Neglect” includes:

...

(ii) the following acts or omissions by a person:

(a) placing a child in or failing to remove a child from a situation that a reasonable person would realize requires judgment or actions beyond the child’s level of maturity, physical condition, or mental abilities and that results in bodily injury or a substantial risk of immediate harm to the child;

...

(d) placing a child in or failing to remove the child from a situation in which the child would be exposed to a substantial risk of sexual conduct harmful to the child; or

(e) placing a child in or failing to remove the child from a situation in which the child would be exposed to acts or omissions that constitute abuse under Subdivision (1)(E), (F), (G), (H), or

(K) committed against another child; or

(iii) the failure by the person responsible for a child’s care, custody, or welfare to permit the child to return to the child’s home without arranging for the necessary care for the child after the child

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<sup>147</sup> The text of Tex. Code Crim. Proc. Ann. art. 261.001(1)(G) included here and elsewhere in this report includes amendments made by the enactment of Senate Bill 825 during the 2015 regular session of the 84th Texas Legislature (effective September 1, 2015).

<sup>148</sup> The text of Tex. Code Crim. Proc. Ann. art. 261.001(4) included here and elsewhere in this report includes amendments made by the enactment of Senate Bill 1889 during the 2015 regular session of the 84th Texas Legislature (effective September 1, 2015).

has been absent from the home for any reason, including having been in residential placement or having run away.

....

5.6 *The definition of “caregiver” or another related term in the child welfare statutes is not a barrier to a sex trafficked child accessing the protection of child welfare.*

Tex. Fam. Code Ann. § 51.02(3e) (Definitions), which provides generally applicable definitions for the Juvenile Justice Code, defines “custodian” as “the adult with whom the child resides.” Tex. Fam. Code Ann. § 51.02(4) defines a “guardian” as “the person who, under court order, is the guardian of the person of the child or the public or private agency with whom the child has been placed by a court.” Tex. Fam. Code Ann. § 51.02(9) defines a “parent” as “the mother or the father of a child, but does not include a parent whose parental rights have been terminated.”

As used within Texas’s provisions regarding the investigation and reporting of child abuse, Tex. Fam. Code Ann. § 261.001(5) (Definitions) defines “person responsible for a child’s care, custody, or welfare” as

a person who traditionally is responsible for a child’s care, custody, or welfare, including:

- (A) a parent, guardian, managing or possessory conservator, or foster parent of the child;
- (B) a member of the child’s family or household as defined by Chapter 71 [Definitions];
- (C) a person with whom the child’s parent cohabits;

....

Tex. Fam. Code Ann. § 71.005 (Household) defines “household” as “a unit composed of persons living together in the same dwelling, without regard to whether they are related to each other.”<sup>149</sup> However, Tex. Fam. Code Ann. § 261.301(c) (Investigation of report) explains that child protective services “is not required to investigate a report that alleges child abuse or neglect by a person other than a person responsible for a child’s care, custody, or welfare. The appropriate state or local law enforcement agency shall investigate that report if the agency determines an investigation should be conducted.”

- 5.6.1 Recommendation: Amend the definition of “person responsible for a child’s care, custody, or welfare” in Tex. Fam. Code Ann. § 261.001(5) (Definitions) to allow child welfare protection for juvenile sex trafficking victims irrespective of the perpetrator of the abuse.

5.7 *Crime victims’ compensation is specifically available to a child victim of sex trafficking or commercial sexual exploitation of children (CSEC) without regard to ineligibility factors.*

A domestic minor sex trafficking victim would qualify as a “victim” eligible to receive crime victims’ compensation and would be statutorily exempt from certain ineligibility criteria under the Crime Victims’ Compensation Act.<sup>150</sup> Some administrative regulations also establish exceptions that could allow domestic minor trafficking victims access to compensation.<sup>151</sup>

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<sup>149</sup> Tex. Fam. Code Ann. § 71.006 (Member of a household) states, “‘Member of a household’ includes a person who previously lived in a household.”

<sup>150</sup> Tex. Code Crim. Proc. Ann. arts. 56.31–.64.

<sup>151</sup> While not statutory, the Texas Administrative Code provides some exceptions to the statutory ineligibility requirements that may allow domestic minor sex trafficking victims to access compensation. Although requiring “threat, coercion, or intimidation” even when a victim of sex trafficking is a minor, Texas Admin. Code R. 61.302(c) (Reduction, denial, or refund of an application or award) provides a specific exception for victims of trafficking of persons:

Tex. Code Crim. Proc. Ann. art. 56.34(a) (Compensation) states, “The attorney general shall award compensation for pecuniary loss<sup>152</sup> arising from criminally injurious conduct<sup>153</sup> if the attorney general is satisfied by a preponderance of the evidence that the requirements of this subchapter are met.”

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Applications arising out of the criminally injurious conduct of trafficking of persons will not be denied solely because the victim engaged in an activity prohibited by law due to threat, coercion, or intimidation as a part of criminally injurious conduct giving rise to the application.

Additionally, Texas Admin. Code R. 61.302(d) provides exceptions to the requirement to cooperate with law enforcement but does not provide a specific exception for domestic minor sex trafficking victims. It states,

Under Texas Code of Criminal Procedure Articles 56.311 and 56.45(1), the legislature intended the CVC program to encourage greater public cooperation in the successful apprehension and prosecution of criminals. When determining whether a victim or claimant has substantially cooperated with law enforcement, the OAG will consider the totality of facts and circumstances, including but not limited to:

- (1) the victim’s physical and mental capacity to participate in the investigation, apprehension and prosecution of the offender or offenders;
- (2) whether the victim has provided a true, accurate and complete description of the crime;
- (3) the extent to which the victim or claimant has participated in investigative activities;
- (4) the extent to which the victim or claimant has participated in the prosecution of the offender; and
- (5) whether any delays in substantial cooperation hindered or hampered the successful apprehension and prosecution of the offender.

Lastly, the Texas Admin. Code R. 61.202(4) (Timely filing an application) allows victims to assert a good cause exception to the timely filing requirements under Tex. Code Crim. Proc. Ann. art. 56.37(c). Texas Admin. Code R. 61.202(4) states,

In accordance with Texas Code of Criminal Procedure Article 56.37(b), the OAG may extend the time for filing an application upon good cause shown by the claimant or victim. Good cause, as determined by the OAG, includes the following circumstances:

- (A) the victim or claimant was not informed about the CVC program by a law enforcement agency, public service agency or service provider and the victim or claimant has not previously applied for or received compensation from the CVC Program;
- (B) physical or psychological factors prevented the victim or claimant from filing in a timely manner;
- (C) communication barriers existed that prevented the victim or claimant from filing in a timely manner; or
- (D) any other circumstance that the OAG considers significant.

<sup>152</sup> Pursuant to Tex. Code Crim. Proc. Ann. art. 56.32(a)(9),

(9) “Pecuniary loss” means the amount of expense reasonably and necessarily incurred as a result of personal injury or death for:

- (A) medical, hospital, nursing, or psychiatric care or counseling, or physical therapy;
- (B) actual loss of past earnings and anticipated loss of future earnings and necessary travel expenses because of:
  - (i) a disability resulting from the personal injury;
  - (ii) the receipt of medically indicated services related to the disability resulting from the personal injury; or
  - (iii) participation in or attendance at investigative, prosecutorial, or judicial processes related to the criminally injurious conduct and participation in or attendance at any postconviction or postadjudication proceeding relating to criminally injurious conduct;
- (C) care of a child or dependent;

...



Tex. Code Crim. Proc. Ann. art. 56.37(c) (Time for filing) states, “If the victim is a child,<sup>154</sup> the application must be filed within three years from the date the claimant or victim is made aware of the crime but not after the child is 21 years of age.”

Tex. Code Crim. Proc. Ann. art. 56.32(a)(11)(A) (Definitions) defines “victim” as

(A) an individual who:

- (i) suffers personal injury or death as a result of criminally injurious conductor as a result of actions taken by the individual as an intervenor, if the conduct or actions occurred in this state; and
- (ii) is a resident of this state, another state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or a possession or territory of the United States;

Tex. Code Crim. Proc. Ann. art. 56.42(d) specifically lists victims eligible for compensation as “a victim of stalking, family violence, or trafficking of persons, or a victim of sexual assault who is assaulted in the victim’s place of residence” and provides that in addition to generally available forms of crime victims compensation, human trafficking victims who were victimized where they live are also eligible for \$2,000 for relocation expenses as well as \$1,800 for housing rental expenses.

Domestic minor sex trafficking victims are exempt from ineligibility resulting from their own participation in the conduct. Tex. Code Crim. Proc. Ann. art. 56.41(b)<sup>155</sup> (Approval of claim) states,

(b) The attorney general shall deny an application for compensation under this subchapter if:

...

- (3) the claimant or victim knowingly and willingly participated in the criminally injurious conduct;
- (4) the claimant or victim is the offender or an accomplice of the offender; [or]
- (5) an award of compensation to the claimant or victim would benefit the offender or an accomplice of the offender;

....

(b-1) Subsection (b)(3) does not apply to a claimant or victim who seeks compensation for criminally injurious conduct that is:

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(G) reasonable replacement costs for clothing, bedding, or property of the victim seized as evidence or rendered unusable as a result of the criminal investigation;

(H) reasonable and necessary costs, as provided by Article 56.42(d), incurred by a victim of family violence or a victim of sexual assault who is assaulted in the victim’s place of residence for relocation and housing rental assistance payments;

....  
<sup>153</sup> Pursuant to Tex. Code Crim. Proc. Ann. art. 56.32(a)(4),

(4) “Criminally injurious conduct” means conduct that:

- (A) occurs or is attempted;
- (B) poses a substantial threat of personal injury or death;
- (C) is punishable by fine, imprisonment, or death, or would be punishable by fine, imprisonment, or death if the person engaging in the conduct possessed capacity to commit the conduct; and

....  
<sup>154</sup> Under Tex. Code Crim. Proc. Ann. art. 56.32(a)(1), “‘Child’ means an individual younger than 18 years of age who: (A) is not married; or (B) has not had the disabilities of minority removed for general purposes under Chapter 31, Family Code.”

<sup>155</sup> The text of Tex. Code Crim. Proc. Ann. art. 56.41 included here and elsewhere in this report includes amendments made by the enactment of House Bill 10 during the 2015 regular session of the 84th Texas Legislature (effective September 1, 2015).

- (1) in violation of Section 20A.02(a)(7), [Trafficking in persons] Penal Code; or
- (2) trafficking of persons, other than an offense described by Subdivision (1), if the criminally injurious conduct the claimant or victim participated in was the result of force, fraud, or coercion.

Similarly, Tex. Code Crim. Proc. Ann. art. 56.45<sup>156</sup> (Denial or reduction of award) states,

- (a) The attorney general may deny or reduce an award otherwise payable:
  - (1) if the claimant or victim has not substantially cooperated with an appropriate law enforcement agency;
  - (2) if the claimant or victim bears a share of the responsibility for the act or omission giving rise to the claim because of the claimant's or victim's behavior;
  - (3) to the extent that pecuniary loss is recouped from a collateral source; or
  - (4) if the claimant or victim was engaging in an activity that at the time of the criminally injurious conduct was prohibited by law or a rule made under law.
- (b) Subsection (a)(4) does not apply to a claimant or victim who seeks compensation for criminally injurious conduct that is:
  - (1) in violation of Section 20A.02(a)(7) [Trafficking in persons], Penal Code; or
  - (2) trafficking of persons, other than an offense described by Subdivision (1), if the criminally injurious conduct the claimant or victim participated in was the result of force, fraud, or coercion.

Under Tex. Code Crim. Proc. Ann. art. 56.42(a), (b) (Limits on compensation), if a claim is accepted, compensation may not exceed \$50,000, though an additional \$75,000 may be awarded for "extraordinary pecuniary losses, if the personal injury to a victim is catastrophic and results in a total and permanent disability to the victim, for lost wages and reasonable and necessary costs of" certain additional items and expenses.

5.7.1 Recommendation: Amend the Crime Victims' Compensation Act to provide an exception to all ineligibility criteria when the applicant is a victim of child sex trafficking.

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

Generally, several victim-friendly criminal justice procedures and protections are afforded specifically to victims of Tex. Penal Code Ann. § 20A.02 (Trafficking of persons) and Texas's CSEC laws. For example, Tex. Code Crim. Proc. Ann. art. 7A.01 (Application for protective order) states,

- (a) The following persons may file an application for a protective order under this chapter without regard to the relationship between the applicant and the alleged offender:
  - (1) a person who is the victim of an offense under Section 21.02 [Continuous sexual abuse of young child or children], 21.11 [Indecency with a child], 22.011 [Sexual assault], or 22.021 [Aggravated sexual assault], Penal Code;
  - (2) a person who is the victim of an offense under Section 20A.02(a)(3), (4), (7), or (8) [Trafficking of persons] or Section 43.05 [Compelling prostitution], Penal Code;
  - (3) a parent or guardian acting on behalf of a person younger than 18 years of age who is the victim of an offense listed in Subdivision (1) or (2); or
  - (4) a prosecuting attorney acting on behalf of a person described by Subdivision (1) or (2).

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<sup>156</sup> The text of Tex. Code Crim. Proc. Ann. art. 56.45 included here and elsewhere in this report includes amendments made by the enactment of House Bill 10 during the 2015 regular session of the 84th Texas Legislature (effective September 1, 2015).

- (b) An application for a protective order under this chapter may be filed in:
  - (1) a district court, juvenile court having the jurisdiction of a district court, statutory county court, or constitutional county court in:
    - (A) the county in which the applicant resides; or
    - (B) the county in which the alleged offender resides; or
    - (C) any county in which an element of the alleged offense occurred; or
  - (2) any court with jurisdiction over a protective order under Title 4, Family Code, involving the same parties named in the application.

Tex Penal Code § 20A.04<sup>157</sup> (Accomplice witness; testimony and immunity) states,

- (a) A party to an offense under [Chapter 20A (Trafficking in Persons)] may be required to provide evidence or testify about the offense.
- (b) A party to an offense under this chapter may not be prosecuted for any offense about which the party is required to provide evidence or testify, and the evidence and testimony may not be used against the party in any adjudicatory proceeding except a prosecution for aggravated perjury. For purposes of this subsection, "adjudicatory proceeding" means a proceeding before a court or any other agency of government in which the legal rights, powers, duties, or privileges of specified parties are determined.
- (c) A conviction under this chapter may be had on the uncorroborated testimony of a party to the offense.

Additionally, Tex. Code Crim. Proc. Ann. art. 38.07 (Testimony in corroboration of victim of sexual offense) states,

- (a) A conviction under Chapter 21 [Sexual offenses], Section 20A.02(a)(3), (4), (7), or (8) [Trafficking of persons], Section 22.011 [Sexual assault], or Section 22.021 [Aggravated sexual assault], Penal Code, is supportable on the uncorroborated testimony of the victim of the sexual offense if the victim informed any person, other than the defendant, of the alleged offense within one year after the date on which the offense is alleged to have occurred.
- (b) The requirement that the victim inform another person of an alleged offense does not apply if at the time of the alleged offense the victim was a person:
  - (1) 17 years of age or younger;
  - ....

Similarly, Tex. Code Crim. Proc. Ann. art. 38.071 (Testimony of child who is victim of offense) provides multiple protections to a child under 13 years of age who is a victim of specified crimes, including Tex. Penal Code Ann. § 20A.02(7), (8). Specifically, Tex. Code Crim. Proc. Ann. art. 38.071, § 1 states,

Sec. 1. This article applies only to a hearing or proceeding in which the court determines that a child younger than 13 years of age would be unavailable<sup>158</sup> to testify in the presence of the defendant about an offense defined by any of the following sections of the Penal Code:

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<sup>157</sup> See *supra* note 132.

<sup>158</sup> Tex. Code Crim. Proc. Ann. art. 38.071, § 8 states,

- (a) In making a determination of unavailability under this article, the court shall consider relevant factors including the relationship of the defendant to the child, the character and duration of the alleged offense, the age, maturity, and emotional stability of the child, and the time elapsed since the alleged offense, and whether the child is more likely than not to be unavailable to testify because:
  - (1) of emotional or physical causes, including the confrontation with the defendant; or

- ...
  - (6) Section 22.011 (Sexual Assault);
  - ...
    - (8) Section 22.021 (Aggravated Sexual Assault);
    - ...
      - (13) Section 43.25 (Sexual Performance by a Child);
      - (14) Section 21.02 (Continuous Sexual Abuse of Young Child or Children);
      - (15) Section 43.05(a)(2) (Compelling Prostitution)
      - (16) Section 20A.02(a)(7) or (8) (Trafficking of Persons).

A child who falls within the provisions of Tex. Code Crim. Proc. Ann. art. 38.071, § 1 may be allowed to give testimony “in a room other than the courtroom and be televised by closed circuit equipment in the courtroom to be viewed by the court and the finder of fact.” Tex. Code Crim. Proc. Ann. art. 38.071, § 3(a). Tex. Code Crim. Proc. Ann. art. 38.071, § 3(a) further provides that “only the judge, the court reporter, the attorneys for the defendant and for the state, persons necessary to operate the equipment, and any person whose presence would contribute to the welfare and well-being of the child may be present in the room with the child during his testimony,” and “[o]nly the attorneys and the judge may question the child.” Tex. Code Crim. Proc. Ann. art. 38.071, § 3(a) additionally states that the court should “attempt to ensure that the child cannot hear or see the defendant.”

Tex. Code Crim. Proc. Ann. art. 38.072, § 2(b) (Hearsay statement of certain abuse victim) also provides specific protections to victims of Tex. Penal Code Ann. § 20A.02(a)(7), (8) (Trafficking of persons). Tex. Code Crim. Proc. Ann. art. 38.072 permits the admissibility of out of court statements made by victims, under the age of 14, of Tex. Penal Code Ann. § 20A.02(a)(7), (8), § 43.05(a)(2) (Compelling prostitution), § 43.25 (Sexual performance by a child), chapter 21 (Sexual offenses), or chapter 22 (Assaultive offenses) of the Texas Penal Code.

Tex. Code Crim. Proc. Ann. art. 38.37, §§ 1, 2 (Evidence of extraneous offenses or acts) provides,

Sec. 1.

(a) Subsection (b) applies to a proceeding in the prosecution of a defendant for an offense, or an attempt or conspiracy to commit an offense, under the following provisions of the Penal Code:

- (1) if committed against a child under 17 years of age:
  - (A) Chapter 21 (Sexual Offenses);
  - (B) Chapter 22 (Assaultive Offenses); or
  - (C) Section 25.02 (Prohibited Sexual Conduct);
- (2) if committed against a person younger than 18 years of age:
  - (A) Section 43.25 (Sexual Performance by a Child);
  - (B) Section 20A.02(a)(7) or (8) [Trafficking of persons]; or
  - (C) Section 43.05(a)(2) (Compelling Prostitution)

(b) Notwithstanding Rules 404 and 405, Texas Rules of Evidence, evidence of other crimes, wrongs, or acts committed by the defendant against the child who is the victim of the alleged offense shall be admitted for its bearing on relevant matters, including:

- (1) the state of mind of the defendant and the child; and

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(2) the child would suffer undue psychological or physical harm through his involvement at the hearing or proceeding.

(b) A determination of unavailability under this article can be made after an earlier determination of availability. A determination of availability under this article can be made after an earlier determination of unavailability.

(2) the previous and subsequent relationship between the defendant and the child.

Sec. 2.

(a) Subsection (b) applies only to the trial of a defendant for:

(1) an offense under any of the following provisions of the Penal Code:

(A) Section 20A.02, if punishable as a felony of the first degree under Section 20A.02(b)(1) (Sex Trafficking of a Child);

(B) Section 21.02 (Continuous Sexual Abuse of Young Child or Children);

(C) Section 21.11 (Indecency With a Child);

(D) Section 22.011(a)(2) (Sexual Assault of a Child);

(E) Sections 22.021(a)(1)(B) and (2) (Aggravated Sexual Assault of a Child);

(F) Section 33.021 (Online Solicitation of a Minor);

(G) Section 43.25 (Sexual Performance by a Child); or

(H) Section 43.26 (Possession or Promotion of Child Pornography), Penal Code; or

(2) an attempt or conspiracy to commit an offense described by Subdivision (1).

(b) Notwithstanding Rules 404 and 405, Texas Rules of Evidence, and subject to Section 2–a, evidence that the defendant has committed a separate offense described by Subsection (a)(1) or (2) may be admitted in the trial of an alleged offense described by Subsection (a)(1) or (2) for any bearing the evidence has on relevant matters, including the character of the defendant and acts performed in conformity with the character of the defendant.

Sec. 2–a. Before evidence described by Section 2 may be introduced, the trial judge must:

(1) determine that the evidence likely to be admitted at trial will be adequate to support a finding by the jury that the defendant committed the separate offense beyond a reasonable doubt; and

(2) conduct a hearing out of the presence of the jury for that purpose.

Tex. R. Evid. 412(a) (Evidence of previous sexual conduct in criminal cases) states, “In a prosecution for . . . aggravated sexual assault [Tex. Penal Code Ann. § 22.021], or attempt to commit . . . aggravated sexual assault, reputation or opinion evidence of the past sexual behavior of an alleged victim of such crime is not admissible.”<sup>159</sup> Tex. Evid. Rule 412(b) states that “evidence of specific instances of an alleged victim’s past sexual behavior is also not admissible” unless it meets certain criteria.<sup>160</sup>

Tex. Code Crim. Proc. Ann. art. 42.0191 (Finding regarding victims of trafficking or other abuse) encourages trafficking victims to participate in the prosecution of the trafficker by ensuring the victim’s confidentiality. Specifically, Tex. Code Crim. Proc. Ann. art. 42.0191 states,

(a) In the trial of an offense, on the motion of the attorney representing the state the judge shall make an affirmative finding of fact and enter the affirmative finding in the papers in the case if the judge determines that, regardless of whether the conduct at issue is the subject of the prosecution or part of the same criminal episode as the conduct that is the subject of the prosecution, a victim in the trial:

(1) is or has been a victim of a severe form of trafficking of persons, as defined by 22 U.S.C. Section 7102(8); or

. . . .

(b) That part of the papers in the case containing an affirmative finding under this article:

(1) must include specific information identifying the victim, as available;

(2) may not include information identifying the victim’s location; and

(3) is confidential, unless written consent for the release of the affirmative finding is obtained from the victim or, if the victim is younger than 18 years of age, the victim’s parent or guardian.

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<sup>159</sup> Tex. R. Evid. 412(a).

<sup>160</sup> Tex. R. Evid. 412(b).

Additionally, Tex. Gov't Code Ann. § 23.101(a)(2)(C)(vi) (Primary priorities) states that courts should give preference to cases involving violations of Tex. Penal Code Ann. § 20A.03 (Continuous trafficking of persons) when scheduling hearings and trials. Pursuant to Tex. Code Crim. Proc. Ann. art. 38.45 (Evidence depicting or describing abuse of or sexual conduct by child or minor), child pornography victims are protected from the further public viewings of the images of their sexual exploitation.

Victims of any crime receive protections under Subchapter A (Crime victims' rights) of Chapter 56 (Rights of crime victims) of the Texas Code of Criminal Procedure. Specifically, Tex. Code Crim. Proc. Ann. art. 56.02(a) (Crime victims' rights) states,

- (a) A victim, guardian of a victim, or close relative of a deceased victim is entitled to the following rights within the criminal justice system:
- (1) the right to receive from law enforcement agencies adequate protection from harm and threats of harm arising from cooperation with prosecution efforts;
  - (2) the right to have the magistrate take the safety of the victim or his family into consideration as an element in fixing the amount of bail for the accused;
  - (3) the right, if requested, to be informed:
    - (A) by the attorney representing the state of relevant court proceedings, including appellate proceedings, and to be informed if those proceedings have been canceled or rescheduled prior to the event; and
    - (B) by an appellate court of decisions of the court, after the decisions are entered but before the decisions are made public;
  - ...
  - (6) the right to receive information regarding compensation to victims of crime as provided by Subchapter B [Crime victims' compensation], including information related to the costs that may be compensated under that subchapter and the amount of compensation, eligibility for compensation, and procedures for application for compensation under that subchapter, the payment for a medical examination under Article 56.06 [Medical examination for sexual assault victim who has reported assault; costs] for a victim of a sexual assault, and when requested, [a] referral to available social service agencies that may offer additional assistance;
  - ...
  - (8) the right to be provided with a waiting area, separate or secure from other witnesses, including the offender and relatives of the offender, before testifying in any proceeding concerning the offender; if a separate waiting area is not available, other safeguards should be taken to minimize the victim's contact with the offender and the offender's relatives and witnesses, before and during court proceedings;
  - ...
  - (13) for a victim of an assault or sexual assault who is younger than 17 years of age or whose case involves family violence, as defined by Section 71.004 [Family Violence], Family Code, the right to have the court consider the impact on the victim of a continuance requested by the defendant; if requested by the attorney representing the state or by counsel for the defendant, the court shall state on the record the reason for granting or denying the continuance; and
  - (16) if the offense is a capital felony, the right to:
    - (A) receive by mail from the court a written explanation of defense-initiated victim outreach if the court has authorized expenditures for a defense-initiated victim outreach specialist;
    - (B) not be contacted by the victim outreach specialist unless the victim, guardian, or relative has consented to the contact by providing a written notice to the court; and
    - (C) designate a victim service provider to receive all communications from a victim outreach specialist acting on behalf of any person.

Other protections are also available to children involved in non-criminal court proceedings. Tex. Fam. Code Ann. § 104.004(a) (Remote televised broadcast of testimony of child), which applies to suits affecting the parent-child relationship, states,

If in a suit a child 12 years of age or younger is alleged to have been abused, the court may, on the motion of a party to the proceeding, order that the testimony of the child be taken in a room other than the courtroom and be televised by closed-circuit equipment in the courtroom to be viewed by the court and the parties.

Additionally, Tex. Fam. Code Ann. § 104.002 (Prerecorded statement of child) states, under certain circumstances, “If a child 12 years of age or younger is alleged in a suit under [Tex. Fam. Code Title 5 (The parent-child relationship and the suit affecting the parent-child relationship)] to have been abused, the recording of an oral statement of the child recorded prior to the proceeding is admissible into evidence . . . .”

Furthermore, Tex. Fam. Code Ann. § 104.003(a) (Prerecorded videotaped testimony of child) permits the court, upon motion of a party, to “order that the testimony of the child be taken outside the courtroom and be recorded for showing in the courtroom before the court, the finder of fact, and the parties to the proceeding.” Lastly, under Tex. Fam. Code Ann. § 104.005(a) (Substitution for in-court testimony of child), “If the testimony of a child is taken as provided by this chapter, the child may not be compelled to testify in court during the proceeding.”

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

Tex. Fam. Code Ann. § 58.003 (Sealing of records) sets out the requirements for the sealing of juvenile records. In addition to the normal process, the court may seal juveniles’ records after completing a trafficked persons program. According to Tex. Fam. Code Ann. § 58.003(a)–(c-7),

(a) Except as provided by Subsections (b) and (c), on the application of a person who has been found to have engaged in delinquent conduct or conduct indicating a need for supervision, or a person taken into custody to determine whether the person engaged in delinquent conduct or conduct indicating a need for supervision, on the juvenile court’s own motion the court shall order the sealing of the records in the case if the court finds that:

(1) two years have elapsed since final discharge of the person or since the last official action in the person’s case if there was no adjudication; and

(2) since the time specified in Subdivision (1), the person has not been convicted of a felony or a misdemeanor involving moral turpitude or found to have engaged in delinquent conduct or conduct indicating a need for supervision and no proceeding is pending seeking conviction or adjudication.

(b) A court may not order the sealing of the records of a person who has received a determinate sentence for engaging in delinquent conduct that violated a penal law listed in Section 53.045 [Offenses Eligible for Determinate Sentence] or engaging in habitual felony conduct as described by Section 51.031 [Habitual felony conduct].

(c) Subject to Subsection (b), a court may order the sealing of records concerning a person adjudicated as having engaged in delinquent conduct that violated a penal law of the grade of felony only if:

(1) the person is 19 years of age or older;

(2) the person was not transferred by a juvenile court under Section 54.02 [Waiver of jurisdiction and discretionary transfer to criminal court] to a criminal court for prosecution;

- (3) the records have not been used as evidence in the punishment phase of a criminal proceeding under Section 3(a), Article 37.07 [Verdict must be general; separate hearing on proper punishment], Code of Criminal Procedure; and
- (4) the person has not been convicted of a penal law of the grade of felony after becoming age 17.

(c–7) Notwithstanding Subsections (a) and (c) and subject to Subsection (b), a juvenile court may order the sealing of records concerning a child found to have engaged in delinquent conduct or conduct indicating a need for supervision or taken into custody to determine whether the child engaged in delinquent conduct or conduct indicating a need for supervision if the child successfully completed a trafficked persons program under Section 152.0016, Human Resources Code. The court may:

- (1) order the sealing of the records immediately and without a hearing; or
- (2) hold a hearing to determine whether to seal the records.

Tex. Fam. Code Ann. § 58.003(d) further states, “If the child is referred to the juvenile court for conduct constituting any offense and at the adjudication hearing the child is found to be not guilty of each offense alleged, the court shall immediately and without any additional hearing order the sealing of all files and records relating to the case.” Tex. Fam. Code Ann. § 58.003(j) explains the effect of sealing a child’s records, stating,

A person whose records have been sealed under this section is not required in any proceeding or in any application for employment, information, or licensing to state that the person has been the subject of a proceeding under this title and any statement that the person has never been found to be a delinquent child shall never be held against the person in any criminal or civil proceeding.

Tex. Gov’t Code § 411.081<sup>161</sup> allows a person who has been convicted of 43.02 (Prostitution), placed on community supervision, and had the conviction set aside, to petition for nondisclosure on the grounds that the person committed the offense solely as a victim of trafficking of persons. Tex. Gov’t Code § 411.081(d-1)(2) further states,

After notice to the state, an opportunity for a hearing, and a determination by the court that the person committed the offense solely as a victim of trafficking of persons and that issuance of the order is in the best interest of justice, the court shall issue an order prohibiting criminal justice agencies from disclosing to the public criminal history record information related to the offense under Section 43.02, Penal Code, giving rise to the community supervision. . . .<sup>162</sup>

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

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<sup>161</sup> The text of Tex. Gov’t Code § 411.081 included here and elsewhere in this report includes amendments made by the enactment of House Bill 2286 during the 2015 regular session of the 84th Texas Legislature (effective September 1, 2015).

<sup>162</sup> Tex. Gov’t Code § 411.081(d-1)(2) further states,

A criminal justice agency may disclose criminal history record information that is the subject of the order only to other criminal justice agencies for criminal justice purposes, an agency or entity listed in Subsection (i), or the person who is the subject of the order. A person may petition the court that placed the person on community supervision for an order of nondisclosure only after the person’s conviction under Section 43.02, Penal Code, is set aside

*See supra* note 161.



Victims whose offenders are convicted under Tex. Penal Code Ann. § 20A.02(a)(7), (8) (Trafficking of persons) or § 43.05(a)(2) (Compelling prostitution) are eligible to receive restitution under Tex. Code Crim. Proc. Ann. art. 42.0372(a) (Mandatory restitution for child victims of trafficking of persons or compelling prostitution), which states,

The court shall order a defendant convicted of an offense under Section 20A.02 [Trafficking of persons] or 43.05(a)(2) [Compelling prostitution], Penal Code, to pay restitution in an amount equal to the cost of necessary rehabilitation, including medical, psychiatric, and psychological care and treatment, for any victim of the offense who is younger than 18 years of age.

Victims whose offenders are convicted of other crimes may receive restitution at the discretion of the court, pursuant to Tex. Code Crim. Proc. Ann. art. 42.037<sup>163</sup> (Restitution), which states,

- (a) In addition to any fine authorized by law, the court that sentences a defendant convicted of an offense may order the defendant to make restitution to any victim of the offense or to the compensation to victims of crime fund established under Subchapter B [Crime victims' compensation], Chapter 56 [Rights of crime victims], to the extent that fund has paid compensation to or on behalf of the victim. . . .
- (b) (1) If the offense results in damage to or loss or destruction of property of a victim of the offense, the court may order the defendant:
  - (A) to return the property to the owner of the property or someone designated by the owner; or
  - (B) if return of the property is impossible or impractical or is an inadequate remedy, to pay an amount equal to the greater of:
    - (i) the value of the property on the date of the damage, loss, or destruction; or
    - (ii) the value of the property on the date of sentencing, less the value of any part of the property that is returned on the date the property is returned.
- (2) If the offense results in personal injury to a victim, the court may order the defendant to make restitution to:
  - (A) the victim for any expenses incurred by the victim as a result of the offense; or
  - (B) the compensation to victims of crime fund to the extent that fund has paid compensation to or on behalf of the victim.. . . .
- (c) The court, in determining whether to order restitution and the amount of restitution, shall consider:
  - (1) the amount of the loss sustained by any victim and the amount paid to or on behalf of the victim by the compensation to victims of crime fund as a result of the offense; and
  - (2) other factors the court deems appropriate.. . . .
- (e) The court shall impose an order of restitution that is as fair as possible to the victim or to the compensation to victims of crime fund, as applicable. The imposition of the order may not unduly complicate or prolong the sentencing process.
- (f)(1) The court may not order restitution for a loss for which the victim has received or will receive compensation only from a source other than the compensation to victims of crime fund. The court may, in the interest of justice, order restitution to any person who has compensated the victim for the loss to the extent the person paid compensation. An order of restitution shall require that all restitution to a victim or to the compensation to victims of crime fund be made before any restitution to any other person is made under the order.

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<sup>163</sup> See *supra* note 59.

(2) Any amount recovered by a victim from a person ordered to pay restitution in a federal or state civil proceeding is reduced by any amount previously paid to the victim by the person under an order of restitution.

....

(m) 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.

....

(r) The court may order a defendant convicted of an offense under Section 43.26 [Possession or promotion of child pornography], Penal Code, to make restitution to an individual who as a child younger than 18 years of age was depicted in the visual material, in an amount equal to the expenses incurred by the individual as a result of the offense, including:

- (1) medical services relating to physical, psychiatric, or psychological care;
- (2) physical and occupational therapy or rehabilitation;
- (3) necessary transportation, temporary housing, and child care expenses;
- (4) lost income; and
- (5) attorney's fees.

Victims of Tex. Penal Code Ann. § 20A.02(a)(7), (8) (Trafficking of persons) are provided with a civil cause of action under Tex. Civ. Prac. & Rem. Code Ann. § 98.002 (Liability), which states,

(a) A defendant who engages in the trafficking of persons or who intentionally or knowingly benefits from participating in a venture that traffics another person is liable to the person trafficked, as provided by this chapter, for damages arising from the trafficking of that person by the defendant or venture.

(b) It is not a defense to liability under this chapter that a defendant has been acquitted or has not been prosecuted or convicted under Chapter 20A [Trafficking of persons], Penal Code, or has been convicted of a different offense or of a different type or class of offense, for the conduct that is alleged to give rise to liability under this chapter.

Tex. Civ. Prac. & Rem. Code Ann. § 98.003 (Damages) further states that trafficking victims may receive “actual damages, including damages for mental anguish even if an injury other than mental anguish is not shown,” reasonable attorney’s fees, court costs, and exemplary damages. These damages can be awarded in addition to any other remedy available by law. Tex. Civ. Prac. & Rem. Code Ann. § 98.004. Additionally, pursuant to Tex. Civ. Prac. & Rem. Code Ann. § 98.005 (Joint and several liability),

A person who engages in the trafficking of persons or who intentionally or knowingly benefits from participating in a venture that traffics another person and is found liable under this chapter or other law for any amount of damages arising from the trafficking is jointly liable with any other defendant for the entire amount of damages arising from the trafficking.

Victims of trafficking may also have a civil right of action under Tex. Civ. Prac. & Rem. Code Ann § 98A.001 (Liability for compelled prostitution and certain promotion of prostitution) which states:

(a) A defendant is liable to a victim of compelled prostitution, as provided by this chapter, for damages arising from the compelled prostitution if the defendant:

- (1) engages in compelling prostitution with respect to the victim;
- (2) knowingly or intentionally engages in promotion of prostitution or aggravated promotion of prostitution that results in compelling prostitution with respect to the victim; or
- (3) purchases an advertisement that the defendant knows or reasonably should know constitutes promotion of prostitution or aggravated promotion of prostitution, and the publication of the advertisement results in compelling prostitution with respect to the victim.

- (b) It is not a defense to liability under this chapter that:
  - (1) the defendant:
    - (A) is related to the victim by affinity or consanguinity, has been in a consensual sexual relationship with the victim, or has resided with the victim in a household; or
    - (B) has paid or otherwise compensated the victim for prostitution; or
  - (2) the victim:
    - (A) voluntarily engaged in prostitution before or after the compelled prostitution occurred; or
    - (B) did not attempt to escape, flee, or otherwise terminate contact with the defendant at the time the compelled prostitution allegedly occurred.

Tex. Civ. Prac. & Rem. Code Ann § 98A.003 (Damages) states:

- (a) claimant who prevails in a suit under this chapter shall be awarded:
  - (1) actual damages, including damages for mental anguish even if an injury other than mental anguish is not shown;
  - (2) court costs; and
  - (3) reasonable attorney’s fees.
- (b) In addition to an award under Subsection (a), a claimant who prevails in a suit under this chapter may recover exemplary damages.

Finally, Tex. Civ. Prac. & Rem. Code Ann § 98A.004 (Cause of Action Cumulative) provides:

The cause of action created by this chapter is cumulative of any other remedy provided by common law or statute, except that a person may not recover damages in a suit under this chapter in which the cause of action is based on a transaction or occurrence that is the basis for a suit under Chapter 98.

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

Tex. Code Crim. Proc. Ann. art. 12.01(1)(B), (D), (G), (H), (I) (Felonies) eliminates statutes of limitations for prosecutions under Tex. Penal Code Ann. § 20A.02(a)(7), (8) (Trafficking of persons), § 20A.03 (Continuous trafficking of persons), § 22.021(a)(1)(B) (Aggravated sexual assault), § 21.02 (Continuous sexual abuse of young child or children), and § 43.05(a)(2) (Compelling prostitution).<sup>164</sup>

Tex. Code Crim. Proc. art. 12.01(2)(G), (H) imposes a 10 year statute of limitations for prosecutions of Tex. Penal Code Ann. § 20A.02(a)(1)–(4) (Trafficking of persons) or § 43.05(a)(1) (Compelling prostitution). Pursuant to Tex. Code Crim. Proc. Ann. art. 12.01(6)(A), (B), (C), (D), however, if the victim was under the age of 18 at the time of the offense, prosecutions under Tex. Penal Code Ann. § 20A.02(5), (6) (Trafficking in persons) or §22.04 (Injury to a child) may be brought within “ten years from the 18th birthday of the victim of the offense.” Tex. Code Crim. Proc. Ann. art. 12.01(5)(A) imposes a 20-year statute of limitation for a prosecution of Tex. Penal Code Ann. § 43.25 (Sexual performance by a child) that is tolled until the victim’s 18th birthday if the victim was younger than 17 years of age at the time of the offense. No statutes of limitations are expressly specified for prosecutions of Tex. Penal Code Ann. § 43.02<sup>165</sup> (Prostitution),

<sup>164</sup> The text of Tex. Code Crim. Proc. Ann. art. 12.01 included here and elsewhere in this report includes amendments made by the enactment of House Bill 10 during the 2015 regular session of the 84th Texas Legislature (effective September 1, 2015).

<sup>165</sup> See *supra* note 11.

§ 15.031(b) (Criminal solicitation of a minor), or § 43.251(b) (Employment harmful to children), meaning that the 3 year statute of limitations provided under Tex. Code Crim. Proc. Ann. art. 12.01(7) applies.

In civil suits concerning personal actions, Tex. Civ. Prac. & Rem. Code Ann. § 16.001(a)(1) (Effect of disability) tolls otherwise applicable statutes of limitations from running until a victim turns 18 years old. Generally, under Tex. Civ. Prac. & Rem. Code Ann. § 16.003 (Two-year limitations period), a victim must sue for personal injury or “action for injury resulting in death” within two years from the day the cause of action arises. However, Tex. Civ. Prac. & Rem. Code Ann. § 16.0045(a)<sup>166</sup> (Limitations period for claims arising from certain offenses) imposes a 15 year statute of limitations “if the injury arises as a result of conduct that violates” Tex. Penal Code Ann. § 22.011 (Sexual assault of a child), § 22.021 (Aggravated sexual assault of a child), § 21.02 (Continuous sexual abuse of young child or children), § 20A.02(a)(7)(A), (B), (C), (D), or (H) or § 20A.02(a)(8), involving an activity described by Section 20A.02(a)(7)(A), (B), (C), (D), or (H) or sexual conduct with a child trafficked in the manner described by Section 20A.02(a)(7), (Certain sexual trafficking of a child), § 43.05(a)(2) (Compelling prostitution by a child), or § 21.11 (Indecency with a child).

Additionally, Tex. Civ. Prac. & Rem. Code Ann. § 16.0045(b) allows civil suits to be brought up to five years for conduct violating Tex. Penal Code Ann. § 22.011 (Sexual assault), § 22.021 (Aggravated sexual assault), § 20A.02 (trafficking of persons) “other than conduct described by Subsection (a)(4)”; or § 43.05(a)(1), (compelling prostitution).

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<sup>166</sup> The text of Tex. Civ. Prac. & Rem. Code Crim. Proc. Ann. § 16.0045 included here and elsewhere in this report includes amendments made by the enactment of House Bill 189 during the 2015 regular session of the 84th Texas Legislature (effective September 1, 2015).

***Legal Components:***

- 6.1 *Training on human trafficking and domestic minor sex trafficking for law enforcement is statutorily mandated or authorized.*
  - 6.2 *Single party consent to audio-taping is permitted in law enforcement investigations.*
  - 6.3 *Wiretapping is an available tool to investigate domestic minor sex trafficking.*
  - 6.4 *Using a law enforcement posing as a minor to investigate buying or selling of commercial sex acts is not a defense to soliciting, purchasing, or selling sex with a minor.*
  - 6.5 *Using the Internet or electronic communications to investigate buyers and traffickers is a permissible investigative technique.*
  - 6.6 *Law enforcement and child welfare agencies are mandated to promptly report missing and recovered children.*
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***Legal Analysis:***

- 6.1 *Training on human trafficking and domestic minor sex trafficking for law enforcement is statutorily mandated or authorized.*

Texas law mandates that law enforcement receives training on human trafficking. Tex. Occ. Code Ann. § 1701.258(a) (Education and training programs on trafficking of persons) requires law enforcement officers licensed on or after January 1, 2011 to “complete within a reasonable time after obtaining the license a one-time basic education and training program on the trafficking of persons.” The program must be at least four hours long and “include a review of the substance of Sections 20A.02 [Trafficking of persons] and 43.05 [Compelling prostitution].” Tex. Occ. Code Ann. § 1701.258(a). Additionally, Tex. Occ. Code Ann. § 1701.258(b) states, “The [Commission on Law Enforcement Officer Standards and Education] shall make available to each officer a voluntary advanced education, instruction, and training program on the trafficking of persons and compelling prostitution prohibited under Sections 20A.02 and 43.05, Penal Code.”

Tex. Occ. Code Ann. § 1701.402(a) (Proficiency certificates) authorizes the Commission on Law Enforcement Officer Standards and Education to issue proficiency certificates to law enforcement officers who meet training, education, and experience requirements. Tex. Occ. Code Ann. § 1701.402(j) states, “As a requirement for an intermediate or advanced proficiency certificate issued by the commission on or after January 1, 2011, an officer must complete the basic education and training program on the trafficking of persons described by Section 1701.258(a).”

Texas also has a mandatory education and training program for officers regarding missing and exploited children. Tex. Occ. Code Ann. § 1701.402(k) (Proficiency certificates) provides,

(k) As a requirement for an intermediate or advanced proficiency certificate issued by the commission on or after January 1, 2015, an officer must complete an education and training program on missing and exploited children. The commission by rule shall establish the program. The program must:

- (1) consist of at least four hours of training;
- (2) include instruction on reporting an attempted child abduction to the missing children and missing persons information clearinghouse under Chapter 63, Code of Criminal Procedure;
- (3) include instruction on responding to and investigating situations in which the Internet is used to commit crimes against children; and

(4) include a review of the substance of Chapters 20 and 43, Penal Code.

Tex. Hum. Res. Code § 242.009(b)<sup>167</sup> requires juvenile correctional officers to receive training on human trafficking, sexual abuse, adolescent development, and trauma-informed care, among other things.

Tex. Gov't Code §§ 22.110(a), (b), (d) and 22.011,<sup>168</sup> mandate judicial trainings regarding trafficking of persons.

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

Texas permits single-party consent to audio-taping. Although Tex. Penal Code Ann. § 16.02(b)(1) (Unlawful interception, use, or disclosure of wire, oral, or electronic communications) states that a person who “intentionally intercepts, endeavors to intercept, or procures another person to intercept or endeavor to intercept a wire, oral, or electronic communication” is guilty of an offense, a list of affirmative defenses permit single-party consent to audio-taping by both law enforcement and citizens. Tex. Penal Code Ann. § 16.02(c)(3), (4) states,

(c) It is an affirmative defense to prosecution under Subsection (b) that:

- ...
- (3) a person acting under color of law intercepts:
  - (A) a wire, oral, or electronic communication, if the person is a party to the communication or if one of the parties to the communication has given prior consent to the interception;
  - ...
- (4) a person not acting under color of law intercepts a wire, oral, or electronic communication, if:
  - (A) the person is a party to the communication; or
  - (B) one of the parties to the communication has given prior consent to the interception, unless the communication is intercepted for the purpose of committing an unlawful act.

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

Tex. Penal Code Ann. § 16.02(c) (Unlawful interception, use, or disclosure of wire, oral, or electronic communications) states,

(c) It is an affirmative defense to prosecution under Subsection (b) that:

- ...
- (3) a person acting under color of law intercepts:
  - ...
  - (B) a wire, oral, or electronic communication, if the person is acting under the authority of Article 18.20 [Detection, interception, and use of wire, oral or electronic communications], Code of Criminal Procedure; or
  - ...
- ...

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<sup>167</sup> The text of Tex. Hum. Res. Code § 242.009 included here and elsewhere in this report includes amendments made by the enactment of House Bill 2372 during the 2015 regular session of the 84th Texas Legislature (effective September 1, 2015).

<sup>168</sup> The text of Tex. Gov't code §§ [22.110](#)(a), (b), (d) and [22.011](#) included here and elsewhere in this report includes amendments made by the enactment of House Bill 10 during the 2015 regular session of the 84th Texas Legislature (effective September 1, 2015).

- (5) a person acting under color of law intercepts a wire, oral, or electronic communication if:
  - (A) oral or written consent for the interception is given by a magistrate before the interception;
  - (B) an immediate life-threatening situation exists;
  - (C) the person is a member of a law enforcement unit specially trained to:
    - (i) respond to and deal with life-threatening situations; or
    - (ii) install electronic, mechanical, or other devices; and
  - (D) the interception ceases immediately on termination of the life-threatening situation.

Tex. Code Crim. Proc. Ann. art. 18.20, § 8 (Application for interception authorization) sets out a procedure for the issuance of an order authorizing wiretapping. Tex. Code Crim. Proc. Ann. art. 18.20, § 4<sup>169</sup> (Offenses for which interceptions may be authorized) allows law enforcement to apply for orders authorizing wiretapping in the investigation of Tex. Penal Code Ann. § 20A.02 (Trafficking of persons), § 20A.03 (Continuous trafficking of persons), or § 43.26 (Possession or promotion of child pornography). Tex. Code Crim. Proc. Ann. art. 18.20, § 4 states,

A judge of competent jurisdiction may issue an order authorizing interception of wire, oral, or electronic communications only if the prosecutor applying for the order shows probable cause to believe that the interception will provide evidence of the commission of:

- (1) a felony under Section 19.02 [Murder], 19.03 [Capital murder], or 43.26 [Possession or promotion of child pornography], Penal Code;
- ...
- (4) an offense under Chapter 20A [Trafficking of persons], Penal Code;
- (5) an offense under Chapter 34 [Money laundering], Penal Code, if the criminal activity giving rise to the proceeds involves the commission of an offense under Title 5, Penal Code, or an offense under federal law or the laws of another state containing elements that are substantially similar to the elements of an offense under Title 5;
- ...
- (7) an offense under 43.04 [Aggravated promotion of prostitution] or 43.05 [Compelling prostitution], Penal Code; or
- (8) an attempt, conspiracy, or solicitation to commit an offense listed in this section.

Additionally, Tex. Code Crim. Proc. Ann. art. 18.20, § 8A(c) (Emergency installation and use of intercepting device) authorizes the issuance of oral or written orders authorizing wiretapping if it will “provide evidence of the commission of a felony, or of a threat, attempt, or conspiracy to commit a felony, in an immediate life-threatening situation.” This emergency consent expires 48 hours after the grant of consent, but a judge may authorize an order to continue the wiretap up to 30 days. Tex. Code Crim. Proc. Ann. art. 18.20, § 8A(d), (e).

Tex. Code Crim. Proc. Ann. art. 18.20 § 2(a) (Prohibition of use as evidence of intercepted communications) further states that wiretapping and its resulting evidence “may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States or of this state or a political subdivision of this state,” with a few exceptions, including if “the communication was intercepted in violation of this article, Section 16.02, Penal Code, [Unlawful interception, use, or disclosure of wire, oral, or electronic communications], or federal law.” Furthermore, “The contents of an intercepted communication and evidence derived from an intercepted communication may be received in a civil trial, hearing, or other proceeding only if the civil trial, hearing, or other proceeding arises out of a violation of a penal law.” Tex. Code Crim. Proc. art. 18.20, § 2(b). Tex. Code

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<sup>169</sup> The text of Tex. Code Crim. Proc. Ann. art. 63.009 included here and elsewhere in this report includes amendments made by the enactment of House Bill 11 during the 2015 regular session of the 84th Texas Legislature (effective September 1, 2015).

Crim. Proc. Ann. art. 18.20, § 7(a)–(c) (Authorization for disclosure and use of intercepted communications) also provides,

(a) An investigative or law enforcement officer who, by any means authorized by this article, obtains knowledge of the contents of a wire, oral, or electronic communication or evidence derived from the communication may disclose the contents or evidence to another investigative or law enforcement officer, including a federal law enforcement officer or agent or a law enforcement officer or agent of another state . . . .

(b) An investigative or law enforcement officer who, by any means authorized by this article, obtains knowledge of the contents of a wire, oral, or electronic communication or evidence derived from the communication may use the contents or evidence to the extent the use is appropriate to the proper performance of his official duties.

(c) A person who receives, by any means authorized by this article, information concerning a wire, oral, or electronic communication or evidence derived from a communication intercepted in accordance with the provisions of this article may disclose the contents of that communication or the derivative evidence while giving testimony under oath in any proceeding held under the authority of the United States, of this state, or of a political subdivision of this state.

6.4 *Using a law enforcement posing as a minor to investigate buying or selling of commercial sex acts is not a defense to soliciting, purchasing, or selling sex with a minor.*

Tex. Penal Code Ann. § 15.031(b) (Criminal solicitation of a minor) intimates that that law enforcement decoys may be used in investigating crimes. Tex. Penal Code Ann. § 15.031(b) states,

A person commits an offense if, with intent that an offense under Section 20A.02(a)(7) or (8) [Trafficking of persons], 21.02 [Continuous sexual abuse of young child or children], 21.11 [Indecency with a child], 22.011 [Sexual assault], 22.021 [Aggravated sexual assault], 43.02 [Prostitution], 43.05(a)(2) [Compelling prostitution], or 43.25 [Sexual performance by a child] be committed, the person by any means requests, commands, or attempts to induce a minor [under 17] or another whom the person believes to be a minor to engage in specific conduct that, under the circumstances surrounding the actor's conduct as the actor believes them to be, would constitute an offense under one of those sections or would make the minor or other believed by the person to be a minor a party to the commission of an offense under one of those sections.

Tex. Penal Code Ann. § 15.031(b) states that the offense occurs even when a “person by any means requests, commands, or attempts to induce a minor or another whom the person believes to be a minor to engage in specific conduct that, under the circumstances surrounding the actor's conduct as the actor believes them to be, would constitute an offense” under one of the specified statutes.

Also, liability for Tex. Penal Code Ann. § 43.02(c-1)(3)<sup>170</sup> (Prostitution) does not rest solely on the actual age of the victim; instead, Tex. Penal Code Ann. § 43.02(c-1)(3) renders an offender culpable for a heightened penalty if the person solicited is represented to the actor or believed by the actor to be under 18 years of age. Tex. Penal Code Ann. §§ 43.02(c-1)(3), 12.33.

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<sup>170</sup> See *supra* note 11.



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

Pursuant to Tex. Penal Code Ann. § 33.021(a)(1)<sup>171</sup> (Online solicitation of a minor), “‘Minor’ means: (A) an individual who is younger than 17 years of age; or (B) an individual whom the actor believes to be younger than 17 years of age.” Therefore it is illegal for a person to “solicit[] a minor to meet another person, including the actor, with the intent that the minor will engage in sexual contact, sexual intercourse, or deviate sexual intercourse.” This appears to allow law enforcement officers the ability to use the Internet for investigations posing as a minor.

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

Some reporting requirements related to sex trafficked children are mandated by law. Tex. Gov’t Code Ann. § 71.0353 (Trafficking of persons information) states that “a district or county court at law shall report the number of cases filed” for violations of Tex. Penal Code Ann. § 20A.02 (Trafficking of persons), § 43.02 (Prostitution), and § 43.05 (Compelling prostitution) and submit the report to the Office of Court Administration of the Texas Judicial System. Furthermore, Tex. Gov’t Code Ann. § 411.042(b)(2) (Bureau of identification and records) states,

(b) The bureau of identification and records shall:

...

(2) collect information concerning the number and nature of offenses reported or known to have been committed in the state and the legal steps taken in connection with the offenses, and other information useful in the study of crime and the administration of justice, including information that enables the bureau to create a statistical breakdown of:

(A) offenses in which family violence was involved;

(B) offenses under Sections 22.011 [Sexual assault] and 22.021 [Aggravated sexual assault], Penal Code; and

(C) offenses under Section 20A.02 [Trafficking of persons] and 43.05 [Compelling prostitution], Penal Code.

Other reporting requirements apply more generally to situations involving runaway or missing children. Tex. Penal Code Ann. § 25.06(e) (Harboring runaway child) requires a law enforcement agency to immediately enter a record of a child escaped from juvenile detention or a runaway child into the National Crime Information Center (NCIC) when reported by a parent, guardian or legal custodian, peace officer, probation officer, the Texas Youth Council, a foster home, or a detention facility.

Tex. Code Crim. Proc. Ann. art. 63.002 (Missing children and missing persons information clearinghouse) establishes a missing children and missing persons information clearinghouse within the Department of Public Safety for use by all law enforcement agencies of the state as a “central repository of information on missing children, missing persons, and attempted child abductions.” Tex. Code Crim. Proc. Ann. art. 63.003(a). Pursuant to Tex. Code Crim. Proc. Ann. art. 63.003(b) (Function of Clearinghouse), the clearinghouse is required to

(1) establish a system of intrastate communication of information relating to missing children<sup>172</sup> and missing persons;<sup>173</sup>

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<sup>171</sup> See *supra* note 22.

<sup>172</sup> Tex. Code Crim. Proc. Ann. art. 63.001(3) defines “missing child” as

- (2) provide a centralized file for the exchange of information on missing children, missing persons, and unidentified dead bodies within the state;
- (3) communicate with the national crime information center for the exchange of information on missing children and missing persons suspected of interstate travel;
- (4) collect, process, maintain, and disseminate accurate and complete information on missing children and missing persons;
- (5) provide a statewide toll-free telephone line for the reporting of missing children and missing persons and for receiving information on missing children and missing persons; and
- (6) provide and disseminate to legal custodians, law enforcement agencies, and the Texas Education Agency information that explains how to prevent child abduction and what to do if a child becomes missing; and
- (7) receive and maintain information on attempted child abductions in this state.

After a missing child is recovered, Tex. Fam. Code § 264.123(f)<sup>174</sup> requires the department to interview the child to determine whether

while missing, the child was a victim of conduct that constitutes an offense under [Tex Penal Code § 20A.02(a)(7)]. The department shall report to an appropriate law enforcement agency any disclosure made by a child that indicates that the child was the victim of a crime during the time the child was missing. The department shall make a report under this subsection not later than 24 hours after the time the disclosure is made.

The department must also gather information regarding “each child who, while in the department’s managing conservatorship, is a victim of conduct that constitutes an offense under” Tex. Penal Code § Section 20A.02(a)(7). Tex. Fam. Code § 264.123(g).

a child whose whereabouts are unknown to the child’s legal custodian, the circumstances of whose absence indicate that:

- (A) the child did not voluntarily leave the care and control of the custodian, and the taking of the child was not authorized by law;
- (B) the child voluntarily left the care and control of the custodian without the custodian’s consent and without intent to return;
- (C) the child was taken or retained in violation of the terms of a court order for possession of or access to the child; or
- (D) the child was taken or retained without the permission of the custodian and with the effect of depriving the custodian of possession of or access to the child unless the taking or retention of the child was prompted by the commission or attempted commission of family violence, as defined by Section 71.004, Family Code, against the child or the actor.

Tex. Code Crim. Proc. Ann. art. 63.001(1-a) (Definitions) defines “child” as “a person under 18 years of age.”

<sup>173</sup> Tex. Code Crim. Proc. Ann. art. 63.001(2) defines a “missing person” as “a person 18 years old or older whose disappearance is possibly not voluntary.” Tex. Code Crim. Proc. Ann. art. 63.001(4) further explains,

“Missing child” or “missing person” also includes a person of any age who is missing and:

- (A) is under proven physical or mental disability or is senile, and because of one or more of these conditions is subject to immediate danger or is a danger to others;
- (B) is in the company of another person or is in a situation the circumstances of which indicate that the missing child’s or missing person’s safety is in doubt; or
- (C) is unemancipated as defined by the law of this state.

<sup>174</sup> The text of Tex. Fam. Code § 264.123 included here and elsewhere in this report includes amendments made by the enactment of House Bill 1217 during the 2015 regular session of the 84th Texas Legislature (effective September 1, 2015).

Tex. Code Crim. Proc. Ann. art. 63.009(a)(1), (2)<sup>175</sup> (Law enforcement requirements) requires a law enforcement agency that receives a report of a missing child or a missing person to begin an investigation “to determine the present location of the child.” Tex. Code Crim. Proc. Ann. art. 63.009(a)(3) also requires law enforcement to enter the child’s name into the clearinghouse. Tex. Code Crim. Proc. Ann. art. 63.0091<sup>176</sup> (Law enforcement requirements regarding reports of certain missing children) requires the Department of Public Safety to issue rules for law enforcement to require that missing children who are “under 14 years of age and otherwise determined by the local law enforcement agency or the Department of Public Safety to be at a high risk of human trafficking, sexual assault, exploitation, abuse or neglectful supervision” be indicated as high risk in the national crime information center missing person file. Pursuant to Tex. Code Crim. Proc. Ann. art. 63.0092 (Option to designate missing child as high risk), for children who are 14 years of age or older but missing under the same circumstances, local law enforcement may also designate the missing child as “high risk” within the national crime information center missing person file. Tex. Code Crim. Proc. Ann. art. 63.013 (Information to clearinghouse) further requires each law enforcement agency to “provide to the missing children and missing persons information clearinghouse any information that would assist in the location or identification of any missing child who has been reported to the agency as missing.”

Lastly, Tex. Code Crim. Proc. Ann. art. 63.009 (f) states, “Immediately after the return of a missing child or missing person or the identification of an unidentified body, the local law enforcement agency having jurisdiction of the investigation shall cancel the entry in the national crime information center database.”

Moreover, the school system is included as a critical component of finding missing children in Texas. Tex. Code Crim. Proc. Ann. art. 63.019 (School records system) requires schools to keep specific information for any child under 11 years of age who is enrolled in a school for the first time and uses this information in its efforts to locate missing children. Under Tex. Code Crim. Proc. Ann. art. 63.019(b), if required documents are not able to be produced within 30 day after the child’s enrollment (90 days if the child was not born in the United States), the school must notify the appropriate law enforcement agency so they can check the clearinghouse to determine if the child has been reported missing. Tex. Code Crim. Proc. Ann. art. 63.019(b) further states, “If the child has been reported missing, the law enforcement agency shall immediately notify other appropriate law enforcement agencies that the missing child has been located.” In addition, Tex. Code Crim. Proc. Ann. art. 63.008(a) (Missing children program) requires the Texas Education Agency to “develop and administer a program for the location of missing children who may be enrolled within the Texas school system, including nonpublic schools, and for the reporting of children who may be missing or who may be unlawfully removed from schools.” The program is coordinated with the information clearinghouse. Tex. Code Crim. Proc. Ann. art. 63.008(b). Also, Tex. Code Crim. Proc. Ann. art. 63.020 (Duty of schools and other entities to flag missing children’s record) outlines the responsibilities of the schools and day care facilities to flag a missing student’s (under 11 years of age) records upon receiving notice from a law enforcement agency that the child is missing.

Additionally, the Tex. Educ. Code § 38.004(a)<sup>177</sup> requires the agency to develop policies that require schools to report “trafficking of a child” pursuant to Tex. Penal Code § 20A.02(a)(5) or (7) “in the

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<sup>175</sup> The text of Tex. Code Crim. Proc. Ann. art. 63.009 included here and elsewhere in this report includes amendments made by the enactment of House Bill 1793 during the 2015 regular session of the 84th Texas Legislature (effective September 1, 2015).

<sup>176</sup> The text of Tex. Code Crim. Proc. Ann. art. 63.0091 included here and elsewhere in this report includes amendments made by the enactment of House Bill 1793 during the 2015 regular session of the 84th Texas Legislature (effective September 1, 2015).

<sup>177</sup> The text of Tex. Educ. Code § 38.004 included here and elsewhere in this report includes amendments made by the enactment of House Bill 10 during the 2015 regular session of the 84th Texas Legislature (effective September 1, 2015).

manner required by Chapter 261, Family Code. Tex. Educ. Code § 38.004(a) also requires the agency to develop policies regarding the reporting “trafficking of a child” pursuant to Tex. Penal Code § 20A.02 (a)(5), (6), (7), or (8), and such policies “must provide for cooperation with law enforcement child abuse investigations without the consent of the child’s parents if necessary, including investigations by the Department of Family and Protective Services.”

Texas also has a mandatory education and training program for officers regarding missing and exploited children. Tex. Occ. Code Ann. § 1701.402(k) (Proficiency certificates) provides,

(k) As a requirement for an intermediate or advanced proficiency certificate issued by the commission on or after January 1, 2015, an officer must complete an education and training program on missing and exploited children. The commission by rule shall establish the program. The program must:

- (1) consist of at least four hours of training;
- (2) include instruction on reporting an attempted child abduction to the missing children and missing persons information clearinghouse under Chapter 63, Code of Criminal Procedure;
- (3) include instruction on responding to and investigating situations in which the Internet is used to commit crimes against children; and
- (4) include a review of the substance of Chapters 20 and 43, Penal Code.

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