

# PROTECTED INNOCENCE INITIATIVE

Creating A Uniform Standard Across States to Combat Domestic Minor Sex Trafficking



## 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 *CSEC or prostitution statutes refer to the sex trafficking statute to identify the commercially sexually exploited minor as a trafficking victim.*

#### *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> Unless otherwise specified, all references to Texas statutes were taken from Texas Code Annotated or Vernon's Texas Statutes Annotated (LEXIS through the 2011 First Called Session) and all federal statutes were taken from United States Code (LEXIS through PL 112-54, approved 11/12/11).

<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 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, 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>5</sup>

Additionally, Tex. Penal Code Ann. § 20A.03 (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].
  - (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.
- .....

<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> Additional sentencing limitations may also be applicable. For example, a person convicted under Tex. Penal Code Ann. § 20A.02 cannot be sentenced to community supervision and is not eligible for release to intensive supervision parole. Tex. Gov’t Code Ann. § 499.027(b)(2)(Z) (First version); Tex. Code Crim. Proc. Ann. art. 42.12, § 3g(a)(1)(M). 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).

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>6</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 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. § 43.02(a) (Prostitution) makes it a crime if a person “(1) offers to engage, agrees to engage, or engages in sexual conduct for a fee; or (2) solicits another in a public place to engage with him 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. If the person solicited is 14–17 years of age, however, a conviction is punishable as a third degree felony by imprisonment for 2–10 years and a possible fine not to exceed \$10,000, and if the person solicited 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. §§ 43.02(c)(3), (4), 12.34, 12.33.
3. 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>7</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.

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

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<sup>6</sup> Pursuant to Tex. Gov’t Code Ann. § 508.145(d)(1) (Eligibility for release on parole; computation of parole eligibility date), “An inmate serving a sentence for an offense . . . under [Tex. Penal Code Ann. § 20A.03] 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.”

<sup>7</sup> Pursuant to Tex. Penal Code Ann. § 15.031(f), “In this section, ‘minor’ means an individual younger than 17 years of age.”

- (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>8</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.
4. 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>9</sup> to work: (1) in a sexually oriented commercial activity;<sup>10</sup> or (2) in any place of business permitting, requesting, or requiring a child to work nude or topless.” A conviction under Tex. Penal Code Ann. § 43.251(b) is punishable as either a felony or a misdemeanor.<sup>11</sup> Pursuant to Tex. Penal Code Ann. § 43.251(c) (First version), 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),<sup>12</sup> 12.33, 12.32. Pursuant to Tex. Penal Code Ann. § 43.251(c) (Second version), however, a first conviction is punishable as a Class A misdemeanor by imprisonment in a county jail up to 1 year, a fine not to exceed \$4,000, or both. Tex. Penal Code Ann. §§ 43.251(c)(1),<sup>13</sup> 12.21.
5. 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).
- .....

<sup>8</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>9</sup> Pursuant to Tex. Penal Code Ann. § 43.251(a)(1), “child” is defined as “a person younger than 18 years of age.”

<sup>10</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.”

<sup>11</sup> There are currently two versions of Tex. Penal Code Ann. § 43.251(c) in effect. The first version, 2011 Tex. Gen. Laws 515, § 4.03, states that a conviction is punishable as a felony, while the second version, 2011 Tex. Gen. Laws 938, § 1, states that a conviction may be punishable as a misdemeanor. *See also* TEXAS LEGISLATIVE COUNCIL, TEXAS LEGISLATIVE COUNCIL DRAFTING MANUAL § 8.08 (Feb. 2011), *available at* <http://www.tlc.state.tx.us/legal/dm/draftingmanual.pdf> (discussing the appropriate resolution for conflicting acts passed in the same session).

<sup>12</sup> 2011 Tex. Gen. Laws 515, § 4.03.

<sup>13</sup> 2011 Tex. Gen. Laws 938, § 1.

- (g) It is an affirmative defense to prosecution under this section that the actor:
- (1) was not more than five years older than:
    - (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 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.

6. 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>14</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>14</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).

7. 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>15</sup> or a sexual performance.<sup>16</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>17</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>18</sup> Tex. Penal Code Ann. §§ 22.011(f), 12.33.

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<sup>15</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>16</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>17</sup> Tex. Penal Code Ann. § 22.011(c)(1) defines “child” as “a person younger than 17 years of age.”

<sup>18</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
  - (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.

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) (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 arouse or gratify the sexual desire of any person, 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>19</sup> manner with a minor;<sup>20</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,<sup>21</sup> sexual intercourse, or deviate sexual intercourse with the actor or another person.

If the victim either represents himself or herself to be 14–16 years of age or the offender believes the victim to be 14–16 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.

<sup>19</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.

<sup>20</sup> Pursuant to Tex. Penal Code Ann. § 33.021(a)(1), “‘Minor’ means: (A) an individual who represents himself or herself to be younger than 17 years of age; or (B) an individual whom the actor believes to be younger than 17 years of age.”

<sup>21</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.”

§§ 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 *CSEC or 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) (Prostitution) refers to Tex. Penal Code Ann. § 20A.02 (Trafficking of persons) by stating that “[i]t is a defense to prosecution under this section 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.” However, the enhanced penalties applicable when a person solicits a minor under Tex. Penal Code Ann. § 43.02(c)(3), (4) do not refer to Tex. Penal Code Ann. § 20A.02 to clarify that the minor is a trafficking victim.

Tex. Penal Code Ann. § 15.031(b) (Criminal solicitation of a minor) also refers to Tex. Penal Code Ann. § 20A.02(a)(7), (8) by making it illegal for a person to “induce a minor . . . to engage in specific conduct that . . . would constitute an offense” under Tex. Penal Code Ann. § 20A.02(a)(7) or (8). Additionally, Tex. Penal Code Ann. § 22.021(a) (Aggravated sexual assault) and § 21.02(c) (Continuous sexual abuse of young child or children) both refer to Tex. Penal Code Ann. § 20A.02(a)(7), (8). Tex. Penal Code Ann. § 22.021(a)(2)(A)(iii) makes it a crime if a person “by acts or words occurring in the presence of the victim threatens to cause any person to become the victim of an offense under Section 20A.02(a)(3), (4), (7), or (8),” while Tex. Penal Code Ann. § 21.02(c)(7) includes conduct in violation of Tex. Penal Code Ann. § 20A.02(a)(7), (8) within the definition of “act of sexual abuse.”

Tex. Penal Code Ann. § 43.05(a) (Compelling prostitution), § 43.251(b) (Employment harmful to children), and § 43.25(b) (Sexual performance by a child) do not refer to Tex. Penal Code Ann. § 20A.02 or otherwise clarify the status of the victim as a trafficking victim.

**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 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 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 are sufficiently high for all minors under 18 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.*

**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 (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.”

- 2.2 *Buyers of commercial sex acts with a minor can be prosecuted under CSEC laws.*

Texas’s CSEC laws specifically include the crime of buying sex with a minor. Tex. Penal Code Ann. § 43.02(a) (Prostitution) makes it a crime if a person “(1) offers to engage, agrees to engage, or engages in sexual conduct for a fee; or (2) solicits another in a public place to engage with him 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. If the person solicited is 14–17 years of age, however, a conviction is punishable as a third degree felony by imprisonment for 2–10 years and a possible fine not to exceed \$10,000, and if the person solicited 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. §§ 43.02(c)(3), (4), 12.34, 12.33. Pursuant to Tex. Health & Safety Code Ann. § 169.002(b) (Authority to establish program; eligibility), however, a buyer convicted under Tex. Penal Code Ann. § 43.02(a)(2) 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 first offender prostitution prevention program.<sup>22</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>23</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” 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>24</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>25</sup> [against a child under the age of 14], regardless of whether the acts of sexual abuse are committed against one

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<sup>22</sup> Tex. Health & Safety Code Ann. § 169.001(a) (First offender prostitution prevention program; procedures for certain defendants) states,

In this chapter, “first offender prostitution prevention 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. § 169.001(b) further explains,

If a defendant successfully completes a first offender prostitution prevention 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 Section 5(c) [Deferred Adjudication; Community Supervision], Article 42.12 [Community Supervision], 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.

<sup>23</sup> See *supra* note 7.

<sup>24</sup> See *supra* note 8.

<sup>25</sup> See *supra* Section 1.2 for the definition of “sexual abuse.”

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>26</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>27</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>28</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.

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>29</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).

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<sup>26</sup> See *supra* Section 1.2 for the substantive provisions of Tex. Penal Code Ann. § 22.021(a).

<sup>27</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>28</sup> See *supra* note 15 for the definition of “sexual conduct.”

<sup>29</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*.

### 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)<sup>30</sup> imposes heightened penalties if an adult solicits or purchases sex with a minor. A conviction under Tex. Penal Code Ann. § 43.02(a) 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. If the person solicited is 14–17 years of age, however, a conviction is punishable as a third degree felony by imprisonment for 2–10 years and a possible fine not to exceed \$10,000, and if the person solicited 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. §§ 43.02(c)(3), (4), 12.34, 12.33.

2.3.1 Recommendation: Amend Tex. Penal Code Ann. § 43.02 (Prostitution) to refer to Tex. Penal Code Ann. § 20A.02 (Trafficking of persons) so that minor victims of Tex. Penal Code Ann. § 43.02 are recognized and treated as minor sex trafficking victims.

### 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) 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>31</sup> A buyer’s conviction under Tex. Penal Code Ann. § 43.02(a) (Prostitution) 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. If the person solicited is 14–17 years of age, however, a conviction is punishable as a third degree felony by imprisonment for 2–10 years and a possible fine not to exceed \$10,000, and if the person solicited 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. §§ 43.02(c)(3), (4), 12.34, 12.33. 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>32</sup> A buyer’s conviction under Tex. Penal Code Ann. § 22.021(a) (Aggravated sexual assault)<sup>33</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>34</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.

<sup>30</sup> See *supra* Section 1.2 for the provisions of Tex. Penal Code Ann. § 43.02.

<sup>31</sup> See *supra* note 5.

<sup>32</sup> See *supra* Section 1.2 for the substantive provisions of Tex. Penal Code Ann. § 15.031(e).

<sup>33</sup> See *supra* Section 1.2 for the substantive provisions of Tex. Penal Code Ann. § 22.021(a).

<sup>34</sup> See *supra* Section 2.2 for discussion on whether Tex. Penal Code Ann. § 43.05(a)(2) (Compelling prostitution) is applicable against buyers.

In comparison, if the victim is under the age of 14, a conviction under the Trafficking Victims Protection Act (TVPA)<sup>35</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>36</sup> against a minor. 18 U.S.C. § 3559(e)(1). To the extent buyers can be prosecuted under other federal CSEC laws,<sup>37</sup> a 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>38</sup>

2.5 *Using the Internet 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) (Online solicitation of a minor) makes it a crime for a person to use the Internet 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 arouse or gratify the sexual desire of any person, 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>39</sup> manner with a minor;<sup>40</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 either represents himself or herself to be 14–16 years of age or the offender believes the victim to be 14–16 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

<sup>35</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>36</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>37</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).

<sup>38</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>39</sup> *See supra* note 19.

<sup>40</sup> *See supra* note 20.

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>41</sup> Tex. Penal Code Ann. § 20A.02(b)(1) states, in part,

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 (Prostitution), § 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 are sufficiently high for all minors under 18 and not reduced for older minors.*

Tex. Penal Code Ann. § 20A.02(a)(8) (Trafficking of persons) does not stagger penalties based on the age of the minor victim. Instead, 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>42</sup>

Several of Texas CSEC’s laws, however, do stagger penalties based on the age of the minor-victim. For example, a conviction under Tex. Penal Code Ann. § 43.02(a) (Prostitution) 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, but if the person solicited is 14–17 years of age, a conviction is punishable as a third degree felony by imprisonment for 2–10 years and a possible fine not to exceed \$10,000, and if the person solicited 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. §§ 43.02(c)(3), (4), 12.22, 12.34, 12.33. Similarly, if the minor-victim is under the age of 18, a 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, but 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.

Additionally, Tex. Penal Code Ann. § 33.021(a)(1) (Online solicitation of a minor), § 21.11(a) (Indecency with a child), § 22.011(c)(1) (Sexual assault), and § 15.031(f) (Criminal solicitation of a minor) define “minor” or “child” as either a person younger than 17 years of age or, in the case of Tex. Penal Code Ann. § 33.021, a person believed to be younger than 17 years of age. If the victim either represents himself or herself to be 14–16 years of age or the offender believes the victim to be 14–16 years of age, a conviction under Tex. Penal Code Ann. § 33.021(b)<sup>43</sup> 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

<sup>41</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>42</sup> See *supra* note 5.

<sup>43</sup> See *supra* Section 1.2 for the substantive provisions of Tex. Penal Code Ann. § 33.021(b), (c).

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. A conviction under either Tex. Penal Code Ann. § 21.11(a)(1) or § 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, 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), 22.011(f), 12.33, 12.34. 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.<sup>44</sup>

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>45</sup> leaving minors between the ages of 14–17 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.

2.7.1 Recommendation: Amend Tex. Penal Code Ann. § 33.021(a)(1) (Online solicitation of a minor), § 21.11(a) (Indecency with a child), § 22.011(c)(1) (Sexual assault), and § 15.031(f) (Criminal solicitation of a minor) to raise the age of minority to under 18.

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(a) (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)(3), (4), 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 pursuant to Tex. Code Crim. Proc. Ann. art. 42.037(a), (b) (Restitution), which states,

<sup>44</sup> See *supra* Section 1.2 for the substantive provisions of Tex. Penal Code Ann. § 15.031(e).

<sup>45</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.

(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.

. . . .

Additionally, Tex. Code Crim. Proc. Ann. art. 59.01(2) (Definitions) includes Tex. Penal Code Ann. § 20A.02 (Trafficking of persons) as a crime for which property used in the commission of the crime constitutes "contraband." Tex. Code Crim. Proc. Ann. art. 59.01(2) 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], 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 or Chapter 43, Penal Code.

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."

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.

Buyers may also face civil liability. Tex. Civ. Prac. & Rem. Code Ann. § 98.002 (Liability) 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) explains 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.

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

Tex. Penal Code Ann. § 43.26(a) (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 visual material<sup>46</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>47</sup> and
- (2) the person knows that the material depicts the child as described by Subdivision (1).

A conviction under Tex. Penal Code Ann. § 43.26(a) 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. §§ 43.26(d), 12.34.

In comparison, a federal conviction for possession of child pornography<sup>48</sup> is generally punishable by imprisonment for 5–20 years and a fine not to exceed \$250,000.<sup>49</sup> Subsequent convictions, however, are punishable by imprisonment up to 40 years and a fine not to exceed \$250,000.<sup>50</sup>

<sup>46</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>47</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>48</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>49</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*

2.9.1 Recommendation: Increase the penalties for possessing child pornography under Tex. Penal Code Ann. § 43.26(a) to be comparable to the federal penalties.

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), (J), (K) (Definitions), the definition of “reportable conviction or adjudication” expressly includes convictions under Tex. Penal Code Ann. § 20A.02(a)(8) (Trafficking of persons), § 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. § 43.02 (Prostitution) or § 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).

2.10.1 Recommendation: Amend the definition of “reportable conviction or adjudication” in Tex. Code Crim. Proc. Ann. art. 62.001(5) to include Tex. Penal Code Ann. § 43.02 (Prostitution) and § 15.031(b) (Criminal solicitation of a minor) if the person with whom sex is purchased is a minor under the age of 18.

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*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> 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).

**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 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 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>51</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>52</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],” may be convicted under Tex. Penal Code Ann. § 20A.03 (Continuous trafficking of persons).<sup>53</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>54</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>55</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. Traffickers may also be convicted under Tex. Penal Code Ann. § 15.031(b) (Criminal solicitation of a minor),<sup>56</sup> which, pursuant 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>57</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>58</sup> A conviction under

<sup>51</sup> See *supra* Section 1.1 for the provisions of Tex. Penal Code Ann. § 20A.02(a)(7), (8).

<sup>52</sup> See *supra* note 5.

<sup>53</sup> See *supra* Section 1.1 for the provisions of Tex. Penal Code Ann. § 20A.03.

<sup>54</sup> See *supra* note 6.

<sup>55</sup> See *supra* Section 1.2 for the provisions of Tex. Penal Code Ann. § 43.05(a)(2).

<sup>56</sup> See *supra* Section 1.2 for the provisions of Tex. Penal Code Ann. § 15.031(b).

<sup>57</sup> See *supra* Section 1.2 for the substantive provisions of Tex. Penal Code Ann. § 15.031(e).

<sup>58</sup> See *supra* Section 1.2 for the provisions of Tex. Penal Code Ann. § 43.251.

Tex. Penal Code Ann. § 43.251(b) is punishable as either a felony or a misdemeanor.<sup>59</sup> Pursuant to Tex. Penal Code Ann. § 43.251(c) (First version), 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),<sup>60</sup> 12.33, 12.32. Pursuant to Tex. Penal Code Ann. § 43.251(c) (Second version), however, a first conviction is punishable as a Class A misdemeanor by imprisonment in a county jail up to 1 year, a fine not to exceed \$4,000, or both. Tex. Penal Code Ann. §§ 43.251(c)(1),<sup>61</sup> 12.21.

A trafficker’s conviction under Tex. Penal Code Ann. § 43.25(b) (Sexual performance by a child)<sup>62</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>63</sup> or in the profits of a combination or as a member of a criminal street gang,<sup>64</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 . . .

...

(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];

....

A conviction under Tex. Penal Code Ann. § 71.02(a) is punishable “one category higher than the most serious offense listed in Subsection (a) that was committed.” Tex. Penal Code Ann. § 71.02(b).

Additionally, Tex. Penal Code Ann. § 71.022(a) (Coercing, inducing, or soliciting membership in a criminal street gang) 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,

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<sup>59</sup> See *supra* note 11.

<sup>60</sup> See *supra* note 12.

<sup>61</sup> See *supra* note 13.

<sup>62</sup> See *supra* Section 1.2 for the provisions of Tex. Penal Code Ann. § 43.25(b).

<sup>63</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>64</sup> See *supra* note 8 for the definition of “criminal street gang.”

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.

In comparison, if the victim is under the age of 14, a conviction under the Trafficking Victims Protection Act (TVPA)<sup>65</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>66</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>67</sup> or a sexual performance.”<sup>68</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>69</sup> directs, or promotes<sup>70</sup> a performance that includes sexual conduct 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 (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>71</sup> or possesses with intent to promote material described by Subsection (a)(1);<sup>72</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>73</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.

<sup>65</sup> See *supra* note 35.

<sup>66</sup> See *supra* note 36.

<sup>67</sup> See *supra* note 15.

<sup>68</sup> See *supra* note 16.

<sup>69</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>70</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.”

<sup>71</sup> Tex. Penal Code Ann. § 43.26(b)(1) defines “promote” as having “the meaning assigned by Section 43.25.” See *supra* note 70 for the applicable definition of “promote.”

<sup>72</sup> See *supra* Section 2.9 for the substantive provisions of Tex. Penal Code Ann. § 43.26(a).

A 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.

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>74</sup> against a minor. Additionally, a federal conviction for distribution of child pornography<sup>75</sup> is generally punishable by imprisonment for 5–20 years and a fine not to exceed \$250,000.<sup>76</sup> Subsequent convictions, however, are punishable by imprisonment up to 40 years and a fine not to exceed \$250,000.<sup>77</sup>

3.3 *Using the Internet 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 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>78</sup> to meet another person, including the actor, with the intent that the minor will engage in sexual contact,<sup>79</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.

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), § 43.05(a)(2) (Compelling prostitution), § 15.031(b)

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<sup>73</sup> See *supra* note 46.

<sup>74</sup> See *supra* note 36.

<sup>75</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>76</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>77</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>78</sup> See *supra* note 20.

<sup>79</sup> See *supra* note 21.

(Criminal solicitation of a minor), § 43.251 (Employment harmful to children),<sup>80</sup> § 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),<sup>81</sup> 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. Traffickers convicted of other crimes may also be required to make restitution pursuant to Tex. Code Crim. Proc. Ann. art. 42.037(a), (b) (Restitution).<sup>82</sup>

Additionally, 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) (Definition)<sup>83</sup> expressly defines “contraband” as property, including real, personal, or intangible property, that is used in or acquired through the commission of Tex. Penal Code Ann. § 20A.02 (Trafficking of persons), § 43.05(a)(2) (Compelling Prostitution), or § 15.031(b) (Criminal solicitation of a minor). Tex. Code Crim. Proc. Ann. art. 59.01(2)(A)(i) also states that “contraband” includes property used in or acquired through the commission of any first or second degree felony. Furthermore, any property “used or intended to be used in the commission of” any crime under Tex. Penal Code Ann. Chapter 71 (Organized crime) is subject to forfeiture.<sup>84</sup> Tex. Code Crim. Proc. Ann. art. 59.01(2)(B)(xii).

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.

Traffickers may also be subject to civil liability. Tex. Civ. Prac. & Rem. Code Ann. § 98.002 (Liability) provides a tort remedy for victims of human trafficking.<sup>85</sup> 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. Furthermore, pursuant to Tex. Civ. Prac. & Rem. Code Ann. § 98.005 (Joint and several liability), multiple defendants are subject to joint and several liability.

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:

...

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<sup>80</sup> Additionally, a conviction under Tex. Penal Code Ann. § 43.251(c) may be prosecuted as a Class A misdemeanor, and, thus, punishable by a possible fine not to exceed \$4,000. *See supra* Section 1.2 and note 11 for discussion regarding possible conflicting punishments for Tex. Penal Code Ann. § 43.251(c).

<sup>81</sup> *See supra* Section 2.8 for the provisions of Tex. Code Crim. Proc. Ann. art. 42.0372.

<sup>82</sup> *See supra* Section 2.8 for the provisions of Tex. Code Crim. Proc. Ann. art. 42.037(a), (b).

<sup>83</sup> *See supra* section 2.8 for the provisions of Tex. Code Crim. Proc. Ann. art. 59.01(2).

<sup>84</sup> *See supra* Section 3.1 for the relevant Organized Crime provisions applicable to some traffickers.

<sup>85</sup> *See supra* Section 2.8 for the provisions of Tex. Civ. Prac. & Rem. Code Ann. § 98.002.

- (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;<sup>86</sup>
- ....

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), (J), (K) (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 (Compelling 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 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) (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(1)(L), (2) states,

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

- (1) that the parent has:

...

<sup>86</sup> There are two versions of Tex. Civ. Prac. & Rem. Code Ann. § 125.0015(19) currently in effect. The first version, amended by 2011 Tex. Gen. Laws 1, adds the crime of trafficking in persons, while the second version, amended by 2011 Tex. Gen. Laws. 687, adds the crime of employing a minor at a sexually oriented business.

(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 . . . Penal Code sections:

. . .

(iv) Section 21.11 (indecenty 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.

Additionally, Tex. Fam. Code Ann. § 262.2015(a), (b)(3)(N), (b)(3)(O) (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.

## FRAMEWORK ISSUE 4: CRIMINAL PROVISIONS FOR FACILITATORS

### *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>87</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

<sup>87</sup> See *supra* Section 1.1 for the provisions of Tex. Penal Code Ann. § 20A.02(a)(7), (8).

exceed \$10,000. Tex. Penal Code Ann. §§ 20A.02(b)(1), 12.32, 12.42(c)(2).<sup>88</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,” may be convicted under Tex. Penal Code Ann. § 20A.03 (Continuous trafficking of persons).<sup>89</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>90</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>91</sup> a performance<sup>92</sup> that includes sexual conduct<sup>93</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, facilitators may face prosecution under Tex. Penal Code Ann. § 71.02(a) (Engaging in organized criminal activity)<sup>94</sup> if the facilitator has “the intent to establish, maintain, or participate in . . . the profits of a combination<sup>95</sup>” and “conspires to commit” a violation of Tex. Penal Code Ann. § 20A.02 (Trafficking of persons) or § 43.25(d) (Sexual performance by a child), among other offenses. A conviction under Tex. Penal Code Ann. § 71.02(a) is punishable “one category higher than the most serious offense listed in Subsection (a) that was committed.” Tex. Penal Code Ann. § 71.02(b).

#### 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),<sup>96</sup> facilitators convicted under Tex. Penal Code Ann. § 20A.02 (Trafficking of persons) are required to make restitution to their victims. Facilitators convicted of other crimes may also be required to make restitution pursuant to Tex. Code Crim. Proc. Ann. art. 42.037(a), (b) (Restitution).<sup>97</sup>

Additionally, 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) (Definitions)<sup>98</sup> expressly defines “contraband” as property, including real, personal, or intangible property, that is used in or acquired through the commission of, among others, Tex. Penal Code Ann. § 20A.02 (Trafficking of Persons) or § 43.25(d) (Sexual performance by a child). Tex. Code Crim. Proc. Ann. art. 59.01(2)(A)(i) also states that “contraband” includes property used in or acquired through the commission of any first or second

<sup>88</sup> See *supra* note 5.

<sup>89</sup> See *supra* Section 1.1 for the provisions of Tex. Penal Code Ann. § 20A.03.

<sup>90</sup> See *supra* note 6.

<sup>91</sup> See *supra* note 70.

<sup>92</sup> See *supra* note 16 for the definition of “performance.”

<sup>93</sup> See *supra* note 15 for the definition of “sexual conduct.”

<sup>94</sup> See *supra* Section 3.1 for the provisions of Tex. Penal Code Ann. § 71.02(a).

<sup>95</sup> See *supra* note 63.

<sup>96</sup> See *supra* Section 2.8 for the provisions of Tex. Code Crim. Proc. Ann. art. 42.0372.

<sup>97</sup> See *supra* Section 2.8 for the provisions of Tex. Code Crim. Proc. Ann. art. 42.037(a), (b).

<sup>98</sup> See *supra* section 2.8 for the provisions of Tex. Code Crim. Proc. Ann. art. 59.01(2).

degree felony. 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 forfeiture. Tex. Code Crim. Proc. Ann. art. 59.01(2)(B)(xii).

Facilitators may also be subject to civil liability. Tex. Civ. Prac. & Rem. Code Ann. § 98.002 (Liability) provides a tort remedy for victims of human trafficking.<sup>99</sup> 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. Furthermore, pursuant to Tex. Civ. Prac. & Rem. Code Ann. § 98.005 (Joint and several liability), multiple defendants are subject to joint and several liability.

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;<sup>100</sup>

....

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.

<sup>99</sup> See *supra* Section 2.8 for the provisions of Tex. Civ. Prac. & Rem. Code Ann. § 98.002.

<sup>100</sup> See *supra* note 86.

#### 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>101</sup> a performance<sup>102</sup> that includes sexual conduct<sup>103</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) (Possession or promotion of child pornography)<sup>104</sup> specifically prohibits the promotion<sup>105</sup> of child pornography. A 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.

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<sup>101</sup> See *supra* note 70.

<sup>102</sup> See *supra* note 16 for the definition of “performance.”

<sup>103</sup> See *supra* note 15 for the definition of “sexual conduct.”

<sup>104</sup> See *supra* Section 3.2 for the provisions of Tex. Penal Code Ann. § 43.26(e), (f).

<sup>105</sup> See *supra* note 70 for the applicable definition of “promote.”

**Legal Components:**

- 5.1 *A victim of domestic minor sex trafficking or CSEC is defined as a victim for purposes of qualifying for crime victims' compensation and other victim benefits.*
- 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, making minors under 18 specifically immune from this offense.*
- 5.4 *Commercially sexually exploited children are provided with a child protection response, including specialized shelter and services, and are not detained in juvenile detention facilities.*
- 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 similar term) in the child welfare statutes is broad enough to include a trafficker who has custody or control of a child in order to bring a trafficked child into protection of child protective services.*
- 5.7 *Crime victims' compensation is specifically available to a child victim of sex trafficking or 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 arrest or criminal 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 are authorized by law for minor victims of sex trafficking or CSEC.*
- 5.11 *Statutes of limitations for civil and criminal actions for child sex trafficking or CSEC offenses are eliminated or lengthened sufficiently to allow prosecutors and victims a realistic opportunity to pursue criminal actions and legal remedies.*

**Legal Analysis:**

- 5.1 *A victim of domestic minor sex trafficking or CSEC is defined as a victim for purposes of qualifying for crime victims' compensation and other victim benefits.*

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." The definition of "victim" in Tex. Code Crim. Proc. Ann. art. 56.32(a)(11), however, does not include "trafficking of persons." 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;

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(a)(2) (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) (Online solicitation of a minor) states, “It is a defense to prosecution under this section that at the time conduct described by Subsection (b) or (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>106</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>107</sup>

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, making minors under 18 specifically immune from this offense.*

Although there is nothing in Tex. Penal Code Ann. § 43.02 (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 under this section 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].” 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.<sup>108</sup>

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<sup>106</sup> See *supra* Section 1.2 for the substantive provisions of Tex. Penal Code Ann. § 22.021.

<sup>107</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 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>108</sup> In discussing the applicability of Tex. Penal Code Ann. § 43.02 (Prostitution) against minors under the age of 17, the Texas Supreme Court recently 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).

5.3.1 Recommendation: Amend Tex. Penal Code Ann. § 43.02 (Prostitution) to specify that the offense of prostitution is inapplicable to minors under 18 years of age.

5.4 *Commercially sexually exploited children are provided with a child protection response, including specialized shelter and services, and are not detained in juvenile detention facilities.*

Tex. Fam. Code Ann. § 261.301(a) (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 Protective Services] or designated agency 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>109</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) (Emergency order authorizing possession of child) explains,

(a) Before a court may, without prior notice and a hearing, issue a temporary restraining order or attachment 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>110</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>109</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>110</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:

- (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.

- (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 Chapter 71 for the protection of the child.” Tex. Fam. Code Ann. § 262.102(c).

Under Tex. Fam. Code Ann. § 262.104(a) (Taking possession of a child in emergency without a court order), however, “If there is no time to obtain a temporary restraining order or attachment 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 “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.” Tex. Fam. Code Ann. § 262.104(a)(3), (4).

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.”

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) (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 on one or more occasions and that there is a substantial risk that the child will be the victim of sexual abuse in the future;

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).

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. Tex. Fam. Code Ann. § 262.201(b) 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 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.

Additionally, Tex. Fam. Code Ann. § 262.2015 (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.

Despite these protections, it is possible that a commercially sexually exploited child could be detained for having committed delinquent conduct or for being in need of supervision. 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). 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, and when a child runs away from home.

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." 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 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.

Additionally, 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. Tex. Fam. Code Ann. § 52.031(j).

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.

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 Youth Commission. Tex. Fam. Code Ann. § 54.04(d).

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.”

#### 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) (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 conduct that constitutes an offense of trafficking of persons under Section 20A.02(a)(7) or (8), Penal Code, prostitution under Section 43.02(a)(2), 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) defines “neglect,” in part, as follows:

(4) “Neglect” includes:

...

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

(i) 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;

...

(iv) 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

(v) 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

(C) 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 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 similar term) in the child welfare statutes is broad enough to include a trafficker who has custody or control of a child in order to bring a trafficked child into protection of child protective services.*

Tex. Fam. Code Ann. § 51.02(3) (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>111</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 include a person who exercises

<sup>111</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.”

control over a child’s movements and decisions. This would bring a trafficker within the definition and therefore allow child protective services an opportunity to respond to a report of a prostituted child.

5.7 *Crime victims’ compensation is specifically available to a child victim of sex trafficking or CSEC without regard to ineligibility factors.*

A domestic minor sex trafficking victim may be eligible to receive crime victims’ compensation, but certain criteria in the Crime Victims’ Compensation Act<sup>112</sup> may limit the ability for domestic minor sex trafficking victims to receive compensation for injuries suffered as a result of commercial sexual exploitation.

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;

Additionally, Tex. Code Crim. Proc. Ann. art. 56.34(a) (Compensation) states, “The attorney general shall award compensation for pecuniary loss<sup>113</sup> arising from criminally injurious conduct<sup>114</sup> if the attorney general is satisfied by a preponderance of the evidence that the requirements of this subchapter are met.”

Tex. Code Crim. Proc. Ann. art. 56.37(c) (Time for filing) states, “If the victim is a child,<sup>115</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.” Under Tex. Code Crim. Proc. Ann. art. 56.41(b) (Approval of claim),

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<sup>112</sup> Tex. Code Crim. Proc. Ann. arts. 56.31–.64.

<sup>113</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;
  - ...
  - (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>114</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>115</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.”

(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;

....

Furthermore, Tex. Code Crim. Proc. Ann. art. 56.45 (Denial or reduction of award) states,

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.

Under Tex. Code Crim. Proc. Ann. art. 56.42(a), (b) (Limits on compensation), however, 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 exceptions to the ineligibility criteria for child sex trafficking victims to ensure they are not excluded from receiving victim compensation.

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

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) (First version)<sup>116</sup> 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).
- (b) An application for a protective order under this chapter may be filed in a district court, juvenile court having the jurisdiction of a district court, statutory county court, or constitutional county court in:
  - (1) the county in which the applicant resides; or

<sup>116</sup> There are currently two versions of Tex. Code Crim. Proc. Ann. art. 7A.01 in effect. The first version, 2011 Tex. Gen. Laws 1, § 2.02, expressly includes the offense of minor sex trafficking, while the second version, 2011 Tex. Gen. Laws 135, § 2, does not include the offense of minor sex trafficking. See also TEXAS LEGISLATIVE COUNCIL, TEXAS LEGISLATIVE COUNCIL DRAFTING MANUAL § 8.08 (Feb. 2011), available at <http://www.tlc.state.tx.us/legal/dm/draftingmanual.pdf> (discussing the appropriate resolution for conflicting acts passed in the same session).

(2) the county in which the alleged offender resides.

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>117</sup> to testify in the presence of the defendant about an offense defined by any of the following sections of the Penal Code:

...

(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.”

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<sup>117</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

(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.

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. This article 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)

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

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>118</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>119</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.

<sup>118</sup> Tex. R. Evid. 412(a).

<sup>119</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;
  - ...
  - (15) 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.

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 arrest or criminal 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. According to Tex. Fam. Code Ann. § 58.003(a)–(c),

(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 [Violent or habitual offenders] 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.

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.

5.10 *Victim restitution and civil remedies are authorized by law for minor victims of sex trafficking or CSEC.*

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 pursuant to Tex. Code Crim. Proc. Ann. art. 42.037 (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.

(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.

....

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. All defendants who engage in trafficking are subject to joint and several liability for any damages resulting from the trafficking. Tex. Civ. Prac. & Rem. Code Ann. § 98.005.

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

Tex. Code Crim. Proc. Ann. art. 12.01(1)(B), (D), (G) (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), or § 21.02 (Continuous sexual abuse of young child or children).<sup>120</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) or § 43.05(a)(1) (Compelling prostitution). Pursuant to Tex. Code Crim. Proc. Ann. art. 12.01(6)(A), (C),<sup>121</sup> 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) or § 43.05(a)(2) 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(a)(2) (Prostitution), § 15.031(b) (Criminal solicitation of a minor), or § 43.251(b)

<sup>120</sup> There are currently two versions of Tex. Code Crim. Proc. Ann. art. 12.01(1)(G) in effect. The first version, 2011 Tex. Gen. Laws 1, § 2.03, states “trafficking of persons under Section 20A.02(a)(7) or (8), Penal Code,” while the second version, 2011 Tex. Gen. Laws 122, § 2, states “continuous trafficking of persons under Section 20A.03, Penal Code.” See also TEXAS LEGISLATIVE COUNCIL, TEXAS LEGISLATIVE COUNCIL DRAFTING MANUAL § 8.08 (Feb. 2011), available at <http://www.tlc.state.tx.us/legal/dm/draftingmanual.pdf> (discussing the appropriate resolution for conflicting acts passed in the same session).

<sup>121</sup> There are currently two versions of Tex. Code Crim. Proc. Ann. art. 12.01(6) in effect. The first version, 2011 Tex. Gen. Laws 1, states “(A) trafficking of persons under Section 20A.02(a)(5) or (6), Penal Code; (B) . . . ; (C) compelling prostitution under Section 43.05(a)(2), Penal Code.” The second version, 2011 Tex. Gen. Laws 222 states “(A) injury to a child under Section 22.04, Penal Code; or (B) bigamy under Section 25.01, Penal Code . . . .” See also TEXAS LEGISLATIVE COUNCIL, TEXAS LEGISLATIVE COUNCIL DRAFTING MANUAL § 8.08 (Feb. 2011), available at <http://www.tlc.state.tx.us/legal/dm/draftingmanual.pdf> (discussing the appropriate resolution for conflicting acts passed in the same session).

(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 (Five-year limitations period) imposes a 5 year statute of limitations “if the injury arises as a result of conduct that violates” Tex. Penal Code Ann. § 22.011 (Sexual assault), § 22.021 (Aggravated sexual assault), § 21.02 (Continuous sexual abuse of young child or children), § 20A.02 (Trafficking of persons), or § 43.05 (Compelling prostitution).

- 5.11.1 Recommendation: Amend Tex. Code Crim. Proc. Ann. art. 12.01(5) (Felonies) to add Tex. Penal Code Ann. § 43.02(a)(2) (Prostitution), § 15.031(b) (Criminal solicitation of a minor), and § 43.251(b) (Employment harmful to children) to those crimes against a child that carry a 20-year statute of limitations, beginning on the child’s 18th birthday, for prosecution.

**Legal Components:**

- 6.1 Training on human trafficking and domestic minor sex trafficking for law enforcement is statutorily mandated.
- 6.2 Single party consent to audiotaping is permitted in law enforcement investigations.
- 6.3 Domestic minor sex trafficking investigations may use wiretapping to investigate the crime.
- 6.4 Using a law enforcement decoy 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 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.

**Legal Analysis:**

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

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).”

- 6.2 Single party consent to audiotaping is permitted in law enforcement investigations.

Texas permits single party consent to audiotaping. 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 *Domestic minor sex trafficking investigations may use wiretapping to investigate the crime.*

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

...

...

(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 (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 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 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 decoy 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.

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

Pursuant to Tex. Penal Code Ann. § 33.021(a)(1) (Online solicitation of a minor), “‘Minor’ means: (A) an individual who represents himself or herself to be 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 and missing persons.” Tex. Code Crim. Proc. Ann. art. 63.003(a). Pursuant to Tex. Code Crim. Proc. Ann. art. 63.003(b) (Functions of clearinghouse), the clearinghouse is required to

(1) establish a system of intrastate communication of information relating to missing children<sup>122</sup> and missing persons;<sup>123</sup>

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<sup>122</sup> Tex. Code Crim. Proc. Ann. art. 63.001(3) defines “missing child” as

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

- (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.

Tex. Code Crim. Proc. Ann. art. 63.009(a)(1), (2) (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. 63.013(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

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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) (Definitions) defines “child” as “a person under 18 years of age.”

<sup>123</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.

flag a missing student's (under 11 years of age) records upon receiving notice from a law enforcement agency that the child is missing.

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