

## Overview of Texas's Sex Trafficking Law

### Adults

- A person age 18 or older is a victim of sex trafficking if he or she is knowingly:

#### (1)

- trafficked (“transport[ed], entice[ed], recruit[ed], harbor[ed], provide[ed], or otherwise obtain[ed]... by any means”) and
  - **Transport:** In *Ritz v. State*, the court held that driving the victim less than 10 miles from her home was sufficient to satisfy “transport” even though the case did not involve ordinary aspects of “human trafficking,” such as organized crime, prostitution, or forced labor. *Ritz v. State*, 481 S.W.3d 383, 385 (Tex. App.—Austin 2015, pet. granted)
  - **Entice:** The definition of “entice” includes to “draw on by arousing hope or desire,” “allure,” “draw into evil ways,” “lead astray,” and “tempt.” *DeLuna v. State*, 04-15-00710-CR, 2016 WL 3342142, at \*5 (Tex. App.—San Antonio June
  - **Recruit:** The definition of “recruit” includes to “hire or otherwise obtain [a person] to perform services” and “secure services of [a person].” *DeLuna*, 2016 WL 3342142, at \*5
  - **Harbor:** “Harbor” has been defined broadly enough to “encompass providing runaway child with shelter, transportation, or a home.” *Kelly v. State*, 453 S.W.3d 634, 644 (Tex. App.—Waco 2015, pet. ref'd).
- “through force, fraud, or coercion” is caused
  - Force and fraud have not been further defined by the Texas Penal Code or case law related to human trafficking.
  - **Coercion:**
    - “(1) destroying, concealing, confiscating, or withholding from a trafficked person, or threatening to destroy, conceal, confiscate, or withhold from a trafficked person, the person's actual or purported:
      - (A) government records; or
      - (B) identifying information or documents;
    - (2) causing a trafficked person, without the person's consent, to become intoxicated, as defined by Section 49.01, to a degree that impairs the person's ability to appraise the nature of the prohibited conduct or to resist engaging in that conduct; or
    - (3) withholding alcohol or a controlled substance to a degree that impairs the ability of a trafficked person with a chemical dependency, as defined by Section 462.001, Health and Safety Code, to appraise the nature of the prohibited conduct or to resist engaging in that conduct.”
- “to engage in conduct prohibited by:
  - (A) Section 43.02 (Prostitution);

- (B) Section 43.03 (Promotion of Prostitution);
  - (B-1) Section 43.031 (Online Promotion of Prostitution);
- (C) Section 43.04 (Aggravated Promotion of Prostitution);
  - (C-1) Section 43.041 (Aggravated Online Promotion of Prostitution); or
- (D) Section 43.05 (Compelling Prostitution);”

**(2)**

- "receives a benefit from participating in a venture that involves an activity [described above] or engages in sexual conduct with a child trafficked in the manner [described above]."

Tex. Pen. Code Ann. § 20A.02

**Minors**

- A child under the age of 18 is a victim of sex trafficking if he or she is knowingly:

**(1)**

- trafficked (“transport[ed], entice[ed], recruit[ed], harbor[ed], provide[ed], or otherwise obtain[ed] another person by any means” (Tex. Pen. Code Ann. § 20A.01(4)) and
- “by any means”
  - “A person is criminally responsible if the result would not have occurred but for his conduct, operating either alone or concurrently with another cause, unless the concurrent cause was clearly sufficient to produce the result and the conduct of the actor clearly insufficient.” Tex. Pen. Code Ann. § 6.04; *Kelly*, 453 S.W.3d at 641 (Tex. App.—Waco 2015, pet. ref’d)
  - “one who provides opportunity for a willing minor to engage in prostitution and influences, persuades or prevails upon her to do so has ... caused the prostitution.” *Waggoner v. State*, 897 S.W.2d 510, 512 (Tex. App.—Austin 1995, no pet.)
- “causes them to engage in conduct prohibited by:
  - (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);
    - (F-1) Section 43.031 (Online Promotion of Prostitution);
  - (G) Section 43.04 (Aggravated Promotion of Prostitution);
    - (G-1) Section 43.041 (Aggravated Online 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)”

(2)

- “receives a benefit from participating in a venture that involves an activity [described above] or engages in sexual conduct with a child trafficked in the manner [described above]”

Tex. Pen. Code Ann. § 20A.02

### **Treatment of Minors Under Sexual Offenses and Sex Trafficking Laws**

This section will discuss how children of different ages involved in sex related crimes are treated under the Texas Penal Code and how that affects their cases and eligibility to be considered victims of human trafficking. In Texas, criminal law governing sexual conduct distinguishes between three different classes of minors: those under 14, 17, and 18. First, sexual contact with a child under the age of 14 is criminalized as aggravated sexual assault irrespective of the child’s alleged willingness, which has led to the inability to prosecute this group for prostitution. Tex. Pen. Code Ann. § 22.021; *In re B.W.*, 313 S.W.3d 818, 826 (Tex. 2010). Second, if the child is at least 14 but under 17, sexual intercourse is still criminalized, but there are limited affirmative defenses available. Tex. Pen. Code Ann. § 22.021. However, Texas case law does not currently prevent them from being prosecuted for prostitution. *In re B.D.S.D.*, 289 S.W.3d 889, 899 (Tex. App.—Houston [14th Dist.] 2009, pet. denied) Lastly, some statutes, including the sex trafficking statute, consider those as old as 17 to be minors and provide additional protection for this group. Tex. Pen. Code Ann. § 20A.01; § 43.25; § 43.03; § 43.031; § 43.251; § 43.26; § 43.05.

First, sexual contact with children under the age of 14 is criminalized regardless of consent. Tex. Pen. Code Ann. § 22.021. The Texas Supreme Court has applied this to mean that those under 14 cannot consent to sexual intercourse, and therefore, cannot commit the crime of prostitution. *In re B.W.*, at 826. The Court reasoned that children do not have the mental capacity necessary to provide meaningful

consent. *Id.* at 820. Therefore, prostitutes under the age of 14 should be viewed as victims rather than offenders and should not be charged with prostitution without express legislative intent. *Id.* at 826.

The Houston Court of Appeals has applied *in re B.W.* in a way that undermines some of the protections against sex crimes involving children; however, the Texas Supreme Court has granted discretionary review. *Turley v. State*, 14-18-00235-CR, 2020 WL 1183159 (Frost, C.J., concurring)(Tex. App.—Houston [14th Dist.] Mar. 12, 2020, pet. granted). The *Turley* court held that the defendant could not be convicted of human trafficking based on compelling prostitution of a child because the 4-year-old child was unable to commit the offense. *Id.* at 46. Therefore, although children under the age of 14 may be able to challenge a prostitution conviction based on their inability to consent, their qualification as a victim of sex trafficking may be compromised. *See Id.* Depending on the circumstances, children could likely qualify as a victims if a different offense is used to satisfy that element of human trafficking, such as: Section 21.02 (Continuous Sexual Abuse of Young Child or Children); Section 21.11 (Indecency with a Child); Section 22.011 (Sexual Assault); Section 22.021 (Aggravated Sexual Assault); Section 43.25 (Sexual Performance by a Child); Section 43.251 (Employment Harmful to Children); or Section 43.26 (Possession or Promotion of Child Pornography). Tex. Pen. Code Ann. § 22.021.

Second, although 14, 15, and 16-year-olds are treated similarly to those under 14 by the Texas Penal Code § 22.021, the *in re B.W.* Court did not address this group when deciding that those who cannot consent to sexual intercourse cannot commit prostitution. *In re B.W.*, 313 S.W.3d at 820. Instead, a decision by the Houston Court of Appeals currently applies to this group. *In re B.D.S.D.*, 289 S.W.3d at 899. The *in re B.D.S.D* court held that a 16-year-old may be adjudicated for engaging in delinquent conduct by committing the offense of prostitution, and furthermore, that the state was not obligated to investigate whether an adult caused appellant by any means to commit prostitution. *Id.* However, this decision cited the Houston Court of Appeals, *in re B.W.*, that was overturned by the Texas Supreme Court. *Id.* At least one court of appeals has held that a 14-year-old cannot consent. *Smallwood v. State*,

471 S.W.3d 601, 607 (Tex. App.—Fort Worth 2015, pet. ref'd). However, that case does not address whether a 14-year-old can be convicted of prostitution. *Id.*

Lastly, although 17-year-olds are able to consent to sex, both sex trafficking and sexual offenses laws offer additional protections anyone under the age of 18. Tex. Pen. Code Ann. § 20A.01; § 43.25; § 43.03; § 43.031; § 43.251; § 43.26; § 43.05. In sex trafficking prosecutions, the state only needs to prove that the defendant caused the victim under the age of 18 to participate in the prohibited action “by any means” rather than proving the defendant used “force, fraud, or coercion.” Tex. Pen. Code Ann. § 20A.01. To evaluate whether an individual meets the “by any means” standard, courts have applied the Penal Code’s definition of causation: “A person is criminally responsible if the result would not have occurred but for his conduct, operating either alone or concurrently with another cause, unless the concurrent cause was clearly sufficient to produce the result and the conduct of the actor clearly insufficient.” Tex. Pen. Code Ann. § 6.04; *Kelly v. State*, 453 S.W.3d 634, 641 (Tex. App.—Waco 2015, pet. ref'd). Applying that definition, the *Kelly* court held that evidence that the defendant made phone calls on the victim's behalf to potential clients, translated between the victim and Spanish-speaking clients, and provided the victim with a bedroom was sufficient. *Id.* The Austin Court of Appeals provided a narrower definition by following the Oregon Court of Appeals, which stated: “one who provides opportunity for a willing minor to engage in prostitution and influences, persuades or prevails upon her to do so has ... caused the prostitution.” *Waggoner v. State*, 897 S.W.2d 510, 512 (Tex. App.—Austin 1995, no pet.) The court held that sufficient evidence was presented where the defendant provided the client, negotiated the price, gave the victim a condom, and drove her to the location. *Id.*

Additionally, 17-year-olds are considered minors for the following sexual offenses that qualify as an element of sex trafficking:

- § 43.25. Sexual Performance by a Child

- § 43.03. Promotion of Prostitution
- § 43.031. Online Promotion of Prostitution
- § 43.251. Employment Harmful to Children
- § 43.26. Possession or Promotion of Child Pornography
- § 43.05. Compelling Prostitution

Tex. Pen. Code Ann. § 43