

## **Unlawful Sexual Conduct with a 16 or 17 Year Old Factsheet**

### **I. Overview of the Crime of Unlawful Sexual Conduct with a 16 or 17 Year Old, Utah Code Annotated § 76-5-401.2 (2012).**

In general, a person commits the crime of Unlawful Sexual Conduct with a 16 or 17 Year Old if, being 10 or more years older than the minor at the time of the sexual conduct, the person has sexual intercourse with the minor or engages in a sexual act with the minor. Such conduct would be charged as a third degree felony. If the conduct of the person charged under this statute is touching the breasts of a female minor, the buttocks or genitalia of the minor, or taking “indecent liberties” with the minor, the conduct is charged as a class A misdemeanor.

Unlawful Sexual Conduct with a minor is, in essence, Utah’s statutory rape statute. It criminalizes consensual sexual conduct between a 16 or 17 year old and an adult ten years or older. It does not include the serious crimes of rape, sexual abuse or sexual assault. These are charged and prosecuted under different sections of the Utah Code.

The original intent of the statute was to protect young persons from sexual exploitation by older, more experienced persons until they reached the legal age of consent and could more maturely comprehend and appreciate the consequences of their sexual acts. However, despite any parent’s earnest desire to see their child remain sexually innocent for as long as possible, the Center for Disease Control, Youth Risk Behavior Survey reports that 47.4 percent of 9<sup>th</sup>-12<sup>th</sup> grade students have had sexual intercourse and 15.3 percent have had sexual intercourse with four or more persons during their life.

When these precocious teens turn their attention away from age-mates to adult men and women for sexual partners, the legal penalties and consequences can be overwhelming for their partner. Consensual sexual intercourse with a 16 or 17 year old is punishable by up to five years in prison for the adult partner and sexual petting is punishable by up to a year in jail.

### **II. Mistake of Age is No Defense to Sexual Conduct With 16 and 17 Year Old Minors**

It is not uncommon for these teens to have misrepresented their age to their partner. At times, there would be few indications that these teens are not the age they claim. However, mistake of age may not be allowed as a defense. Mistake of age is not allowed as a defense in the related crime of Unlawful Sexual Activity with a Minor (when the minor is 14 or 15 years old). Utah Code Ann. § 76-2-304.5. The unavailability of this defense makes this crime one of strict liability where the state does not need to prove that the defendant intended to have sexual contact with a minor, knowing or at least reckless as to his or her age. Rather, the state need only prove that the minor was 14 or 15 at the time the sexual contact occurred. *State v. Martinez*, 2002 UT 80, 52 P.3d 1276 ¶ 19. The application of strict liability for sexual conduct with 16 or 17 years olds is not firmly settled.

The lack of this defense is most unjust in those cases where the minor misrepresents his or her age. Addressing this issue, Alaska, California and New Mexico have allowed defendants to provide, by a preponderance of evidence, that the defendant had a reasonable mistake as to the age of the minor. Utah courts have previously recognized the troubling results when a minor intentionally misrepresents his or her age so that the older participant reasonably relies upon the misrepresentation. As the Utah Supreme Court noted in *State v. Elton*, 680 P.3d 727, 732 (Utah 1984), "Not to require the prosecution to prove a mens rea as to the element of age and to deny the defense of mistake of fact would subject an honestly misled party, whether adult or fellow teenager, to criminal liability brought about by a sophisticated youth who seeks to abuse the criminal law for his or her own sensual indulgences or for even more insidious purposes, such as blackmail or an attempt to avoid community or familial condemnation by denying that he or she enticed another to participate in the sexual act." However, the *Elton* decision was made just prior to the legislature's amendment to the criminal code to disallow mistake as to age as a defense. This statute was adopted in 1983.

Additional problems arise when a precocious teen prematurely shoulders adult roles of parenthood and even marriage. Utah teens may marry, providing they comply with certain conditions including parental consent and the consent of a juvenile judge, at 15 years old. Should a 16 or 17 year old be married to their sexual partner, their sexual conduct with their spouse is not considered a crime, regardless of the age of their spouse. However, even with these indications of adult lives and responsibilities, these sexually active teens retain their status of minors under the statute.

Considering the common circumstances when this crime arises, Utah should allow the defense of mistake of age as a defense for unlawful sexual conduct with a 16 or 17 year old when these teens misrepresent their age.

### III. The Utah Sex Offender Registry Requirements Treats Consensual Sexual Activity With 16 and 17 Year Olds the Same As Violent Child Molesters.

The greatest consequences to the defendant when criminally charged and convicted of Unlawful Sexual Conduct with a 16 or 17 Year Old are the requirements of the Sex Offender Registry. A conviction for this crime subjects the defendant to these requirements for 10 years. Their status as a sex offender will encompass every aspect of his or her life. Federal legislation ensures that this status will apply and be enforced nationwide. 42 U.S.C. § 16911 (2006).

A convicted offender, under this statute, is required to register twice a year on his or her birthday and six months later, or within three days of the offender changing his or her address, employment, vehicle information, or educational information. At the time of registration, the offender is required to provide the following information:

- His or her name and aliases;
- Addresses of primary and secondary residences;
- A physical description including date of birth, height, weight, eye and hair color;
- The make model year and plate number and VIN of any vehicle owned by the offender or regularly driven by the offender;
- A current photograph of offender; fingerprints and DNA;
- Telephone number;
- Internet identifiers and addresses of all websites on which the offender is registered;
- A copy of all passports or, if the offender is a not a citizen, all documents establishing the offender's immigration status;

- Professional licenses that authorize the offender to engage in an occupation or carry out a trade or business;
- Each educational institution at which the offender is employed or carries on a vocation or is a student;
- The name and address of the offender's employment;
- Any place where the offender is a volunteer; and,
- The social security number of the offender. The offender may not change his or her name while subject to the registration requirements. Utah Code Ann. § 77-41-105. The registration will require a yearly fee of \$100.00 to the department of corrections and \$25.00 to the registering agency if it is not the department of corrections Utah Code Ann. § 77-41-110.

The offender is then placed on a public registry website. His or her name and aliases, the offender's primary and secondary addresses, physical description, vehicle description including make, model, color, year and plate number, current photograph, professional licenses, educational institution affiliations, and places where the offender volunteers and the register-able offenses are all displayed on the website. Utah Code Ann. § 77-41-103.

If an offender fails to register or provides false or incomplete information, then he or she is guilty of a third degree felony and required to serve 90 days jail, at least one year of probation and the violation will extend the registration period an additional year for every year in which the offender did not comply with the registration requirements. Utah Code Ann. § 77-41-106. The offender is also required to surrender his or her driver's license and obtain a new one. If the offender does not have a driver's license, then he or she is required to obtain and maintain an identification card during the registration period. Utah Code Ann. § 53-3-806.5. These identification cards will expire annually and require the payment of a fee to obtain a new card. Utah Code Ann. § 53-3-807.

In addition to these requirements, the offender is barred from being in defined protected areas, including preschools, schools or daycares, swimming pools open to the public, community parks and playgrounds that are open to the public, including play areas in restaurants such as McDonald's. The offender is further barred from coming within 1000 feet of the victim's home. Utah Code Ann. § 77-27-21.7. Utah law also bars offenders from requesting, inviting, or soliciting a child under 14 years of age who is not the natural child of the offender to accompany the offender unless the offender verbally advises the child's parents or legal guardian that the offender is on the sex offender registry and obtains written permission from the parent or guardian to accompany the child, including specific dates and locations. Failure to comply with this provision will add five additional years to the registering requirement. Utah Code Ann. § 77-27-21.8.

After five years on the registry, a person convicted of certain crimes may petition the court where the offender was convicted for removal from the Sex Offender and Kidnap Offender Registry. However, this provision is only allowed when the offender was not more than 10 years older than the victim. While the crime of unlawful sexual conduct with a 16 or 17 year old is included in the offenses, the age requirement would disqualify individuals convicted of this charge. This narrow exception requires successful completion of treatment and proof that the offender has not committed any other crimes, excluding traffic offenses (except for DUI or reckless driving), and has completed all registration requirements. Notice and an opportunity to be heard is given to the victim, or if the victim is a minor, to the victim's parent or guardian. If the court determines that it is not contrary to the interests of the public, the court may grant the petition and allow the offender off the registry. Utah Code Ann. § 77-41-211.

A person convicted of this crime and subject to the registry will have difficulty in even the most basic aspects of their lives: finding a job, finding a place to live, associating with extended family members, maintaining family ties and support systems that are essential to prevent recidivism, etc. He or she may not walk in a public park and may even be limited in attending social gatherings at church or school. Even family activities may be limited if children are present. As a result, normal, healthy social relationships with adults that promote encourage law-abiding conduct will be adversely affected. Similarly, because sex offender registrants are not eligible for most drug treatment programs, they cannot receive the very help they need to succeed in society. And, placing persons on the registry may cause them to be targeted and harassed by others or ostracized by their neighbors and family members.

The sex offender registry was intended as a safeguard to protect the public from sexual predators that would exploit vulnerable persons among society for their own sexual gratification. However, studies submitted to the National Institute of Justice--the research, development and evaluation agency of the U.S. Department of Justice--show that the registry and notification requirements did not reduce the number of rearrests for sex offenses, and did not reduce the number of victims involved in sexual offenses. Rather, all too often, the registry simply serves as a formula for failure, further criminal activity, and broken lives.

These onerous registration requirements are especially questionable when applied to persons who may have unknowingly entered into a relationship with an underage teen. Placement on the Sex Offender Registry should not be applied categorically for these individuals. Instead, the appropriateness of this sanction should be determined at the judicial level when all parties, armed with all the facts of the case, may address the matter at sentencing.

IV. Lowering the Age Difference From Ten to Seven Years Will Further Broaden The Registration Requirements to A Large Class of Potentially Inappropriate Offenders.

The current proposal in HB 10 will exacerbate these problems and lead to many more offenders who must register as sex offenders even if they pose no danger to others. To illustrate, under current law, a person must be at least 26 years old to be found guilty of engaging in sexual relations with a 16-year old minor. But, under the proposed amendment, a 23-year old college student could be convicted of a felony for engaging in sexual relations with a 16 year old high school student after the pair meets at an on campus college party. The 23-year old would be guilty of a serious crime even though the gathering involved college-aged students, the minor represents him or herself as an adult, and the minor dresses, acts, and appears as a college student. This common scenario will ensnare unsuspecting persons who have little or no reason to question another's age. A significant number of persons could be charged and convicted of crimes when they reasonably believe that they have engaged in consensual sexual activity with an adult.

The fiscal note attached to the bill contends that under the proposed amendments six persons per year will be convicted and sent to county jails while two offenders will be fined as part of their sentence annually. These numbers do not clearly indicate whether fiscal analysts believe that six or eight additional persons will be convicted per year. Nor does the report indicate how analysts arrived at these numbers.

Regardless of the actual projected numbers, many more persons will be convicted per year if the age difference is lowered from 10 to seven years. As discussed previously, at least 50% of minors between the ages of 16 and 17 engage in sexual relations. These numbers are likely higher given that the study cited above included 14 and 15 year olds. The frequency in which minors engage in sexual conduct

suggests that far more people than six or eight will suffer criminal consequences under the suggested changes. With Utah's population at almost 3 million residents and given the young demographics in the state, far more prosecutions will likely result if the Legislature were to adopt the bill.

Additionally, the fiscal note does not address other hidden costs. For example, probation officials will be forced to supervise offenders who are convicted under the seven year age difference even though they may pose no threat of harm to anyone. Supervising these offenders, in turn, drains scarce resources from probation officers who must monitor persons who pose a danger of harm to others. In addition, court mandated sex offender treatment is already spread extremely thin. Funds that could be devoted to dangerous persons who need treatment will be wasted on offenders who need no treatment at all. Society is best served when these limited funds are used to treat and supervise serious offenders.

#### V. Final Note on Inconsistency in Utah Sex Crimes Laws

Further, HB 10 highlights an anomaly with current law that the Legislature should address. Unlike sex offenses involving 14 and 15 year old minors, the crime of engaging in sex with a 16 or 17 year old does not include a lesser included offense for offenders who are less than four years older than a minor. Under Utah Code Annotated section 76-5-401(3), a person who is less than four years older than a 14 or 15 year old may be charged with just a class B misdemeanor. But, that option is not available to a person who is less than four years older than a 16 or 17 year old. Rather, those persons are subject to a third degree felony. No apparent reason justifies this discrepancy.

#### VI. Conclusion

In the absence of a demonstrated need for lowering the age difference between adults and 16 and 17 year olds, HB 10 proposes a solution to a nonexistent problem. As shown above, existing sex offender registration requirements are ineffective. Expanding them to a class of persons who may need no supervision simply adds unnecessary costs to the criminal justice system and the state budget. Absent a problem, a new law is not needed.