

# PROTECTED INNOCENCE CHALLENGE

STATE ACTION. NATIONAL CHANGE.

## 2016 ANALYSIS AND RECOMMENDATIONS HAWAII

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

#### *Legal Components:*

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

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

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

Hawaii specifically criminalizes the sex trafficking of a minor, which includes any person under 18 years of age, regardless of the use of force, fraud, or coercion. Haw. Rev. Stat. Ann. § 712-1202<sup>2</sup> (Sex Trafficking) states,

- (1) A person commits the offense of sex trafficking if the person knowingly:
  - (a) Advances prostitution<sup>3</sup> by compelling or inducing a person by force, threat,<sup>4</sup> fraud<sup>5</sup> or intimidation to engage in prostitution, or profits from such conduct by another; or

<sup>1</sup> This report includes legislation enacted as of August 1, 2016.

<sup>2</sup> The text of Haw. Rev. Stat. § 712-1202 cited here and elsewhere in this report includes amendments made by the enactment of House Bill 1902 during the 2016 Regular Session 28th Legislature of the Hawaii Legislature (effective July 1, 2016).

(b) Advances or profits<sup>6</sup> from prostitution of a minor<sup>7</sup>; provided that with respect to the victim's age, the prosecution shall be required to prove only that the person committing the offense acted negligently.

(2) Sex trafficking is a class A felony.

A conviction under this statute is punishable as a Class A felony by an indeterminate imprisonment term of 20 years, "without the possibility of suspension of sentence or probation," and a possible fine not exceeding \$50,000.<sup>8</sup> Haw. Rev. Stat. Ann. §§ 706-659, 706-640(1)(a).

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.*

The following state laws create separate offenses of commercial sexual exploitation of children:

1. Hawaii's Child Labor Law may provide a means to prosecute individuals who commercially sexually exploit children in connection with adult entertainment. Haw. Rev. Stat. Ann. § 390-2(a) (Employment of minors under eighteen years of age) specifically prohibits minors under 18 from being "employed or permitted to work in, about, or in connection with adult entertainment or any gainful occupation<sup>9</sup> prohibited by law or which has been declared by rule of the director<sup>10</sup> to be hazardous for the minor." Haw. Rev. Stat. Ann. § 390-1 (Definitions) defines "adult entertainment" as the following:

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<sup>3</sup> Pursuant to Haw. Rev. Stat. Ann. § 712-1201(1) (Advancing prostitution; profiting from prostitution; definition of terms), "A person 'advances prostitution' if, acting other than as a prostitute or a patron of a prostitute, the person knowingly causes or aids a person to commit or engage in prostitution, procures or solicits patrons for prostitution, provides persons for prostitution purposes, permits premises to be regularly used for prostitution purposes, operates or assists in the operation of a house of prostitution or a prostitution enterprise, or engages in any other conduct designed to institute, aid, or facilitate an act or enterprise of prostitution." The text of Haw. Rev. Stat. Ann. § 712-1201 cited here and elsewhere in this report includes amendments made by the enactment of House Bill 1902 during the 2016 Regular Session, 28th Legislature of the Hawaii Legislature (effective July 1, 2016).

<sup>4</sup> Haw. Rev. Stat. Ann. § 712-1202(3) (Sex trafficking) defines "threat" as "any action listed in section 707-764(1)." See *supra* note 2.

<sup>5</sup> Haw. Rev. Stat. Ann. § 712-1202(3) (Sex trafficking) defines "fraud" as "making material false statements, misstatements, or omissions." See *supra* note 2.

<sup>6</sup> Pursuant to Haw. Rev. Stat. Ann. § 712-1201(2) (Advancing prostitution; profiting from prostitution; definition of terms), "A person 'profits from prostitution' if, acting other than as a prostitute receiving compensation for personally-rendered prostitution services, the person accepts or receives money or other property pursuant to an agreement or understanding with any person whereby the person participates or is to participate in the proceeds of prostitution activity." See *supra* note 3.

<sup>7</sup> Pursuant to Haw. Rev. Stat. Ann. § 712-1202(3) (Sex trafficking), "'Minor' means a person who is less than eighteen years of age." See *supra* note 2.

<sup>8</sup> Unless otherwise specified, the sentences of imprisonment for all felonies provided throughout this report are based on the assumption that the defendant has no prior felony convictions and that the possibility of extended imprisonment sentences pursuant to Haw. Rev. Stat. Ann. §§ 706-660.2, 706-661, 706-662 are applicable. A defendant with at least two prior felony convictions or who has "substantial income or resources not explained to be derived from a source other than criminal activity" may be subject to a greater minimum sentence of imprisonment. Haw. Rev. Stat. Ann. §§ 706-661, 706-662. The presence of aggravating factors, such as when "a person who, in the course of committing or attempting to commit a felony, causes the death or inflicts serious or substantial bodily injury upon a person who is . . . [e]ight years of age or younger" may also be used to impose extended imprisonment sentences. Haw. Rev. Stat. Ann. §§ 706-660.2.

<sup>9</sup> Haw. Rev. Stat. Ann. § 390-1(D) defines "gainful occupation" as "any activity which produces pecuniary gain for any person or persons connected therewith."

<sup>10</sup> Haw. Rev. Stat. Ann. § 390-1(D) defines "director" as the "director of labor and industrial relations."

[A]n activity to which a minor would not be able to legally gain admittance and shall include but not be limited to:

- (1) Performing of exotic entertainment;
- (2) Nude, exotic, or lap dancing;
- (3) Showing of film, video, still picture, electronic reproduction, or other visual reproduction depicting:
  - (A) Acts or simulated acts of sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation, or any sexual acts that are prohibited by law;
  - (B) Any person being touched, caressed, or fondled on the breast, buttocks, anus, or genitalia;
  - (C) Scenes wherein a person displays the anus or genitalia; or
  - (D) Scenes wherein artificial devices or inanimate objects are employed to depict, or drawings are employed to portray, any of the prohibited activities described above.

A conviction under Hawaii's Child Labor Law, Haw. Rev. Stat. Ann. § 390-1 et seq. is punishable as a misdemeanor by imprisonment up to 1 year and a possible fine<sup>11</sup> not to exceed \$2,000. Haw. Rev. Stat. Ann. §§ 390-7, 706-663, 706-640(1)(d).<sup>12</sup>

2. Pursuant to Haw. Rev. Stat. Ann. § 712-1209.1 (Solicitation of a minor for prostitution), "a person eighteen years of age or older commits the offense of solicitation of a minor for prostitution if the person intentionally, knowingly, or recklessly offers or agrees to pay a fee to a minor<sup>13</sup> or to a member of a police department, a sheriff, or a law enforcement officer who represents that person's self as a minor to engage in sexual conduct." Solicitation of a minor for prostitution is a Class C felony, punishable by up to 5 years imprisonment, a fine of no less than \$5,000 but not to exceed \$10,000, and an additional fine of \$1,000 to be deposited in the human trafficking victim services fund. Haw. Rev. Stat. Ann. §§ 712-1209.1(2), (3), 706-660(1)(b), 706-640(1)(c), and Haw. Rev. Stat. Ann. § 706-650.5(2)(c) (Human trafficking victim services fund).
3. Haw. Rev. Stat. Ann. § 707-720(1) (Kidnapping) states in part, "A person commits the offense of kidnapping if the person intentionally or knowingly restrains<sup>14</sup> another person with intent to: . . .

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<sup>11</sup> As an alternative to any set fine established by Haw. Rev. Stat. Ann. § 706-640, the court may impose a fine at, "[a]ny higher amount equal to double the pecuniary gain derived from the offense by the defendant." Haw. Rev. Stat. Ann. § 706-640(1)(f).

<sup>12</sup> Pursuant to Haw. Rev. Stat. Ann. § 706-620 (Authority to withhold sentence of imprisonment),

A defendant who has been convicted of a crime may be sentenced to a term of probation unless:

- (1) The crime is first or second degree murder or attempted first or second degree murder;
- (2) The crime is a class A felony, except class A felonies defined in chapter 712, part IV, and by section 707-702;
- (3) The defendant is a repeat offender under section 706-606.5;
- (4) The defendant is a felony firearm offender as defined in section 706-660.1(2);
- (5) The crime involved the death of or the infliction of serious or substantial bodily injury upon a child, an elder person, or a handicapped person under section 706-660.2; or
- (6) The crime is cruelty to animals where ten or more pet animals were involved under section 711-1108.5 or 711-1109.

<sup>13</sup> Pursuant to Haw. Rev. Stat. Ann. § 712-1209.1(4) (Solicitation of a minor for prostitution), "[m]inor" is defined as "a person who is less than eighteen years of age."

<sup>14</sup> Haw. Rev. Stat. Ann. § 707-700 (Definitions) defines "restrain" as "to restrict a person's movement in such a manner as to interfere substantially with the person's liberty: (1) By means of force, threat, or deception; or (2) If the

(c) Facilitate the commission of a felony<sup>15</sup> or flight thereafter; (d) Inflict bodily injury<sup>16</sup> upon that person or subject that person to a sexual offense; . . . or (g) Unlawfully obtain the labor<sup>17</sup> or services<sup>18</sup> of that person, regardless of whether related to the collection of a debt.” A conviction under this statute is punishable as a Class A felony by an indeterminate imprisonment term of 20 years, “without the possibility of suspension of sentence or probation,” and a possible fine not exceeding \$50,000. Haw. Rev. Stat. Ann. §§ 707-720(2), 706-659, 706-640(1)(a).

4. Haw. Rev. Stat. Ann. § 707-750(1) (Promoting child abuse in the first degree) criminalizes when a person “knowing or having reason to know its character and content, . . . (a) Produces<sup>19</sup> or participates in the preparation of child pornography;<sup>20</sup> (b) Produces or participates in the preparation of pornographic material that employs, uses, or otherwise contains a minor<sup>21</sup> engaging in or assisting others to engage in sexual conduct; or (c) Engages in a pornographic performance that employs, uses, or otherwise contains a minor engaging in or assisting others to engage in sexual conduct.”<sup>22</sup> Promoting child abuse in the first degree is a Class A felony punishable by an indeterminate imprisonment term of 20 years, “without the possibility of suspension of sentence or probation,” and a possible fine not to exceed \$50,000. Haw. Rev. Stat. Ann. §§ 707-750(4), 706-659, 706-640(1)(a).
5. Haw. Rev. Stat. Ann. § 712-1200(1)(b)<sup>23</sup> (Prostitution) makes it a crime when a person “[p]ays, agrees to pay, or offers to pay a fee to another to engage in sexual conduct.” Pursuant to Haw. Rev. Stat. Ann. § 712-1200(3)(b), “If the person who commits the offense under subsection (1)(b) does so in reckless disregard of the fact that the other person is a victim of sex trafficking, prostitution is a class C felony.” While not all commercially sexually exploited minors fall within Hawaii’s definition of a child sex trafficking victim,<sup>24</sup> this provision criminalizes commercial sexual exploitation of children by those who buy sex with a child

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person is under the age of eighteen or incompetent, without the consent of the relative, person, or institution having lawful custody of the person.”

<sup>15</sup> Haw. Rev. Stat. Ann. § 701-107(2) (Grades and classes of offenses) states, “A crime is a felony if it is so designated in this Code or if persons convicted thereof may be sentenced to imprisonment for a term which is in excess of one year.”

<sup>16</sup> Haw. Rev. Stat. Ann. § 707-700 defines “bodily injury” as “physical pain, illness, or any impairment of physical condition.”

<sup>17</sup> Haw. Rev. Stat. Ann. § 707-700 defines “labor” as “work of economic or financial value.”

<sup>18</sup> Haw. Rev. Stat. Ann. § 707-700 defines “services” as “a relationship between a person and the actor in which the person performs activities under the supervision of or for the benefit of the actor. Prostitution-related and obscenity-related activities as set forth in chapter 712 are forms of ‘services’ under this section. Nothing in this chapter shall be construed to legitimize or legalize prostitution.”

<sup>19</sup> Haw. Rev. Stat. Ann. § 707-750(2) defines “produces” as “to produce, direct, manufacture, issue, publish, or advertise.”

<sup>20</sup> “Child pornography” is defined as “any pornographic visual representation, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexual conduct, if: (a) The pornographic production of such visual representation involves the use of a minor engaging in sexual conduct; or (b) The pornographic visual representation has been created, adapted, or modified to appear that an identifiable minor is engaging in sexual conduct.” Haw. Rev. Stat. Ann. § 707-750(2).

<sup>21</sup> A “minor” is defined as “any person less than eighteen years old.” Haw. Rev. Stat. Ann. § 707-750(2).

<sup>22</sup> “Sexual conduct” is defined as “acts of masturbation, homosexuality, lesbianism, bestiality, sexual penetration, deviate sexual intercourse, sadomasochistic abuse, or lascivious exhibition of the genital or pubic area of a minor.” Haw. Rev. Stat. Ann. § 707-750(2).

<sup>23</sup> The text of Haw. Rev. Stat. Ann. § 712-1200 cited here and elsewhere in this report includes amendments made by the enactment of House Bill 1902 during the 2016 Regular Session 28th Legislature of the Hawaii Legislature (effective July 1, 2016).

<sup>24</sup> See *infra* Component 5.1 for full discussion on victims that are identified for core protections.

and recklessly disregard the fact that the child may be under the control of a trafficker. Violations of Haw. Rev. Stat. Ann. § 712-1200(3)(b) are punishable as a class C felony by up to 5 years imprisonment, a minimum fine of \$5,000, not to exceed \$10,000, and an additional fine of \$1,000 to be deposited into the human trafficking victim services fund. Haw. Rev. Stat. Ann. §§ 706-640(1)(c), 706-650.5(2)(c).

6. Haw. Rev. Stat. Ann. § 707-756 (Electronic enticement of a child in the first degree) states,

- (1) Any person who, using a computer or any other electronic device:
    - (a) Intentionally or knowingly communicates:
      - (i) With a minor known by the person to be under the age of eighteen years;
      - (ii) With another person, in reckless disregard of the risk that the other person is under the age of eighteen years, and the other person is under the age of eighteen years; or
      - (iii) With another person who represents that person to be under the age of eighteen years;
    - (b) With the intent to promote or facilitate the commission of a felony:
      - ....
      - (ii) that is a class A felony; or
      - (iii) that is another covered offense<sup>25</sup> as defined in section 846E-1 [Definitions; sex offenses; crime against minor],<sup>26</sup>
  - agrees to meet with the minor, or with another person who represents that person to be a minor under the age of 18 years; and
  - (c) Intentionally or knowingly travels to the agreed upon meeting place at the agreed upon meeting time,
- is guilty of electronic enticement of a child in the first degree.

Electronic enticement of a child in the first degree is a Class B felony punishable by imprisonment up to 10 years and a possible fine not to exceed \$25,000. Haw. Rev. Stat. Ann. §§ 707-756(2), 706-660(1)(a), 706-640(1)(b).

Other sexual offense laws that may apply in cases of commercial sexual exploitation of a child include the following:

1. Haw. Rev. Stat. Ann. § 707-757 (Electronic enticement of a child in the second degree), states in part,

- (1) Any person who, using a computer or any other electronic device:
  - (a) Intentionally or knowingly communicates:
    - (i) With a minor known by the person to be under the age of eighteen years;
    - (ii) With another person, in reckless disregard of the risk that the other person is under the age of eighteen years, and the other person is under the age of eighteen years; or
    - (iii) With another person who represents that person to be under the age of eighteen years; and
  - (b) With the intent to promote or facilitate the commission of a felony, agrees to meet with the minor, or with another person who represents that person to be a minor under the age of eighteen years; and
  - (c) Intentionally or knowingly travels to the agreed upon meeting place at the agreed upon meeting time;

<sup>25</sup> “Covered offense” is defined to include “[a] crime within the definition of ‘sexual offense’ in this section.” Haw. Rev. Stat. § 846E-1. See *infra* Sections 2.10, 3.5 for a discussion of the definition of “sexual offense.”

<sup>26</sup> Pursuant to Haw. Rev. Stat. Ann. § 846E-1 (Definitions; sex offenses; crime against minor), sex trafficking and several CSEC offenses fall under the definition of a covered offense. See Sections 2.8 and 3.5 for full discussion of offenses subject to sex offender registration.

is guilty of electronic enticement of a child in the second degree.

A conviction under Haw. Rev. Stat. Ann. § 707-757 is punishable as a Class C felony by imprisonment up to five years and a possible fine not exceeding \$10,000. Haw. Rev. Stat. Ann. §§ 706-660(1)(b), 706-640(1)(c), 707-757(2). Haw. Rev. Stat. Ann. § 707-757(2) states, “Electronic enticement of a child in the second degree is a class C felony. Notwithstanding any law to the contrary, if a person sentenced under this section is sentenced to probation rather than an indeterminate term of imprisonment, the terms and conditions of probation shall include, but not be limited to, a term of imprisonment of one year.”

2. Haw. Rev. Stat. Ann. § 707-730(1)(b), (c) (Sexual assault in the first degree) makes it unlawful if a “person knowingly engages in sexual penetration with another person who is less than fourteen years old” or “knowingly engages in sexual penetration with a person who is at least fourteen years old but less than sixteen years old; provided that: (i) The person is not less than five years older than the minor; and (ii) The person is not legally married to the minor.” Sexual assault in the first degree is a Class A felony punishable by an indeterminate imprisonment term of 20 years, “without the possibility of suspension of sentence or probation,” and a possible fine not to exceed \$50,000. Haw. Rev. Stat. Ann. §§ 707-730(2), 706-659, 706-640(1)(a).

3. Haw. Rev. Stat. Ann. § 707-732(1)(b), (c) (Sexual assault in the third degree) states,

A person commits the offense of sexual assault in the third degree if:

.....

(b) The person knowingly subjects to sexual contact another person who is less than fourteen years old or causes such a person to have sexual contact with the person;

(c) The person knowingly engages in sexual contact with a person who is at least fourteen years old but less than sixteen years old or causes the minor to have sexual contact with the person; provided that:

(i) The person is not less than five years older than the minor; and

(ii) The person is not legally married to the minor.

Sexual assault in the third degree is a Class C felony punishable by imprisonment up to five years and a possible fine not exceeding \$10,000. Haw. Rev. Stat. Ann. §§ 707-732(2), 706-660(1)(b), 706-640(1)(c).

4. Under Haw. Rev. Stat. Ann. § 707-733.6(1) (Continuous sexual assault of a minor under the age of fourteen years), “[a] person commits the offense of continuous sexual assault of a minor under the age of fourteen years if the person: (a) Either resides in the same home with a minor under the age of fourteen years or has recurring access to the minor; and (b) Engages in three or more acts of sexual penetration or sexual contact with the minor over a period of time, while the minor is under the age of fourteen years.” Continuous sexual assault of a minor under the age of 14 is a Class A felony punishable by an indeterminate imprisonment term of 20 years, “without the possibility of suspension of sentence or probation,” and a possible fine not to exceed \$50,000. Haw. Rev. Stat. Ann. §§ 707-733.6(4), 706-659, 706-640(1)(a).

5. Haw. Rev. Stat. Ann. § 708-893(1) (Use of a computer in the commission of a separate crime) states,

A person commits the offense of use of a computer in the commission of a separate crime if the person:

.....

(b) Knowingly uses a computer to identify, select, solicit, persuade, coerce, entice, induce, procure the victim or intended victim for the following offenses:

.....

(iii) Section 707-731, relating to sexual assault in the second degree;

- (iv) Section 707-732, relating to sexual assault in the third degree;
- (v) Section 707-733, relating to sexual assault in the fourth degree;
- (vi) Section 707-751, relating to promoting child abuse in the second degree;
- ....
- (ix) Section 712-1215, relating to promoting pornography for minors.

This crime is punishable as an offense one degree higher than the underlying crime. Haw. Rev. Stat. Ann. § 708-893(2).

*1.3 Prostitution statutes refer to the sex trafficking statute to acknowledge the intersection of prostitution with trafficking victimization.*

Hawaii’s prostitution statute does not specifically refer to the sex trafficking statute to clarify that a commercially sexually exploited minor is a victim of sex trafficking. However, Haw. Rev. Stat. Ann. § 712-1200(3)(b)<sup>27</sup> (Prostitution) refers to the sex trafficking law to provide a heightened penalty when the offender “pays, agrees to pay or offers to pay” another person to engage in sexual conduct “in reckless disregard of the fact the other person is a victim of sex trafficking.”

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

Haw. Rev. Stat. Ann. §§842-1 through 842-12 (Organized Crime) makes it unlawful:

- (1) For any person who has received any income derived, directly or indirectly, from a racketeering activity or through collection of an unlawful debt, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in the acquisition of any interest in, or the establishment or operation of, any enterprise;<sup>28</sup>
- (2) For any person through a racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise;
- (3) For any person employed by or associated with any enterprise to conduct or participate in the conduct of the affairs of the enterprise through racketeering activity or collection of an unlawful debt.

“Racketeering activity” is defined in §842-1 (Definitions) as “any act or threat involving but not limited to . . . kidnapping . . . prostitution . . . that is chargeable as a crime under state law and punishable by imprisonment for more than one year.” Thus, the CSEC offenses under Haw. Rev. Stat. Ann. § 712-1209.1 (Solicitation of a minor for prostitution), Haw. Rev. Stat. Ann. § 707-720(1) (Kidnapping) and Haw. Rev. Stat. Ann. § 712-1200(1)(b) (Prostitution), and the sex trafficking offense, Haw. Rev. Stat. Ann. § 712-1202 (Sex trafficking), should fall within the definition of “racketeering activity.”

Additional financial penalties are available under Haw. Rev. Stat. Ann. §842-3(Penalty; forfeiture of property) which states, “Any person who violates this chapter shall be guilty of a class B felony and shall forfeit to the State any interest or property acquired or maintained in violation of this chapter as provided in chapter 712A.”

<sup>27</sup> See *supra* note 23.

<sup>28</sup> Haw. Rev. Stat. Ann. § 842-1 defines “enterprise” as “any sole proprietorship, partnership, corporation, association, and any union or group of individuals associated for a particular purpose although not a legal entity.”

### ***Legal Components:***

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

- 2.1 *The state human trafficking law can be applied to buyers of commercial sex acts from a minor.*

Hawaii's core sex trafficking law, Haw. Rev. Stat. Ann. § 712-1202<sup>29</sup> (Sex trafficking), specifically exempts buyers from criminal liability. Pursuant to Haw. Rev. Stat. Ann. § 712-1202(1)(b), "A person commits the crime of sex trafficking if the person knowingly . . . advances or profits from prostitution of a minor . . . ." Haw. Rev. Stat. Ann. § 712-1201<sup>30</sup> (Advancing prostitution; profiting from prostitution; definition of terms) exempts buyers by stating that a person "[a]dvances prostitution" when that person is "acting, other than as a prostitute or patron of prostitute . . . ."

- 2.1.1 Recommendation: Amend Haw. Rev. Stat. Ann. § 712-1202 (Sex trafficking) to make the statute applicable to the actions of buyers of commercial sex with minors.

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

Pursuant to Haw. Rev. Stat. Ann. § 712-1209.1 (Solicitation of a minor for prostitution), "a person eighteen years of age or older commits the offense of solicitation of a minor for prostitution if the person intentionally, knowingly, or recklessly offers or agrees to pay a fee to a minor<sup>31</sup> or to a member of a police department, a sheriff, or a law enforcement officer who represents that person's self as a minor to engage in sexual conduct." Solicitation of a minor for prostitution is a Class C felony, punishable by up to 5 years imprisonment, a minimum fine of \$5,000, not to exceed \$10,000, and an additional fine of

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<sup>29</sup> See *supra* note 2.

<sup>30</sup> See *supra* note 3.

<sup>31</sup> See *supra* note 7.



\$1,000 to be deposited into the human trafficking victim services fund. Haw. Rev. Stat. Ann. § 706-640(1)(c), § 706-650.5(2)(c).

Buyers of sex with minors may also face penalties under Haw. Rev. Stat. Ann. § 712-1200<sup>32</sup> (Prostitution) which makes it a crime to pay, agree to pay, or offer to pay a fee to another to engage in sexual conduct and increases the penalty to a class C felony when the defendant “does so in reckless disregard of the fact that the other person is a victim of sex trafficking.” Haw. Rev. Stat. Ann. § 712-1200(3)(b). Since Hawaii’s sex trafficking law does not recognize all commercially sexually exploited children as victims of sex trafficking, only buyers who knew the child was under third party control would face the heightened penalty provided under this provision.<sup>33</sup>

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

Haw. Rev. Stat. Ann. § 712-1209.1 (Solicitation of a minor for prostitution) makes buying sex with a minor distinct from the crime of buying sex with an adult.

(1) A person eighteen years of age or older commits the offense of solicitation of a minor for prostitution if the person intentionally, knowingly, or recklessly offers or agrees to pay a fee to a minor or to a member of a police department, a sheriff, or a law enforcement officer who represents that person’s self as a minor to engage in sexual conduct.

(2) Solicitation of a minor for prostitution is a class C felony.

(3) A person convicted of committing the offense of solicitation of a minor for prostitution shall be imposed a fine of not less than \$5,000; provided that \$5,000 of the imposed fine shall be credited to the general fund.

....

(6) For purposes of this section:

“Minor” means a person who is less than eighteen years of age.

“Sexual conduct” has the same meaning as in section 712-1200(2).

While Haw. Rev. Stat. Ann. § 712-1200 (Prostitution) does not distinguish between buying sex with an adult and buying sex with a minor, it does distinguish between buying sex with a victim of sex trafficking and buying sex with someone who is not a victim of sex trafficking. While the sex trafficking law carves out special protections for minors by eliminating the need to prove force, fraud or coercion when the victim is a minor, the protection of the trafficking law only extends to commercially sexually exploited minors who are under the control of a third party because buyers are not criminalized.<sup>34</sup> Consequently, because some commercially sexually exploited minors are not victims of sex trafficking under Hawaii law, Haw. Rev. Stat. Ann. § 712-1200 does not draw a clear distinction between buying sex with adults versus minors.

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

A buyer charged under Haw. Rev. Stat. Ann. § 712-1209.1 (Solicitation of a minor for prostitution) or Haw. Rev. Stat. Ann. § 712-1200(3)(b)<sup>35</sup> (Prostitution) faces a Class C felony punishable by imprisonment up to 5 years, a minimum fine of \$5,000, not to exceed \$10,000, and an additional fine of

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<sup>32</sup> See *supra* note 23.

<sup>33</sup> See Component 5.1 for full discussion on victims that are identified for core protections.

<sup>34</sup> See Component 5.1 for full discussion on victims that are identified for core protections.

<sup>35</sup> See *supra* note 23.

\$1,000 to be deposited into the human trafficking victim services fund. Haw. Rev. Stat. Ann. §§ 712-1209.1(2), (3), 706-660(1)(b), 706-640(1)(c), 706-650.5(2)(c).<sup>36</sup>

In contrast, if the victim is under the age of 14, a conviction under the TVPA<sup>37</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>38</sup> against a minor. 18 U.S.C. § 3559(e)(1). To the extent buyers can be prosecuted under other federal CSEC laws,<sup>39</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>40</sup>

- 2.4.1 Recommendation: Amend Haw. Rev. Stat. Ann. § 712-1209.1 (Solicitation of a minor for prostitution) and the CSEC provision under Haw. Rev. Stat. Ann. § 712-1200(3)(b) (Prostitution) to increase the penalty to reflect the seriousness of these offenses.

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<sup>36</sup> Pursuant Haw. Rev. Stat. Ann. §853-4(a)(13) (Chapter not applicable; when), deferred sentence and related sentencing alternatives provided under Chapter 853 (Criminal Procedure: Deferred Acceptance of Guilty Plea, Nolo Contendere Plea) are not applicable in prosecutions of the following offenses:

- ....  
(V) Prostitution pursuant to section 712-1200(1)(b);  
(W) Street solicitation of prostitution under section 712-1207(1)(b);  
(X) Solicitation of prostitution near schools or public parks under section 712-1209;  
(Y) Habitual solicitation of prostitution under section 712-1209.5; or  
(Z) Solicitation of a minor for prostitution under section 712-1209.1

The text of Haw. Rev. Stat. Ann. § 853-4 cited here and elsewhere in this report includes amendments made by the enactment of House Bill 1902 during the 2016 Regular Session, 28th Legislature of the Hawaii Legislature (effective July 1, 2016).

<sup>37</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>38</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>39</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>40</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(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.); *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).

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

Hawaiian law separately criminalizes the use of the Internet or electronic communications to commit certain felonies, which can include luring, enticing, recruiting, or purchasing commercial sex acts with a minor. Haw. Rev. Stat. Ann. § 707-756(1) (Electronic enticement of a child in the first degree), states in part,

Any person who, using a computer or any other electronic device:

- (a) Intentionally or knowingly communicates:
  - (i) With a minor known by the person to be under the age of eighteen years;
  - (ii) With another person, in reckless disregard of the risk that the other person is under the age of eighteen years, and the other person is under the age of eighteen years; or
  - (iii) With another person who represents that person to be under the age of eighteen years;
- (b) With the intent to promote or facilitate the commission of a felony:
  - ....
  - (ii) That is a class A felony; or
  - (iii) That is another covered offense as defined in section 846E-1 [Definitions], agrees to meet with the minor, or with another person who represents that person to be a minor under the age of eighteen years; and
- (c) Intentionally or knowingly travels to the agreed upon meeting place at the agreed upon meeting time, is guilty of electronic enticement of a child in the first degree.

A conviction under Haw. Rev. Stat. Ann. § 707-756 is punishable as a Class B felony by imprisonment up to 10 years and a possible fine not to exceed \$25,000. Haw. Rev. Stat. Ann. §§ 706-660(1)(a), 706-640(1)(b), 707-756(2).

Haw. Rev. Stat. Ann. § 707-757(1) (Electronic enticement of a child in the second degree) provides another means of holding buyers accountable for using the Internet to purchase commercial sex acts with a minor, stating in part,

Any person who, using a computer or any other electronic device:

- (a) Intentionally or knowingly communicates:
  - (i) With a minor known by the person to be under the age of eighteen years;
  - (ii) With another person, in reckless disregard of the risk that the other person is under the age of eighteen years, and the other person is under the age of eighteen years;or
  - (iii) With another person who represents that person to be under the age of eighteen years; and
- (b) With the intent to promote or facilitate the commission of a felony, agrees to meet with the minor, or with another person who represents that person to be a minor under the age of eighteen years; and
- (c) Intentionally or knowingly travels to the agreed upon meeting place at the agreed upon meeting time; is guilty of electronic enticement of a child in the second degree.

A conviction under Haw. Rev. Stat. Ann. § 707-757 is punishable as a Class C felony by imprisonment up to five years and a possible fine not exceeding \$10,000. Haw. Rev. Stat. Ann. §§ 706-660(1)(b), 706-640(1)(c), 707-757(2). Haw. Rev. Stat. Ann. § 707-757(2) states, “Electronic enticement of a child in the second degree is a class C felony. Notwithstanding any law to the contrary, if a person sentenced under this section is sentenced to probation rather than an indeterminate term of imprisonment, the terms and conditions of probation shall include, but not be limited to, a term of imprisonment of one year.”

Furthermore, under Haw. Rev. Stat. Ann. § 708-893(1) (Use of a computer in the commission of a separate crime), an individual commits an offense who, among other things, “(b) Knowingly uses a computer to identify, select, solicit, persuade, coerce, entice, induce, procure . . . the victim or intended victim of the following offenses: . . . (iv) Section 707-732, relating to sexual assault in the third degree . . .” Subsection (2) states, “Use of a computer in the commission of a separate crime is an offense one class or grade, as the case may be, greater than the offense facilitated. Notwithstanding any other law to the contrary, a conviction under this section shall not merge with a conviction for the separate crime.” Haw. Rev. Stat. Ann. § 708-893(2).

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

Haw. Rev. Stat. Ann § 712-2901.1(5) (Solicitation of a minor for prostitution), which criminalizes solicitation of prostitution with a minor, revokes a mistake of age defense by providing, “The state of mind requirement for this offense is not applicable to the fact that the person solicited was a minor. A person is strictly liable with respect to the attendant circumstances that the person solicited was a minor.”

However the buyer applicable CSEC offense under Haw. Rev. Stat. Ann. § 712-1200(3)(b)<sup>41</sup> (Prostitution) does not explicitly prohibit the mistake of age defense from being raised.<sup>42</sup> Additionally, the requirement under Haw. Rev. Stat. Ann. § 712-1200(3)(b) that the defendant acted “in reckless disregard of the fact that the other person is a victim of sex trafficking,” may allow a defendant to raise mistake of age as a defense.

Haw. Rev. Stat. Ann. § 712-1202 (Sex trafficking) does not apply to buyers of sex with minors.

- 2.6.1 Recommendation: Amend Haw. Rev. Stat. Ann. § 712-1202 (Sex trafficking) and Haw. Rev. Stat. Ann. § 712-1200(3)(b) (Prostitution) to expressly prohibit a defense based on the defendant’s mistake as to the age of the minor victim.<sup>43</sup>

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

Under Haw. Rev. Stat. Ann. § 712-1209.1 (Solicitation of a minor for prostitution), buying sex with a minor is punishable as a Class C felony for all minors under 18 and is not reduced for older minors. Similarly, Haw. Rev. Stat. Ann. § 712-1200(3)(b)<sup>44</sup> (Prostitution) which criminalizes buying sex with a victim of sex trafficking does not stagger penalties based on the age of the minor victim since Haw. Rev. Stat. Ann. § 712-1202(3) (Sex trafficking) defines “minor” as under 18 for purposes of the sex trafficking law.

Both Haw. Rev. Stat. Ann. § 712-1209.1 (Solicitation of a minor for prostitution) and Haw. Rev. Stat. Ann. § 712-1200(3)(b) (Prostitution) are punishable as a Class C felony. A Class C felony is punishable by imprisonment up to 5 years, a fine not to exceed \$10,000, and an additional fine of \$1,000 to be deposited into the human trafficking victim services fund. Haw. Rev. Stat. Ann. §§ 712-1209.1(2), (3), 706-660(1)(b), 706-640(1)(c), Haw. Rev. Stat. Ann. § 706-650.5(2)(c).

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<sup>41</sup> See *supra* note 23.

<sup>42</sup> Haw. Rev. Stat. Ann. § 712-1202(1)(b) (Sex trafficking), does not prohibit a mistake of age defense and provides “that with respect to the victim’s age, the prosecution shall be required to prove only that the person committing the offense acted negligently.” This offense, however, is not applicable to buyers. See *supra* Component 2.1 and note 2.

<sup>43</sup> This recommendation is predicated upon the recommendation in Component 2.1 being simultaneously or previously enacted.

<sup>44</sup> See *supra* note 23.

- 2.7.1 Recommendation: Amend Haw. Rev. Stat. Ann. § 712-1209.1 (Solicitation of a minor for prostitution) and the CSEC offense under Haw. Rev. Stat. Ann. § 712-1200(3)(b) (Prostitution) to increase the penalty to reflect the seriousness of these offenses.

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.*

Buyers of commercial sex with minors face fines, asset forfeiture, and victim restitution under laws that are specific to CSEC. A buyer of sex with a minor or a minor who is a victim of sex trafficking faces a Class C felony under Haw. Rev. Stat. Ann. § 712-1209.1 (Solicitation of a minor for prostitution) and Haw. Rev. Stat. Ann. § 712-1200(3)(b)<sup>45</sup> (Prostitution), respectively, and is subject to a fine of not less than \$5,000, not to exceed \$10,000, and an additional fine of \$1,000 to be deposited in the human trafficking victim services fund. Haw. Rev. Stat. Ann. §§ 712-1209.1, 706-640(1)I, Haw. Rev. Stat. Ann. § 706-650.5(2)(c).

While Haw. Rev. Stat. Ann. § 706-640(1)(f) (Authorized fines) may not in most instances apply to buyers, the court may impose a fine at, “[a]ny higher amount equal to double the pecuniary gain derived from the offense by the defendant . . .” as an alternative to any set fine established by Haw. Rev. Stat. Ann. § 706-640.

The court shall order restitution, where there are verified losses. The restitution shall first be paid to the crime victim compensation commission, rather than directly to the victim. Haw. Rev. Stat. Ann. § 706-646 (Victim restitution), provides in part,

(2) The court shall order the defendant to make restitution for reasonable and verified losses suffered by the victim or victims as a result of the defendant’s offense when requested by the victim. The court shall order restitution to be paid to the crime victim compensation commission in the event that the victim has been given an award for compensation under chapter 351 [Crime victim compensation]. If the court orders payment of a fine in addition to restitution or a compensation fee, or both, the payment of restitution and compensation fee shall have priority over the payment of the fine, and payment of restitution shall have priority over payment of a compensation fee.

(3) In ordering restitution, the court shall not consider the defendant’s financial ability to make restitution in determining the amount of restitution to order. The court, however, shall consider the defendant’s financial ability to make restitution for the purpose of establishing the time and manner of payment. The court shall specify the time and manner in which restitution is to be paid. Restitution shall be a dollar amount that is sufficient to reimburse any victim fully for losses, including but not limited to:

. . . .

(b) Medical expenses; and

(c) Funeral and burial expenses incurred as a result of the crime.

(4) The restitution ordered shall not affect the right of a victim to recover under section 351-33 [Award of compensation] or in any manner provided by law; provided that any amount of restitution actually recovered by the victim under this section shall be deducted from any award under section 351-33.

Chapter 712A governs forfeiture proceedings for violations of § 842-3, as well as other offenses. Forfeiture laws shall apply, provided there is probable cause to initiate proceedings. Forfeiture laws apply to persons, including buyers of sex with minors, who commit certain offenses. Pursuant to Haw. Rev. Stat. Ann. § 712A-

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<sup>45</sup> See *supra* note 23.

4<sup>46</sup> (Covered offenses), “Offenses for which property is subject to forfeiture under this chapter” include “promoting child abuse, promoting prostitution, sex trafficking, solicitation of a minor for prostitution, habitual solicitation of prostitution, electronic enticement of a child that is chargeable as a felony offense under state law . . . .” as well as “solicitation of prostitution near schools or public parks.” Haw. Rev. Stat. Ann. § 712A-4(b), (c). Haw. Rev. Stat. Ann. § 712A-5(1)(A) (Property subject to forfeiture; exemption) states, subject to certain exceptions,

The following is subject to forfeiture:

. . . .

(b) Property used or intended for use in the commission of, attempt to commit, or conspiracy to commit a covered offense, or which facilitated or assisted such activity;

. . . .

(e) Any proceeds or other property acquired, maintained, or produced by means of or as a result of the commission of the covered offense;

(f) Any property derived from any proceeds which were obtained directly or indirectly from the commission of a covered offense;

(g) Any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over any enterprise which has been established, participated in, operated, controlled, or conducted in order to commit a covered offense;

(h) All books, records, bank statements, accounting records, microfilms, tapes, computer data, or other data which are used, intended for use, or which facilitated or assisted in the commission of a covered offense, or which document the use of the proceeds of a covered offense.

Seizure of forfeitable assets is governed by Haw. Rev. Stat. Ann §712A-6. The asset forfeiture proceeding may occur *in personam* pursuant to Haw. Rev. Stat. Ann. § 712A-13 or *in rem* pursuant to § 712A-12. Pursuant to Haw. Rev. Stat. Ann. §712A-16(3), “All forfeited property . . . shall, after payment of expenses of administration and sale, be distributed as follows:

(a) One quarter shall be distributed to the unit or units of state or local government [whose] officers or employees conducted the investigation and caused the arrest of the person whose property was forfeited or seizure of the property for forfeiture;

(b) One quarter shall be distributed to the prosecuting attorney who instituted the action producing the forfeiture; and

(c) One half shall be deposited into the criminal forfeiture fund established by this chapter.

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

Haw. Rev. Stat. Ann. § 707-752(1) (Promoting child abuse in the third degree) states,

A person commits the offense of promoting child abuse in the third degree if, knowing or having reason to know its character and content, the person possesses:

(a) Child pornography;

(b) Any book, magazine, periodical, film, videotape, computer disk, electronically stored data, or any other material that contains an image of child pornography; or

(c) Any pornographic material that employs, uses, or otherwise contains a minor engaging in or assisting others to engage in sexual conduct.

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<sup>46</sup> The text of Haw. Rev. Stat. Ann. § 712A-4 cited here and elsewhere in this report includes amendments made by the enactment of House Bill 1902 during the 2016 Regular Session 28th Legislature of the Hawaii Legislature (effective July 1, 2016).

As a Class C felony, this offense is punishable by imprisonment up to five years and a possible fine not to exceed \$10,000. Haw. Rev. Stat. Ann. §§ 706-660(1)(b), 706-640(1)(c), 707-752(4).<sup>47</sup>

Where 30 or more images, or certain types of images are possessed, Haw. Rev. Stat. Ann. § 707-751(1)I (Promoting child abuse in the second degree) provides,

A person commits the offense of promoting child abuse in the second degree if, knowing or having reason to know its character and content, the person:

....

Possesses thirty or more images of any form of child pornography, and the content of at least one image contains one or more of the following:

- (i) A minor who is younger than the age of twelve;
- (ii) Sadomasochistic abuse of a minor; or
- (iii) Bestiality involving a minor.

A conviction for promoting child abuse in the second degree is punishable as a Class B felony by imprisonment up to ten years and a possible fine not to exceed \$25,000. Haw. Rev. Stat. Ann. §§ 706-660(1)(a), 706-640(1)(b), 707-751(4).

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>

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<sup>47</sup> However, a defense to prosecution for promoting child abuse in the third degree is provided in Haw. Rev. Stat. Ann. § 707-753 (Affirmative defense to promoting child abuse), which states,

It shall be an affirmative defense to a charge of promoting child abuse in the third degree that the defendant:

- (a) Possessed less than three images of child pornography; and
- (b) Promptly and in good faith, and without retaining or allowing any person, other than a law enforcement agency, to access any image or copy thereof:
  - (i) Took reasonable steps to destroy each such image; or
  - (ii) Reported the matter to a law enforcement agency and afforded that agency access to each such image.

<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 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).

- 2.9.1 Recommendation: Amend Haw. Rev. Stat. Ann. § 707-752(1) (Promoting child abuse in the third degree) to raise the penalty to reflect the seriousness of the offense.

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

Haw. Rev. Stat. Ann. § 846E-2(a) (Registration requirements) requires a “covered offender” to register as a sex offender. A “covered offender” includes a person who has been convicted as a “sex offender” or “offender against minors.” Haw. Rev. Stat. Ann. § 846E-1. Haw. Rev. Stat. Ann. § 846E-1 (Definitions), defines “sex offender,” in part, as “[a] person who is or has been convicted . . . of a ‘sexual offense’” and defines “sexual offense” to include sex trafficking, the buyer applicable CSEC offense of solicitation of a minor for prostitution and non-commercial sex offenses that that may apply to buyers of sex with children.

Pursuant to Haw. Rev. Stat. Ann. § 846E-1,

“Sexual offense” means an offense that is:

- (1) Set forth in section 707-730(1), 707-731(1), 707-732(1), 707-733(1)(a), 707-733.6, 712-1202(1) [Sex trafficking] . . . but excludes conduct that is criminal only because of the age of the victim, as provided in section 707-730(1)(b), or section 707-732(1)(b) if the perpetrator is under the age of eighteen;

....

- (3) An act that consists of:

- (A) Criminal sexual conduct toward a minor, including but not limited to an offense set forth in section 707-759 [Indecent electronic display to a child];
- (B) Solicitation of a minor who is less than fourteen years old to engage in sexual conduct;
- (C) Use of a minor in a sexual performance;
- (D) Production, distribution, or possession of child pornography chargeable as a felony under section 707-750 [Promoting child abuse in the first degree], 707-751 [Promoting child abuse in the second degree], or 707-752 [Promoting child abuse in the third degree];
- (E) Electronic enticement of a child chargeable under section 707-756 [Electronic enticement of a child in the first degree] or 707-757 [Electronic enticement of a child in the second degree] if the offense was committed with the intent to promote or facilitate the commission of another covered offense as defined in this section; or
- (F) Solicitation of a minor for prostitution in violation of section 712-1209.1;

....

- (5) An act, as described in chapter 705, that is an attempt, criminal solicitation, or criminal conspiracy to commit one of the offenses designated in paragraphs (1) through (4);
- (6) A criminal offense that is comparable to or that exceeds a sexual offense as defined in paragraphs (1) through (5); or
- (7) Any federal, military, out-of-state, tribal, or foreign conviction for any offense that under the laws of this State would be a sexual offense as defined in paragraphs (1) through (6).



### *Legal Components:*

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

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

A violation of Haw. Rev. Stat. Ann. § 712-1202<sup>51</sup> (Sex trafficking) is a Class A felony which is punishable by an indeterminate imprisonment term of 20 years, “without the possibility of suspension of sentence or probation,” and a possible fine not exceeding \$50,000. Haw. Rev. Stat. Ann. §§ 712-1202, 706-659, 706-640(1)(a).

A violation of Haw. Rev. Stat. Ann. § 390-7 (Child labor crime) is a misdemeanor punishable by imprisonment up to 1 year and a possible fine not to exceed \$2,000. Haw. Rev. Stat. Ann. §§ 706-663, 706-640(1)(d).

A violation of Haw. Rev. Stat. Ann. § 707-720(1) (Kidnapping) with intent to subject the victim to a sexual offense is a Class A felony punishable by imprisonment for an indeterminate term of twenty years, “without the possibility of suspension of sentence or probation,” and a possible fine not to exceed \$50,000. Haw. Rev. Stat. Ann. §§ 706-659, 706-640(1)(a), 707-720(1)(d). However, if the defendant voluntarily releases the victim, “alive and not suffering from serious or substantial bodily injury, in a safe place prior to trial,” a conviction for kidnapping is punishable as a Class B felony by imprisonment up to ten years and a possible fine not to exceed \$25,000. Haw. Rev. Stat. Ann. §§ 706-660(1)(a), 706-640(1)(b), 707-720(3).

Exploiting a minor to create child pornography under Haw. Rev. Stat. Ann. § 707-750 (Promoting child abuse in the first degree) is punishable as a Class A felony by an indeterminate imprisonment term of 20 years, “without the possibility of suspension of sentence or probation,” and a possible fine not to exceed \$50,000. Haw. Rev. Stat. Ann. §§ 706-659, 706-640(1)(a), 707-750(4).

A conviction under Haw. Rev. Stat. Ann. § 707-756 (Electronic enticement of a child in the first degree) is punishable as a Class B felony by imprisonment up to ten years and a possible fine not to exceed \$25,000. Haw. Rev. Stat. Ann. §§ 706-660(1)(a), 706-640(1)(b), 707-756(2). A conviction under Haw. Rev. Stat. Ann. § 707-757 (Electronic enticement of a child in the second degree) is punishable as a Class C felony by imprisonment up to five years and a possible fine not to exceed \$10,000. Haw. Rev. Stat. Ann. §§ 706-660(1)(b), 706-640(1)(c), 707-757(2).

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<sup>51</sup> See *supra* note 2.

Traffickers may be found guilty of the sexual offense of Haw. Rev. Stat. Ann. § 707-733.6(1) (Continuous sexual assault of a minor under the age of fourteen years). A violation of § 707-733.6(1) is punishable as a Class A felony by an indeterminate imprisonment term of 20 years, “without the possibility of suspension of sentence or probation,” and a possible fine not exceeding \$50,000. Haw. Rev. Stat. Ann. §§ 706-659, 706-640(1)(a), 707-733.6(4).

When a computer is used to commit a crime as specified in Haw. Rev. Stat. Ann. § 708-893(1) (Use of a computer in the commission of a separate crime), the punishment of the underlying crime is increased by one degree. Haw. Rev. Stat. Ann. § 708-893(2).

Traffickers might also be convicted for violating of Haw. Rev. Stat. Ann. § 712-1218(1) (Failure to maintain age verification records of sexual performers), which states,

A person commits the offense of failure to maintain age verification records of sexual performers if the person knowingly produces any pornographic performance, book, magazine, periodical, film, videotape, computer image, or other matter that contains one or more pornographic visual depictions made after June 30, 2002, of sexual conduct and:

- (a) Knowingly fails to create and maintain age verification records for each sexual performer;
- (b) Knowingly makes or causes to be made any false entry into the age verification records of sexual performers required by this section; or
- (c) Knowingly fails to produce the age verification records of sexual performers required by this section, upon request by a law enforcement officer for the purpose of verifying the age of a sexual performer.

A conviction under this statute is a Class C felony conviction punishable by imprisonment up to five years and a possible fine not exceeding \$10,000. Haw. Rev. Stat. Ann. §§ 706-660(1)(b), 706-640(1)(c), 712-1218(2).

Haw. Rev. Stat. Ann. § 706-660.2 (Sentence of imprisonment for offenses against children, elder persons, or handicapped persons) provides enhanced minimum sentences for offenses against children when the child is 8 years old or younger, the defendant knew or reasonably should have known the child’s age, and the crime committed is a felony. Extended imprisonment sentences are also imposed pursuant to Haw. Rev. Stat. Ann. § 706-661 (Extended terms of imprisonment) if any of the criteria in Haw. Rev. Stat. Ann. § 706-662 (Criteria for extended terms of imprisonment), such as committing certain felonies that cause serious or substantial bodily harm to a minor under the age of 9, when the offender knew or had reason to know of the victim’s age, are satisfied. Haw. Rev. Stat. Ann. § 706-662(5). Other relevant criteria applicable to traffickers include proving that the defendant is a “professional criminal” through the following evidence: “(a) The circumstances of the crime show that the defendant has knowingly engaged in criminal activity as a major source of livelihood; or (b) The defendant has substantial income or resources not explained to be derived from a source other than criminal activity.” Haw. Rev. Stat. Ann. § 706-662(2).

A trafficker “who believes the value or aggregate value of the property transported, transmitted, transferred, received, or acquired is \$8,000 or more; or . . . [t]he value or the aggregate value of the property transported, transmitted, transferred, received, or acquired is \$8,000 or more” may be penalized under Hawaii’s Money Laundering Act. Haw. Rev. Stat. Ann. § 708A-3(4)(a), (b). Haw. Rev. Stat. Ann. § 708A-3 (Money laundering; criminal penalty) states,

- (1) It is unlawful for any person:
  - (a) Who knows that the property involved is the proceeds of some form of unlawful activity,<sup>52</sup> to knowingly transport, transmit, transfer, receive, or acquire the property or to conduct a transaction involving the property, when, in fact, the property is the proceeds of specified unlawful activity<sup>53</sup>:
    - (i) With the intent to promote the carrying on of specified unlawful activity; or
    - (ii) Knowing that the transportation, transmission, transfer, receipt, or acquisition of the property or the transaction or transactions is designed in whole or in part to:
      - (A) Conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or
      - (B) Avoid a transaction reporting requirement under state or federal law;
  - (b) Who knows that the property involved in the transaction is the proceeds of some form of unlawful activity, to knowingly engage in the business of conducting, directing, planning, organizing, initiating, financing, managing, supervising, or facilitating transactions involving the property that, in fact, is the proceeds of specified unlawful activity:
    - (i) With the intent to promote the carrying on of specified unlawful activity; or
    - (ii) Knowing that the business is designed in whole or in part to:
      - (A) Conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or
      - (B) Avoid a transaction reporting requirement under state or federal law; or
  - (c) To knowingly conduct or attempt to conduct a financial transaction involving property represented to be the proceeds of specified unlawful activity, or property used to conduct or facilitate specified unlawful activity, with the intent to:
    - (i) Promote the carrying on of specified unlawful activity; or
    - (ii) Conceal or disguise the nature, the location, the source, the ownership, or the control of property believed to be the proceeds of specified unlawful activity.
- ....
- (5) A person who violates subsection (1):
  - (a) Is guilty of a class C felony where the value or aggregate value of the property transported, transmitted, transferred, received, or acquired is less than \$10,000, and may be fined not more than \$16,000 or twice the value of the property involved, whichever is greater; or
  - (b) Is guilty of a class B felony where the value or aggregate value of the property transported, transmitted, transferred, received, or acquired is \$10,000 or more, and may be fined not more than \$25,000 or twice the value of the property involved, whichever is greater.

In comparison, if the victim is under the age of 14, a conviction under the Trafficking Victims Protection Act (TVPA)<sup>54</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>55</sup> against a minor. 18 U.S.C. § 3559(e)(1).

<sup>52</sup> Haw. Rev. Stat. Ann. § 708A-2 defines “unlawful activity” as “any act that is chargeable or indictable as an offense of any degree or class under the laws of this State or under federal law or, if the act occurred in a jurisdiction other than this State, would be chargeable or indictable as an offense of any degree or class under the laws of this State or under federal law.”

<sup>53</sup> Haw. Rev. Stat. Ann. § 708A-2 defines “specified unlawful activity” as “any act, or series of acts, that: (a) Constitutes a felony under the laws of this State; . . . (c) Involves an act or acts constituting the offense of . . . prostitution . . . (d) If occurring outside this State, would constitute the offense of . . . prostitution . . . .”

<sup>54</sup> See *supra* note 37.

<sup>55</sup> See *supra* note 38.

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

Creating child pornography is a crime under Haw. Rev. Stat. Ann. § 707-750(1) (Promoting child abuse in the first degree), which states,

A person commits the offense of promoting child abuse in the first degree if, knowing or having reason to know its character and content, the person:

- (a) Produces or participates in the preparation of child pornography;<sup>56</sup>
- (b) Produces or participates in the preparation of pornographic material that employs, uses, or otherwise contains a minor engaging in or assisting others to engage in sexual conduct; or
- (c) Engages in a pornographic performance that employs, uses, or otherwise contains a minor engaging in or assisting others to engage in sexual conduct.

A conviction for promoting child abuse in the first degree is punishable as a Class A felony by imprisonment for an indeterminate term of 20 years, “without the possibility of suspension of sentence or probation,” and a possible fine not exceeding \$50,000. Haw. Rev. Stat. Ann. §§ 706-659, 706-640(1)(a).

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>57</sup> against a minor. 18 U.S.C. § 3559(e)(1). Additionally, a federal conviction for distribution of child pornography<sup>58</sup> is generally punishable by imprisonment for 5–20 years and a fine not to exceed \$250,000.<sup>59</sup> Subsequent convictions, however, are punishable by imprisonment up to 40 years and a fine not to exceed \$250,000.<sup>60</sup>

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

Haw. Rev. Stat. Ann. § 707-756(1) (Electronic enticement of a child in the first degree) states,

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<sup>56</sup> See *supra* note 20 for the definition of child pornography.

<sup>57</sup> See *supra* note 38.

<sup>58</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>59</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>60</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).

- (1) Any person who, using a computer or any other electronic device:
  - (a) Intentionally or knowingly communicates:
    - (i) With a minor known by the person to be under the age of eighteen years;
    - (ii) With another person, in reckless disregard of the risk that the other person is under the age of eighteen years, and the other person is under the age of eighteen years; or
    - (iii) With another person who represents that person to be under the age of eighteen years;
  - (b) With the intent to promote or facilitate the commission of a felony:
    - ....
    - (ii) That is a class A felony; or
    - (iii) That is another covered offense as defined in section 846E-1, agrees to meet with the minor, or with another person who represents that person to be a minor under the age of eighteen years; and
  - (c) Intentionally or knowingly travels to the agreed upon meeting place at the agreed upon meeting time, is guilty of electronic enticement of a child in the first degree.

A conviction under Haw. Rev. Stat. Ann. § 707-756 is punishable as a Class B felony by imprisonment up to ten years and a possible fine not exceeding \$25,000. Haw. Rev. Stat. Ann. §§ 707-756(2), 706-660(1)(a), 706-640(1)(b). Haw. Rev. Stat. Ann. § 707-756(2) states, “Electronic enticement of a child in the first degree is a class B felony. Notwithstanding any law to the contrary, a person convicted of electronic enticement of a child in the first degree shall be sentenced to an indeterminate term of imprisonment as provided by law.”

Haw. Rev. Stat. Ann. § 707-757 (Electronic enticement of a child in the second degree) states,

- (1) Any person who, using a computer or any other electronic device:
  - (a) Intentionally or knowingly communicates:
    - (i) With a minor known by the person to be under the age of eighteen years;
    - (ii) With another person, in reckless disregard of the risk that the other person is under the age of eighteen years, and the other person is under the age of eighteen years; or
    - (iii) With another person who represents that person to be under the age of eighteen years; and
  - (b) With the intent to promote or facilitate the commission of a felony, agrees to meet with the minor, or with another person who represents that person to be a minor under the age of eighteen years; and
  - (c) Intentionally or knowingly travels to the agreed upon meeting place at the agreed upon meeting time; is guilty of electronic enticement of a child in the second degree.

A conviction under Haw. Rev. Stat. Ann. § 707-757 is punishable as a Class C felony by imprisonment up to 5 years and a possible fine not exceeding \$10,000. Haw. Rev. Stat. Ann. §§ 706-660(1)(b), 706-640(1)(c), 707-757(2). Haw. Rev. Stat. Ann. § 707-757(2) states, “Electronic enticement of a child in the second degree is a class C felony. Notwithstanding any law to the contrary, if a person sentenced under this section is sentenced to probation rather than an indeterminate term of imprisonment, the terms and conditions of probation shall include, but not be limited to, a term of imprisonment of one year.”

Furthermore, under Haw. Rev. Stat. Ann. § 708-893(1) (Use of a computer in the commission of a separate crime), an individual commits an offense who, among other things, “(b) Knowingly uses a computer to identify, select, solicit, persuade, coerce, entice, induce, procure . . . the victim or intended victim of the following offenses: . . . (iv) Section 707-732, relating to sexual assault in the third degree . . . .” Subsection (2) states, “Use of a computer in the commission of a separate crime is an offense one class or grade, as the case may be,

greater than the offense facilitated. Notwithstanding any other law to the contrary, a conviction under this section shall not merge with a conviction for the separate crime.” Haw. Rev. Stat. Ann. § 708-893(2).

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

Financial penalties for traffickers include fines, asset forfeiture, and victim restitution. A trafficker convicted under Haw. Rev. Stat. Ann. § 712-1202<sup>61</sup> (Sex trafficking) commits a Class A felony with possible fines that may not exceed \$50,000. Haw. Rev. Stat. Ann. §§ 712-1202, 706-659, 706-640(1)(a).

Additionally, possible fines for exploiting a minor to create child pornography under Haw. Rev. Stat. Ann. § 707-750 (Promoting child abuse in the first degree) may not exceed \$50,000. Haw. Rev. Stat. Ann. §§ 707-750(4), 706-640(1)(a). Haw. Rev. Stat. Ann. § 707-720 (Kidnapping) also carries a possible fine not to exceed \$50,000. Haw. Rev. Stat. Ann. §§ 707-720(2), 706-640(1)(a).

Traffickers face fines for using computers to entice a minor under Haw. Rev. Stat. Ann. § 707-756 (Electronic enticement of a child in the first degree) and § 707-757 (Electronic enticement of a child in the second degree) of up to \$25,000 and \$10,000 respectively. Haw. Rev. Stat. Ann. §§ 707-756(2), 707-757(2), 706-640(1)(b), 706-640(1)(c). Haw. Rev. Stat. Ann. § 390-7 (Child labor crime) carries a possible fine not to exceed \$2,000. Haw. Rev. Stat. Ann. §§ 390-7, 706-640(1)(d).

As an alternative to any set fine established by Haw. Rev. Stat. Ann. § 706-640, the court may impose a fine at, “[a]ny higher amount equal to double the pecuniary gain derived from the offense by the defendant . . . .” Haw. Rev. Stat. Ann. § 706-640(1)(f).

The court shall order restitution, where there are verified losses. The restitution shall first be paid to the crime victim compensation commission, rather than directly to the victim. Haw. Rev. Stat. Ann. § 706-646 (Victim restitution), provides in part,

. . . .

(2) The court shall order the defendant to make restitution for reasonable and verified losses suffered by the victim or victims as a result of the defendant’s offense when requested by the victim. The court shall order restitution to be paid to the crime victim compensation commission in the event that the victim has been given an award for compensation under chapter 351 [Crime victim compensation]. If the court orders payment of a fine in addition to restitution or a compensation fee, or both, the payment of restitution and compensation fee shall have priority over the payment of the fine, and payment of restitution shall have priority over payment of a compensation fee.

(3) In ordering restitution, the court shall not consider the defendant’s financial ability to make restitution in determining the amount of restitution to order. The court, however, shall consider the defendant’s financial ability to make restitution for the purpose of establishing the time and manner of payment. The court shall specify the time and manner in which restitution is to be paid. Restitution shall be a dollar amount that is sufficient to reimburse any victim fully for losses, including but not limited to:

. . . .

(b) Medical expenses; and

(c) Funeral and burial expenses incurred as a result of the crime.

(4) The restitution ordered shall not affect the right of a victim to recover under section 351-33 [Award of compensation] or in any manner provided by law; provided that any amount of restitution actually recovered by the victim under this section shall be deducted from any award under section 351-33.

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<sup>61</sup> See *supra* note 2.

General forfeiture laws also apply to traffickers. Forfeiture shall apply, provided there is probable cause to initiate proceedings. Pursuant to Haw. Rev. Stat. Ann. § 712A-4<sup>62</sup> (Covered offenses), “[o]ffenses for which property is subject to forfeiture under this chapter [Forfeiture]” include “kidnapping . . . promoting child abuse, promoting prostitution, sex trafficking, solicitation of a minor for prostitution, habitual solicitation of prostitution, or electronic enticement of a child that is chargeable as a felony offense under state law, . . . promoting pornography, promoting pornography for minors, or solicitation of prostitution near schools or public parks, which is chargeable as a felony or misdemeanor offense, but not as a petty misdemeanor, under state law.” Haw. Rev. Stat. Ann. § 712A-4(b), (c). Haw. Rev. Stat. Ann. § 712A-5(1) (Property subject to forfeiture; exemption) states, subject to certain exceptions,

The following is subject to forfeiture:

- (a) Property described in a statute authorizing forfeiture;
- (b) Property used or intended for use in the commission of, attempt to commit, or conspiracy to commit a covered offense, or which facilitated or assisted such activity;
- . . . .
- (e) Any proceeds or other property acquired, maintained, or produced by means of or as a result of the commission of the covered offense;
- (f) Any property derived from any proceeds which were obtained directly or indirectly from the commission of a covered offense;
- (g) Any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over any enterprise which has been established, participated in, operated, controlled, or conducted in order to commit a covered offense;
- (h) All books, records, bank statements, accounting records, microfilms, tapes, computer data, or other data which are used, intended for use, or which facilitated or assisted in the commission of a covered offense, or which document the use of the proceeds of a covered offense.

Seizure of forfeitable assets is governed by Haw. Rev. Stat. Ann §712A-6. The asset forfeiture proceeding may occur *in personam* pursuant to Haw. Rev. Stat. Ann. §712A-13 or *in rem* pursuant to § 712A-12. Pursuant to Haw. Rev. Stat. Ann. §712A-16, “All forfeited property . . . shall, after payment of expenses of administration and sale, be distributed as follows:

- (a) One quarter shall be distributed to the unit or units of state or local government [whose] officers or employees conducted the investigation and caused the arrest of the person whose property was forfeited or seizure of the property for forfeiture;
- (b) One quarter shall be distributed to the prosecuting attorney who instituted the action producing the forfeiture; and
- (c) One half shall be deposited into the criminal forfeiture fund established by this chapter.

A trafficker may be convicted under the Money Laundering Act of a Class C felony. Haw. Rev. Stat. Ann. § 708A-3(5) (Money laundering; criminal penalty) states,

A person who violates subsection (1):

- (a) Is guilty of a class C felony where the value or aggregate value of the property transported, transmitted, transferred, received, or acquired is less than \$10,000, and may be fined not more than \$16,000 or twice the value of the property involved, whichever is greater; or
- (b) Is guilty of a class B felony where the value or aggregate value of the property transported,

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<sup>62</sup> See *supra* note 46.

transmitted, transferred, received, or acquired is \$10,000 or more, and may be fined not more than \$25,000 or twice the value of the property involved, whichever is greater.

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

Haw. Rev. Stat. Ann. § 846E-2 (Registration requirements) requires the “covered offender” to register as sex offenders. A “covered offender” includes individuals who have been convicted as a “sex offender” or as an “offender against minors.” Haw. Rev. Stat. Ann. § 846E-1. Haw. Rev. Stat. Ann. § 846E-1 (Definitions) defines “sex offender,” in part, as “[a] person who is or has been convicted . . . of a ‘sexual offense’” and defines “sexual offense” to include Haw. Rev. Stat. Ann. § 712-1202(1) (Sex trafficking) .

Pursuant to Haw. Rev. Stat. Ann. § 846E-1,

“Sexual offense” means an offense that is:

- (1) Set forth in section 707-730(1), 707-731(1), 707-732(1), 707-733(1)(a), 707-733.6, 712-1202(1) [Sex trafficking] . . . but excludes conduct that is criminal only because of the age of the victim, as provided in section 707-730(1)(b), or section 707-732(1)(b) if the perpetrator is under the age of eighteen;
- (2) An act defined in section 707-720 [Kidnapping] if the charging document for the offense for which there has been a conviction alleged intent to subject the victim to a sexual offense;
- (3) An act that consists of:
  - (A) Criminal sexual conduct toward a minor, including but not limited to an offense set forth in section 707-759 [Indecent electronic display to a child];
  - (B) Solicitation of a minor who is less than fourteen years old to engage in sexual conduct;
  - (C) Use of a minor in a sexual performance;
  - (D) Production, distribution, or possession of child pornography chargeable as a felony under section 707-750 [Promoting child abuse in the first degree], 707-751 [Promoting child abuse in the second degree], or 707-752 [Promoting child abuse in the third degree];
  - (E) Electronic enticement of a child chargeable under section 707-756 [Electronic enticement of a child in the first degree] or 707-757 [Electronic enticement of a child in the second degree] if the offense was committed with the intent to promote or facilitate the commission of another covered offense as defined in this section; or
  - (F) Solicitation of a minor for prostitution in violation of section 712-1209.1.
- . . . .
- (5) An act, as described in chapter 705, that is an attempt, criminal solicitation, or criminal conspiracy to commit one of the offenses designated in paragraphs (1) through (4);
- (6) A criminal offense that is comparable to or that exceeds a sexual offense as defined in paragraphs (1) through (5); or
- (7) Any federal, military, out-of-state, tribal, or foreign conviction for any offense that under the laws of this State would be a sexual offense as defined in paragraphs (1) through (6).

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

Hawaii’s law relating to the termination of parental rights does not expressly list promoting prostitution or sexual offenses as grounds for terminating parental rights but the definition of aggravated circumstances for which parental rights may be terminated includes a parent required to register as a sex offender under federal law.



Haw. Rev. Stat. Ann. § 571-61(b) (Termination of parental rights; petition) states in part,

Involuntary termination.

(1) The family courts may terminate the parental rights in respect to any child as to any legal parent:

....

(E) Whose child has been removed from the parent's physical custody pursuant to legally authorized judicial action under section 571-11(9) [For the protection of any child under Hawaii's Child Protective Act], and who is found to be unable to provide now and in the foreseeable future the care necessary for the well-being of the child;

....

(5) The family courts may terminate the parental rights in respect to any child of any natural parent upon a finding that the natural parent has been convicted in a court of competent jurisdiction in any state of rape or sexual assault and the child was conceived as a result of the rape or sexual assault perpetrated by the parent whose rights are sought to be terminated; provided that:

(A) The termination of parental rights shall not affect the obligation of the convicted natural parent to support the child;

(B) The court may order the convicted natural parent to pay child support;

(C) This paragraph shall not apply if subsequent to the date of conviction, the convicted natural parent and custodial natural parent cohabit and establish a mutual custodial environment for the child; and

(D) The custodial natural parent may petition the court to reinstate the convicted natural parent's parental rights terminated pursuant to this paragraph.

Pursuant to Haw. Rev. Stat. Ann. § 587A-28 (Return hearing), the court shall terminate parental rights if the court determines during child protective proceedings that aggravated circumstances are present. Haw. Rev. Stat. Ann § 587A-4 includes as aggravated circumstances, "a parent [who] is required to register with a sex offender registry under section 113(a) of the Adam Walsh Child Protection and Safety Act of 2006, title 42 United States Code section 16913(a)."

- 3.6.1 Recommendation: Amend Haw. Rev. Stat. Ann. § 571-61 to expressly include convictions under Haw. Rev. Stat. Ann. § 712-1202 (Sex trafficking) and Hawaii's CSEC laws as grounds for terminating parental rights.

### *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.*
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### *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.*

Hawaii's sex trafficking statute holds facilitators criminally liable for aiding or facilitating sex trafficking of a child. Haw. Rev. Stat. Ann. § 712-1202(1)(b)<sup>63</sup> (Sex trafficking) makes it a crime when a person knowingly "advances or "profits from prostitution of a minor . . ." Pursuant to Haw. Rev. Ann. Stat § 712-1201(1)<sup>64</sup> (Advancing prostitution; profiting from prostitution; definition of terms):

A person 'advances prostitution' if, acting other than as a prostitute or a patron of a prostitute, the person knowingly causes or aids a person to commit or engage in prostitution, procures or solicits patrons for prostitution, provides persons for prostitution purposes, permits premises to be regularly used for prostitution purposes, operates or assists in the operation of a house of prostitution or a prostitution enterprise, or engages in any other conduct designed to institute, aid, or facilitate an act or enterprise of prostitution.

Haw. Rev. Stat. Ann. § 706-660.2 (Sentence of imprisonment for offenses against children, elder persons, or handicapped persons) provides enhanced minimum sentences for offenses against children when the child is 8 years old or younger, the defendant knew or reasonably should have known the child's age, and the crime committed is a felony. Extended imprisonment sentences are also imposed pursuant to Haw. Rev. Stat. Ann. § 706-661 (Extended terms of imprisonment) if any of the criteria in Haw. Rev. Stat. Ann. § 706-662 (Criteria for extended terms of imprisonment) are satisfied, such as committing certain felonies that cause serious or substantial bodily harm to a minor under the age of 9 when the offender knew or had reason to know of the victim's age. Haw. Rev. Stat. Ann. § 706-662(5). Other relevant criteria applicable to facilitators include proving that the defendant is a "professional criminal" through the following evidence: "(a) The circumstances of the crime show that the defendant has knowingly engaged in criminal activity as a major source of livelihood; or (b) The defendant has substantial income or resources not explained to be derived from a source other than criminal activity." Haw. Rev. Stat. Ann. § 706-662(2).

A facilitator "who believes the value or aggregate value of the property transported, transmitted, transferred, received, or acquired is \$8,000 or more; or . . . [t]he value or the aggregate value of the property transported, transmitted, transferred, received, or acquired is \$8,000 or more" may be penalized under Hawaii's Money Laundering Act.<sup>65</sup> Haw. Rev. Stat. Ann. § 708A-3(4)(a), (b).

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<sup>63</sup> See *supra* note 2.

<sup>64</sup> See *supra* note 3.

<sup>65</sup> See discussion of relevant provisions *supra* Component 3.1.

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.*

A facilitator convicted under Haw. Rev. Stat. Ann. § 712-1202<sup>66</sup> (Sex trafficking) may be assessed a possible fine up to \$ 50,000 as a Class A felony. Haw. Rev. Stat. Ann. §§ 712-1202, 706-659, 706-640(1)(a). Additionally, the court shall order restitution, where there are verified losses. The restitution shall first be paid to the crime victim compensation commission, rather than direct to the victim. Haw. Rev. Stat. Ann. § 706-646 (Victim restitution), provides in part,

....

(2) The court shall order the defendant to make restitution for reasonable and verified losses suffered by the victim or victims as a result of the defendant's offense when requested by the victim. The court shall order restitution to be paid to the crime victim compensation commission in the event that the victim has been given an award for compensation under chapter 351 [Crime victim compensation]. If the court orders payment of a fine in addition to restitution or a compensation fee, or both, the payment of restitution and compensation fee shall have priority over the payment of the fine, and payment of restitution shall have priority over payment of a compensation fee.

(3) In ordering restitution, the court shall not consider the defendant's financial ability to make restitution in determining the amount of restitution to order. The court, however, shall consider the defendant's financial ability to make restitution for the purpose of establishing the time and manner of payment. The court shall specify the time and manner in which restitution is to be paid. Restitution shall be a dollar amount that is sufficient to reimburse any victim fully for losses, including but not limited to:

....

(b) Medical expenses; and

(c) Funeral and burial expenses incurred as a result of the crime.

(4) The restitution ordered shall not affect the right of a victim to recover under section 351-33 [Award of compensation] or in any manner provided by law; provided that any amount of restitution actually recovered by the victim under this section shall be deducted from any award under section 351-33.

Furthermore, a person injured as a result of a travel agency or charter tour operator engaging in "[p]romoting travel for prostitution," or "[s]elling, advertising, or otherwise offering to sell travel services or facilitate travel" for, among other things, "the purpose of engaging in a commercial sexual act," under Haw. Rev. Stat. Ann. § 468L-7.5(9), (10) (Prohibited acts), has a claim under Haw. Rev. Stat. Ann. § 468L-10 (Consumer right of action), which states,

Any person who suffers damage as a result of a violation of this chapter shall be entitled to injunctive relief restraining further violations, and may sue to recover damages in any circuit court of the State, and, if successful, shall recover three times the actual damages or \$1,000, whichever is greater. In any action brought under this chapter, the prevailing party shall be entitled to the recovery of costs of suit, including reasonable attorney's fees.

Additionally, under Haw. Rev. Stat. Ann. § 468L-8 (Restitution), "Any person who engages in an act or practice that violates any provision of this chapter or rules adopted pursuant hereto may be ordered by a court of proper jurisdiction to make restitution to all persons injured by the act or practice."

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<sup>66</sup> See *supra* note 2.

General forfeiture laws may also apply to facilitators. Forfeiture shall apply, provided there is probable cause to initiate proceedings. Pursuant to Haw. Rev. Stat. Ann. § 712A-4(b)<sup>67</sup> (Covered offenses), “[o]ffenses for which property is subject to forfeiture under this chapter [Forfeiture]” include “promoting child abuse, promoting prostitution, sex trafficking, solicitation of a minor for prostitution, habitual solicitation of prostitution, or electronic enticement of a child that is chargeable as a felony offense under state law . . . .” Haw. Rev. Stat. Ann. § 712A-5(1) (Property subject to forfeiture; exemption) states, subject to certain exceptions,

The following is subject to forfeiture:

- (a) Property described in a statute authorizing forfeiture;
- (b) Property used or intended for use in the commission of, attempt to commit, or conspiracy to commit a covered offense, or which facilitated or assisted such activity;
- . . . .
- (e) Any proceeds or other property acquired, maintained, or produced by means of or as a result of the commission of the covered offense;
- (f) Any property derived from any proceeds which were obtained directly or indirectly from the commission of a covered offense;
- (g) Any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over any enterprise which has been established, participated in, operated, controlled, or conducted in order to commit a covered offense;
- (h) All books, records, bank statements, accounting records, microfilms, tapes, computer data, or other data which are used, intended for use, or which facilitated or assisted in the commission of a covered offense, or which document the use of the proceeds of a covered offense.

Seizure of forfeitable assets is governed by Haw. Rev. Stat. Ann. § 712A-6. The asset forfeiture proceeding may occur *in personam* pursuant to Haw. Rev. Stat. Ann. § 712A-13 or *in rem* pursuant to § 712A-12. Pursuant to Haw. Rev. Stat. Ann. § 712A-16, “All forfeited property . . . shall, after payment of expenses of administration and sale, be distributed as follows:

- (a) One quarter shall be distributed to the unit or units of state or local government [whose] officers or employees conducted the investigation and caused the arrest of the person whose property was forfeited or seizure of the property for forfeiture;
- (b) One quarter shall be distributed to the prosecuting attorney who instituted the action producing the forfeiture; and
- (c) One half shall be deposited into the criminal forfeiture fund established by this chapter.

Finally, Haw. Rev. Stat. Ann. § 371-20 (National Human Trafficking Resource Center hotline) establishes that an employer who “willfully and knowingly fails, neglects, or refuses” to post the National Human Trafficking Resource Hotline is subject to a civil fine up to \$100 for each separate offense.

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

Haw. Rev. Stat. Ann. § 712-1208(1) (Promoting travel for prostitution) makes it illegal if a person “knowingly sells or offers to sell travel services<sup>68</sup> that include or facilitate travel for the purpose of engaging in what would

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<sup>67</sup> See *supra* note 46.

<sup>68</sup> Haw. Rev. Stat. Ann. § 468L-1 states that travel services include, “‘Travel services’ includes transportation by air, sea, or rail; related ground transportation; hotel accommodations; or package tours, whether offered on a wholesale or retail basis. This chapter shall not apply to any hotel as defined under section 486K-1, or air carrier as defined by the Federal Aviation Act of 1958 ( 49 U.S.C.S. Appx § 1301), as amended, for travel services for which they do not

be prostitution if occurring in the state.” A conviction for promoting travel for prostitution is punishable as a Class C felony by imprisonment up to five years, a possible fine not exceeding \$10,000, and an additional fine of \$1,000 to be deposited into the human trafficking victim services fund. Haw. Rev. Stat. Ann. §§ 706-660(1)(b), 706-640(1)(c), 712-1208(3), Haw. Rev. Stat. Ann. § 706-650.5(2)(c). No enhanced penalty exists if the travel services are for the promotion of child sex tourism.

In addition, Haw. Rev. Stat. Ann. § 468L-7.5(9), (10) (Prohibited acts), prohibits travel agencies or charter tour operators from “[p]romoting travel for prostitution” and “[s]elling, advertising, or otherwise offering to sell travel services or facilitate travel: (A) For the purpose of engaging in a commercial sexual act; (B) That consists of tourism packages or activities using and offering sexual acts as enticement for tourism; or (C) That provides or purports to provide access to or that facilitates the availability of sex escorts or sexual services.”

- 4.3.1 Recommendation: Amend Haw. Rev. Stat. Ann. § 712-1208(1) (Promoting travel for prostitution) and Haw. Rev. Stat. Ann. § 468L-7.5(9), (10) (Prohibited acts) to provide a heightened penalty when travel services include or facilitate travel for the purpose of commercial sexual exploitation of children.

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

Under Haw. Rev. Stat. Ann. § 707-751(1) (Promoting child abuse in the second degree),

A person commits the offense of promoting child abuse in the second degree if, knowing or having reason to know its character and content, the person:

- (a) Disseminates<sup>69</sup> child pornography;<sup>70</sup>
- (b) Reproduces child pornography with intent to disseminate;
- (c) Disseminates any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography;
- (d) Disseminates any pornographic material which employs, uses, or otherwise contains a minor engaging in or assisting others to engage in sexual conduct; or
- (e) Possesses thirty or more images of any form of child pornography, and the content of at least one image contains one or more of the following:
  - (i) A minor who is younger than the age of twelve;
  - (ii) Sadomasochistic abuse of a minor; or
  - (iii) Bestiality involving a minor.

A conviction for promoting child abuse in the second degree is punishable as a Class B felony by imprisonment up to ten years and a possible fine not to exceed \$25,000. Haw. Rev. Stat. Ann. §§ 706-660(1)(a), 706-640(1)(b), 707-751(4).

Under Haw. Rev. Stat. Ann. §§ 712-1215.5 (Promoting minor-produced images in the first degree) and 712-1215.6 (Promoting minor-produced sexual images in the second degree), both minors and adults can be found in violation of this law if they encourage other minors to take nude photographs or videos and transmit them electronically.

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accept: (1) Consumer monies for services other than their own; or (2) Commissions or any other form of consideration.”

<sup>69</sup> “Disseminate” means to publish, sell, distribute, transmit, exhibit, present material, mail, ship, or transport by any means, including by computer, or to offer or agree to do the same.” Haw. Rev. Stat. Ann. § 707-751(2).

<sup>70</sup> See *supra* note 20.

### *Legal Components:*

- 5.1 *Victims under the core child sex trafficking offense include all commercially sexually exploited children.*
- 5.2 *The state sex trafficking statute expressly prohibits a defendant from asserting a defense based on the willingness of a minor under 18 to engage in the commercial sex act.*
- 5.3 *State law prohibits the criminalization of minors under 18 for prostitution offenses.*
- 5.4 *State law provides a non-punitive avenue to specialized services through one or more points of entry.*
- 5.5 *Child sex trafficking is identified as a type of abuse and neglect within child protection statutes.*
- 5.6 *The definition of “caregiver” or another related term in the child welfare statutes is not a barrier to a sex trafficked child accessing the protection of child welfare.*
- 5.7 *Crime victims’ compensation is specifically available to a child victim of sex trafficking or commercial sexual exploitation of children (CSEC).*
- 5.8 *Victim-friendly procedures and protections are provided in the trial process for minors under 18.*
- 5.9 *Expungement or sealing of juvenile delinquency records resulting from arrests or adjudications for prostitution-related offenses committed as a result of, or in the course of, the commercial sexual exploitation of a minor is available within a reasonable time after turning 18.*
- 5.10 *Victim restitution and civil remedies for victims of domestic minor sex trafficking or commercial sexual exploitation of children (CSEC) are authorized by law.*
- 5.11 *Statutes of limitations for civil and criminal actions for child sex trafficking or commercial sexual exploitation of children (CSEC) offenses are eliminated or lengthened sufficiently to allow prosecutors and victims a realistic opportunity to pursue criminal action and legal remedies.*

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### *Legal Analysis:*

- 5.1 *Victims under the core child sex trafficking offense include all commercially sexually exploited children.*<sup>71</sup>

Hawaii’s sex trafficking statute does not define all commercially sexually exploited children as victims of sex trafficking because it requires third party control. Under Haw. Rev. Stat. Ann. § 712-1202<sup>72</sup> (Sex trafficking) proof of force, fraud, or coercion is not necessary for a conviction.<sup>73</sup> However, Haw. Rev. Stat. Ann. § 712-1202 does not hold buyers criminally liable<sup>74</sup> and therefore requires that a minor victim be under the control of a third party trafficker in order to qualify as a sex trafficking victim. Therefore, some sex trafficking victims who do not have an identifiable trafficker may not be identified as a sex trafficking victim and may not be able to access services, benefits and protections intended for child sex trafficking victims.

- 5.1.1 **Recommendation:** Amend Haw. Rev. Stat. Ann. § 712-1202 (Sex trafficking) to ensure that all commercially sexually exploited children are identifiable as victims and eligible for protections pursuant to their victim status.

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<sup>71</sup> See generally **SHARED HOPE INTERNATIONAL**, “Eliminating the Third Party Control Barrier to Identifying Juvenile Sex Trafficking Victims,” JuST Response Policy Paper (2015), [http://sharedhope.org/wp-content/uploads/2015/08/Policy-Paper\\_Eliminating-Third-Party-Control\\_Final1.pdf](http://sharedhope.org/wp-content/uploads/2015/08/Policy-Paper_Eliminating-Third-Party-Control_Final1.pdf) (discussing need to include all commercially sexually exploited children within sex trafficking definitions and corresponding need to include buyer conduct in core sex trafficking offenses regardless of whether victim is under control of a third party).

<sup>72</sup> See *supra* note 2.

<sup>73</sup> See Component 1.1 for discussion of Hawaii’s sex trafficking law.

<sup>74</sup> See Component 2.1 for discussion of applicability of Hawaii’s sex trafficking law to buyers of sex with minors.

5.2 *The state sex trafficking statute expressly prohibits a defendant from asserting a defense based on the willingness of the minor under 18 to engage in the commercial sex act. .*

The core sex trafficking statute, Haw. Rev. Stat. Ann. § 712-1202<sup>75</sup> (Sex trafficking) does not prohibit a defendant from raising a defense based on the consent of a minor victim. Additionally, CSEC laws do not prohibit a defense based on the minor's consent to the commercial sex act.

Haw. Rev. Stat. Ann. § 702-233 (Consent; general) states, "In any prosecution, the victim's consent to the conduct alleged, or to the result thereof, is a defense if the consent negatives an element of the offense or precludes the infliction of the harm or evil sought to be prevented by the law defining the offense." However, Haw. Rev. Stat. Ann. § 702-235 (Ineffective consent) states,

Unless otherwise provided by this Code or by the law defining the offense, consent does not constitute a defense if:

- (1) It is given by a person who is legally incompetent to authorize the conduct alleged; or
- (2) It is given by a person who by reason of youth . . . is manifestly unable or known by the defendant to be unable to make a reasonable judgment as to the nature or harmfulness of the conduct alleged; or
- (3) It is given by a person whose improvident consent is sought to be prevented by the law defining the offense; or
- (4) It is induced by force, duress or deception.

5.2.1 Recommendation: Amend Haw. Rev. Stat. Ann. § 712-1202 (Sex trafficking) and Hawaii's CSEC laws to expressly prohibit a defense based on the consent of the minor to a commercial sex act.

5.3 *State law prohibits the criminalization of minors under 18 for prostitution offenses.*<sup>76</sup>

Hawaii reduces, but does not eliminate, criminal liability for minors under Haw. Rev. Stat. Ann. § 712-1200<sup>77</sup> (Prostitution) by lowering the class of offense from a misdemeanor to a violation.<sup>78</sup> Haw. Rev. Stat. Ann. § 712-1200 states,

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<sup>75</sup> See *supra* note 2.

<sup>76</sup> For more information regarding recent federal legislation impacting this component see: <http://go.sharedhope.org/stateimpactmemo>.

<sup>77</sup> See *supra* note 23.

<sup>78</sup> Pursuant to Haw. Rev. Stat. Ann. § 701-107(5) (Grades and classes of offenses),

An offense defined by this Code or by any other statute of this State constitutes a violation if it is so designated in this Code or in the law defining the offense or if no other sentence than a fine, or fine and forfeiture or other civil penalty, is authorized upon conviction or if it is defined by a statute other than this Code which provides that the offense shall not constitute a crime. A violation does not constitute a crime, and conviction of a violation shall not give rise to any civil disability based on conviction of a criminal offense.

However, Hawaii caselaw indicates that a violation may still be treated as a penal offense, subject to criminal penalties. See *Tauese v. State*, 113 Haw. 1, 31, 147 P.3d 785, (Haw. 2006) ("Courts of this jurisdiction, however, have recognized that '[t]he legislature's declaration that a violation is non-criminal and does not constitute a crime does not compel the conclusion that the penalties for conviction of a violation are civil rather than criminal.'") (citing *State v. Simeona*, 10 Haw. App. 220, 231, 864 P.2d 1109, 1115 (1993), *overruled on other grounds*, *State v. Ford*, 84 Hawai'i 65, 929 P.2d 78 (1996)).

- (1) A person commits the offense of prostitution if the person:
  - (a) Engages in, or agrees or offers to engage in, sexual conduct with another person in return for a fee. . . .
  - . . . .
- (2) As used in this section:
  - . . . .
  - “Minor” means a person who is less than eighteen years of age.
- (3) Prostitution is a petty misdemeanor; provided that:
  - (a) If the person who commits the offense under subsection (1)(a) is a minor, prostitution is a violation . . . .
  - . . . .
- (6) A minor may be taken into custody by any police officer without order of the judge when there are reasonable grounds to believe that the minor has violated paragraph (1)(a). The minor shall be released, referred, or transported pursuant to subsection 571-31(b) [Taking children into custody; release; notice].<sup>79</sup> The minor shall be subject to the jurisdiction of the family court pursuant to section 571-11(1) [Jurisdiction; children], including for the purposes of custody, detention, diversion, and access to services and resources.

While Haw. Rev. Stat. Ann. § 712-1200(3)(a) reduces the penalty for prostitution to a violation when the person charged under (1)(a) is a minor, subsection (6) still directs juvenile sex trafficking victims into the juvenile justice system as law violators under Haw. Rev. Stat. Ann. § 571-11(1) (Jurisdiction; children) which provides,

Except as otherwise provided in this chapter, the court shall have exclusive original jurisdiction in proceedings:

- (1) Concerning any person who is alleged to have committed an act prior to achieving eighteen years of age that would constitute a violation or attempted violation of any federal, state, or local law or county ordinance. Regardless of where the violation occurred, jurisdiction may be taken by the court of the circuit where the person resides, is living, or is found, or in which the offense is alleged to have occurred . . . .

Additionally, Haw. Rev. Stat. Ann. § 712-1206 (Loitering for the purpose of engaging in or advancing prostitution) does not exempt minors from prosecution for prostitution-related offenses and does not reduce the penalty applicable to minors.

- 5.3.1 Recommendation: Amend Haw. Rev. Stat. Ann. § 712-1200 (Prostitution) and § 712-1206 (Loitering for the purpose of engaging in or advancing prostitution) to eliminate liability for prostitution offenses for all minors under 18.

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<sup>79</sup> Pursuant Haw. Rev. Stat. Ann. § 571-31(b) (Taking children into custody; release; notice),

When an officer or other person takes a child into custody the parents, guardian, or legal custodian shall be notified immediately. The child shall be (1) released to the care of the child's parent or other responsible adult; (2) referred or delivered to the court or other designated agency with or without simultaneous release to parent or other responsible adult; or (3) taken directly to a detention facility, if the child's immediate welfare or the protection of the community requires it, or the child is subject to detention for violation of a court order of probation or protective supervision.



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

**Child Identified as Abused/Neglected**

Pursuant to Haw. Rev. Stat. Ann. § 350-1 (Reports)<sup>80</sup>, a sexually exploited child is likely to be identified as abused or neglected, included within the duties of mandated reporters. For purposes of child protective services, Haw. Rev. Stat. Ann. § 346-1 (Definitions) defines for Chapter 346 (Department of Human Services) “abused or neglected” as “subjected to ‘harm’, ‘imminent harm’, or ‘threatened harm’ as defined in section [587A-4].” Under Chapter 587A (Child Protective Act), Haw. Rev. Stat. Ann. § 587A-4 (Definitions) the definition of “harm” includes when a

child has been the victim of sexual contact or conduct, including sexual assault; sodomy; molestation; sexual fondling; incest; prostitution; obscene or pornographic photographing, filming, or depiction; or other similar forms of sexual exploitation, including but not limited to acts that constitute an offense pursuant to section 712-1202(1)(b) [Sex trafficking] . . . .

Haw. Rev. Stat. Ann. § 587A-11<sup>81</sup> (Investigation; department powers) directs the Department of Human Services (Department) to investigate any reports it receives alleging that “a child is subject to imminent harm, has been harmed, or is subject to threatened harm . . . .” Under Haw. Rev. Stat. Ann. § 587A-11, in investigating the allegations, the Department may:

- (1) Enlist the cooperation and assistance of appropriate state and federal law enforcement authorities, who may conduct an investigation and, if an investigation is conducted, shall provide the department with all preliminary findings, including the results of a criminal history record check of an alleged perpetrator of harm or threatened harm to the child;
  - (2) Conduct a criminal history record check of an alleged perpetrator and all adults living in the family home, with or without consent, to ensure the safety of the child;
  - (3) Interview the child without the presence or prior approval of the child’s family and temporarily assume protective custody of the child for the purpose of conducting the interview;
  - (4) Resolve the matter in an informal fashion that it deems appropriate under the circumstances;
  - (5) Close the matter if the department finds, after an assessment, that the child is residing with a caregiver who is willing and able to meet the child's needs and provide a safe and appropriate placement for the child;
  - (6) Immediately enter into a service plan:
    - (A) To safely maintain the child in the family home; or
    - (B) To place the child in voluntary foster care pursuant to a written agreement with the child’s parent.
- If the child is placed in voluntary foster care and the family does not successfully complete the service plan within three months after the date on which the department assumed physical custody of the child, the department shall file a petition . . . .
- (7) Assume temporary foster custody of the child . . . or
  - (8) File a petition or ensure that a petition is filed by another appropriate authorized agency in court under this chapter.

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<sup>80</sup> See *infra* Component 5.5 for a full analysis of the definition of “abuse” as it relates to identification of sexually exploited children.

<sup>81</sup> The text of Haw. Rev. Stat. Ann. § 587A-11 cited here and elsewhere in this report includes amendments made by the enactment of House Bill 2340 during the 2016 Regular Session, 28th Legislature of the Hawaii Legislature (effective June 21, 2016).

## *I. Initial custody*

### *a. Authority for initial custody*

Prior to an investigation into reports of abuse, a child may be taken into custody pursuant to Haw. Rev. Stat. Ann. § 587A-8(a) (Protective custody by police officer without court order), which provides,

A police officer shall assume protective custody of a child without a court order and without the consent of the child's family, if in the discretion of the police officer, the officer determines that:

- (1) The child is subject to imminent harm while in the custody of the child's family;
- (2) The child has no parent, as defined in this chapter, who is willing and able to provide a safe family home for the child;
- (3) The child has no caregiver, as defined in this chapter, who is willing and able to provide a safe and appropriate placement for the child; or
- (4) The child's parent has subjected the child to harm or threatened harm and the parent is likely to flee with the child.

### *b. Placement*

After taking a child into protective custody, the law enforcement officer transfers protective custody to the Department of Human Services. Haw. Rev. Stat. Ann. § 587A-8(b). Once the Department of Human Services assumes custody of the child, within 3 days, the Department shall, among other things, "[a]ssume temporary foster custody of the child if, in the discretion of the department, the department determines that the child is subject to imminent harm while in the custody of the child's family." Haw. Rev. Stat. Ann. § 587A-9(a)(1). Pursuant to Haw. Rev. Stat. Ann. § 587A-11(7),<sup>82</sup> placement preference is with an approved relative.

## *II. Process following initial custody*

Pursuant to Haw. Rev. Stat. Ann. § 587A-9(a)(5)(A-C)<sup>83</sup> (Temporary foster custody without court order), within three business days of receiving a child in protective custody, the Department must "return the child to the child's parents . . . secure a voluntary placement agreement from the child's parents to place the child in foster care . . . or . . . file a petition with the court.

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

Under Haw. Rev. Stat. Ann. § 587A-5(1) of Hawaii's Child Protective Act the court has,

[E]xclusive original jurisdiction:

- (1) In a child protective proceeding concerning any child who is or was found within the State at the time specified facts and circumstances occurred, are discovered, or are reported to the department. These facts and circumstances constitute the basis for the court's finding that the child's physical or psychological health or welfare is subject to imminent harm, has been harmed, or is subject to threatened harm by the acts or omissions of the child's family.

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<sup>82</sup> See *supra* note 79.

<sup>83</sup> The text of Haw. Rev. Stat. Ann. § 587A-9 cited here and elsewhere in this report includes amendments made by the enactment of House Bill 2340 during the 2016 Regular Session, 28th Legislature of the Hawaii Legislature (effective June 21, 2016).

Under Haw. Rev. Stat. Ann. § 571-32(d) (Detention; shelter; release; notice.), “No child shall be held in a detention facility for juveniles or shelter longer than twenty-four hours, excluding weekends and holidays . . . unless the judge orders otherwise after a court hearing.”

If the court determines that continued supervision is necessary, Haw. Rev. Stat. Ann. § 571-33 (Detention and shelter facilities.) states,

Provisions shall be made for the temporary detention of children or minors in a detention home, to be conducted as an agency of the court; or the court may arrange for the care and custody of such children or minors temporarily in private homes subject to the supervision of the court, or may arrange with any institution or agency to receive for temporary care and custody children or minors within the jurisdiction of the court.

#### *IV. Adjudication*

Under Haw. Rev. Stat. Ann. §571-41(a) (Procedure in children’s cases), the hearing may be informal and will take place without a jury in a process separate from the adult court process. The judge shall make findings of fact based on a preponderance of the evidence standard and using regularly applicable rules of evidence in civil procedure. Haw. Rev. Stat. Ann. §571-41(c).

#### *V. Outcomes*

If a child is adjudicated as abused or neglected, Haw. Rev. Stat. Ann. § 571-48(2) (Decree, if informal adjustment or diversion to a private or community agency or program has not been effected.) provides that:

(A) The court may place the child under protective supervision, as hereinabove defined, in the child's own home, or in the custody of a suitable person or agency elsewhere, upon conditions determined by the court; or

(B) The court may vest legal custody of the child, after prior consultation with the agency or institution, in a local governmental agency or institution licensed or approved by the State to care for children, with the exception of an institution authorized by the court to care for children. If legal custody of the child is vested in a private agency or institution in another state, the court shall select one that is approved by the family or juvenile court of the other state or by that state's department of social services or other appropriate department; provided that the child may not be committed to a public or private institution operated solely for the treatment of law violators . . .

While there is no reference to specific services available to DMST victims, under Haw. Rev. Stat. Ann. § 571-48(5), “[t]he court may order, for any child within its jurisdiction, whatever care or treatment is authorized by law.”

#### **Child Identified as Status Offender**

A sexually exploited minor may also be identified as a status offender if the minor is truant, a runaway, or beyond the control of his or her parent.

## *I. Initial custody*

### *a. Authority for initial custody*

Pursuant to Haw. Rev. Stat. Ann. § 571-31(a) (Taking children into custody; release; notice), a law enforcement officer may take a child into custody if the child falls within Haw. Rev. Stat. Ann. § 571-11(2) (Jurisdiction; children), which states,

Except as otherwise provided in this chapter, the court shall have exclusive original jurisdiction in proceedings:

(2) Concerning any child living or found within the circuit:

(A) Who is neglected as to or deprived of educational services because of the failure of any person or agency to exercise that degree of care for which it is legally responsible;

(B) Who is beyond the control of the child's parent or other custodian or whose behavior is injurious to the child's own or others' welfare;

(C) Who is neither attending school nor receiving educational services required by law whether through the child's own misbehavior or nonattendance or otherwise; or

(D) Who is in violation of curfew.

### *b. Placement*

Upon taking the child into custody, law enforcement shall immediately notify the child's parents, guardian, or legal custodian and under Haw. Rev. Stat. Ann. § 571-31(b) (Taking children into custody; release; notice),

The child shall be (1) released to the care of the child's parent or other responsible adult; (2) referred or delivered to the court or other designated agency with or without simultaneous release to parent or other responsible adult; or (3) taken directly to a detention facility, if the child's immediate welfare or the protection of the community requires it, or the child is subject to detention for violation of a court order of probation or protective supervision.

## *II. Process following initial custody*

Haw. Rev. Stat. Ann. § 571-32(d) provides that a child may not be held in detention or shelter care for more than 24 hours, "unless a petition or motion for revocation of probation, or motion for revocation of protective supervision has been filed, or unless the judge orders otherwise after a court hearing."

Under Haw. Rev. Stat. Ann. §571-21(a) (Complaint; investigation; petition), whenever the court is informed of a case of a potential status offender:

[T] the intake officer shall make a preliminary investigation to determine whether informal adjustment is suitable under section 571-31.4 [Informal adjustment, law violators] or 571-31.5 [Informal adjustment, status offenders]. The court may authorize the filing of a petition, may make whatever arrangement for informal adjustment that is suitable under section 571-31.4, 571-31.5, or 571-31.6 [Informal adjustment, minor who may be both law violator and status offender]; or may take such action as is otherwise allowed under this chapter. Efforts to effect informal adjustment may be continued not longer than three months without review by the judge.

## *III. Placement process pending adjudication*

If a child believed to fall within Haw. Rev. Stat. Ann. § 571-11(1) or (2) (Jurisdiction; children), is determined unsuitable for diversion and is not released in informal adjustment, then the child is taken "to the place of

detention or shelter designated by the court.” Haw. Rev. Stat. Ann. § 571-32(a). Additionally, “If the court determines that the child requires care away from the child’s own home but does not require secure physical restriction, the child shall be given temporary care in any available nonsecure child caring institution, foster family home, or other shelter facility.” Haw. Rev. Stat. Ann. § 571-32(a).

Pursuant to Haw. Rev. Stat. Ann. § 571-32(e), (f), after a court hearing,

(e) No child may be held after the filing of a petition or motion, as specified in subsection (d) unless an order for continued detention or shelter has been made by a judge after a court hearing . . . . If there is probable cause to believe that the child comes within section . . . 571-11(2) [Jurisdiction; children], the child may be held, following a court hearing, in a shelter but may not be securely detained in a detention facility for juveniles for longer than twenty-four hours, excluding weekends and holidays, unless the child is subject to the provisions of chapter 582, Interstate Compact on Juveniles, or chapter, Interstate Compact for Juveniles, or is allegedly in or has already been adjudicated for a violation of a valid court order, as provided under the federal Juvenile Justice and Delinquency Prevention Act of 1974, as amended.

(f) No child shall be released from detention except in accordance with this chapter.

In determining whether the “immediate welfare<sup>84</sup> or the protection of the community”<sup>85</sup> requires the child’s detention pursuant to Haw. Rev. Stat. Ann. § 571-31.1(c) (Standard for detention), the court will consider,

- (1) The severity of the violation or violations which the child is reasonably believed to have committed;
- (2) The frequency with which the child is reasonably believed to have committed such or other violations;
- (3) The child’s age, character, physical, and mental health;
- (4) The interpersonal relationships between the child, the family, and the community; and
- (5) Any previous history of referrals to the court.

If a child is brought to a detention or shelter facility, under Haw. Rev. Stat. Ann. § 571-32(b) (Detention; shelter; release; notice),

Prior to acceptance of the child for detention or shelter care, a prompt inquiry must be made by a duly authorized staff member of the detention or shelter facility or officer of the court. Where it is deemed

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<sup>84</sup> Haw. Rev. Stat. Ann. § 571-31.1(b) defines “immediate welfare” as including the following situations:

- (1) The minor is in physical, emotional, or psychological danger, or may be prior to the court’s disposition;
- (2) No parent or other responsible adult known to the decision-maker is willing and able to provide the type and degree of supervision necessary to protect the minor from that danger;
- (3) No other secure facility is appropriate and available.

<sup>85</sup> Haw. Rev. Stat. Ann. § 571-31.1(a) defines “protection of the community” as,

- [A] threat to, and a necessity to protect, the person or property of others from:
- (1) A minor who is alleged to have committed an offense which caused physical harm, or a threat of physical harm, to another person; or
  - (2) A minor who is alleged to have committed an offense which caused damage to, or theft of, property; and
    - (A) The minor’s record reveals a pattern of behavior which has caused damage to, or loss of, property; and
    - (B) Previous control measures have failed.

in the best interests of the child, the judge, officer, staff member, or the director of detention services may then order the child to be released, if possible, to the care of the child's parent, guardian, legal custodian, or other responsible adult, or the judge may order the child held in the facility subject to further order or placed in some other appropriate facility.

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

##### *a. Adjudication*

Under Haw. Rev. Stat. Ann. §571-41(a) (Procedure in children's cases), the hearing may be informal and will take place without a jury in a process separate from the adult court process. The judge shall make findings of fact based on a preponderance of the evidence standard and using regularly applicable rules of evidence in civil procedure. Haw. Rev. Stat. Ann. §571-41(c)

##### *b. Diversion*

Pursuant to Haw. Rev. Stat. Ann. § 571-31.5 (Informal adjustment, status offenders), a child determined to be a status offender pursuant to § 571-11(2) may receive informal adjustment from an intake officer of the family court if the family consents and the child understands. Informal adjustment may include placement in a nonsecure shelter in addition to the programs provided in Haw. Rev. Stat. Ann. § 571-31.4(b).

#### *V. Outcomes (final permanent placement)*

If the child is adjudicated under Haw. Rev. Stat. Ann. § 571-11(2) for being a status offender, then the court may order protective supervision for the child in his own home or at a suitable agency, or the court may transfer the child's custody to an agency or institution. Haw. Rev. Stat. Ann. § 571-48(2). The court may order "whatever care of treatment is authorized by law." Haw. Rev. Stat. Ann. § 571-48(5). When considering whether to transfer custody, "the court shall give primary consideration to the welfare of the child." Haw. Rev. Stat. Ann. § 571-48(6). Except as authorized in chapter 352 (Hawaii Youth Correctional Facilities), an institution that receives custody of the child may not transfer the child to an adult facility. Haw. Rev. Stat. Ann. § 571-48(4).

#### **Child Identified as Law Violator**

Under Haw. Rev. Stat. Ann. § 712-1200(6)<sup>86</sup> (Prostitution), a commercially sexually exploited child would be identified as a law violator and processed through the juvenile justice system pursuant to Haw. Rev. Stat. Ann. § 571-11(1) (Jurisdiction; children).<sup>87</sup> Haw. Rev. Stat. Ann. § 712-1200(6) provides, in part, "The minor shall be subject to the jurisdiction of the family court pursuant to section 571-11(1) [Jurisdiction; children], including for the purposes of custody, detention, diversion, and access to services and resources."

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<sup>86</sup> See *supra* note 23.

<sup>87</sup> See Component 5.3 for full discussion of Hawaii's prostitution law and referral of minors into the juvenile justice system.

## *I. Initial custody*

### *a. Authority for initial custody*

Pursuant to Haw. Rev. Stat. Ann. § 712-1200(6) “A minor may be taken into custody by any police officer without order of the judge when there are reasonable grounds to believe that the minor has violated paragraph (1)(a) [Prostitution].” Additionally, a minor may be taken into custody under Haw. Rev. Stat. Ann. § 571-31(a) (Taking children into custody; release; notice), for other violations of law under Haw. Rev. Stat. Ann. § 571-11(1) (Jurisdiction; children), which states,

Except as otherwise provided in this chapter, the court shall have exclusive original jurisdiction in proceedings:

(1) Concerning any person who is alleged to have committed an act prior to achieving eighteen years of age that would constitute a violation or attempted violation of any federal, state, or local law or municipal ordinance. Regardless of where the violation occurred, jurisdiction may be taken by the court of the circuit where the person resides, is living, or is found, or in which the offense is alleged to have occurred

. . . .

### *b. Placement*

If taken into custody for a violation of Haw. Rev. Stat. Ann. § 712-1200(1)(a) (Prostitution), Haw. Rev. Stat. Ann. § 712-1200(6) states that “[t]he minor shall be released, referred, or transported pursuant to subsection 571-31(b) [Taking children into custody; release; notice] . . .” which provides,

The child shall be (1) released to the care of the child’s parent or other responsible adult; (2) referred or delivered to the court or other designated agency with or without simultaneous release to parent or other responsible adult; or (3) taken directly to a detention facility, if the child’s immediate welfare or the protection of the community requires it, or the child is subject to detention for violation of a court order of probation or protective supervision.

A juvenile sex trafficking victim taken into custody under Haw. Rev. Stat. Ann. § 571-31(a)<sup>88</sup> (Taking children into custody; release; notice) for another violation must also be released, referred or transported as provided in Haw. Rev. Stat. Ann. § 571-31(b).

## *II. Process following initial custody*

Haw. Rev. Stat. Ann. § 571-32(d) provides that a child may not be held in detention or shelter care for more than 24 hours, “unless a petition or motion for revocation of probation, or motion for revocation of protective supervision has been filed, or unless the judge orders otherwise after a court hearing.” Haw. Rev. Stat. Ann. § 571-32(d) further specifies that

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<sup>88</sup> Haw. Rev. Stat. Ann. § 571-31(a) (Taking children into custody; release; notice) provides,

A child may be taken into custody by any police officer without order of the judge when there are reasonable grounds to believe that a child comes within section 571-11(1) [law violations] . . . or by any police or probation officer when there are reasonable grounds to believe that the child has violated a court order of probation or protective supervision.

[i]f there is probable cause to believe that the child comes within section 571-11(1) [by violating the law], the child may be securely detained in a certified police station cellblock or community correctional center. The detention shall be limited to six hours. In areas which are outside a standard metropolitan statistical area, the detention may be up to twenty-four hours, excluding weekends and holidays, if no detention facility for juveniles is reasonably available. Any detention in a police station cellblock or community correctional center shall provide for the sight and sound separation of the child from adult offenders.

Under Haw. Rev. Stat. Ann. §571-21(a) (Complaint; investigation; petition), whenever the court is informed of a case of a potential status offender:

[T] the intake officer shall make a preliminary investigation to determine whether informal adjustment is suitable under section 571-31.4 [Informal adjustment, law violators] or 571-31.5 [Informal adjustment, status offenders]. The court may authorize the filing of a petition, may make whatever arrangement for informal adjustment that is suitable under section 571-31.4, 571-31.5, or 571-31.6 [Informal adjustment, minor who may be both law violator and status offender]; or may take such action as is otherwise allowed under this chapter. Efforts to effect informal adjustment may be continued not longer than three months without review by the judge.

### *III. Placement process pending adjudication*

If a child believed to fall within Haw. Rev. Stat. Ann. § 571-11(1) or (2) (Jurisdiction; children), is determined unsuitable for diversion and is not released in informal adjustment, then the child is taken “to the place of detention or shelter designated by the court.” Haw. Rev. Stat. Ann. § 571-32(a). Additionally, “If the court determines that the child requires care away from the child’s own home but does not require secure physical restriction, the child shall be given temporary care in any available nonsecure child caring institution, foster family home, or other shelter facility.” Haw. Rev. Stat. Ann. § 571-32(a).

Pursuant to Haw. Rev. Stat. Ann. § 571-32(e), (f), after a court hearing,

(e) No child may be held after the filing of a petition or motion, as specified in subsection (d) unless an order for continued detention or shelter has been made by a judge after a court hearing. If there is probable cause to believe that the child comes within section 571-11(1) [Jurisdiction; children], the child may be securely detained, following a court hearing, in a detention facility for juveniles or may be held in a shelter . . . .

(f) No child shall be released from detention except in accordance with this chapter.

In determining whether the “immediate welfare”<sup>89</sup> or the protection of the community”<sup>90</sup> requires the child’s detention pursuant to Haw. Rev. Stat. Ann. § 571-31.1(c) (Standard for detention), the court will consider,

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<sup>89</sup> Haw. Rev. Stat. Ann. § 571-31.1(b) defines “immediate welfare” as including the following situations:

- (1) The minor is in physical, emotional, or psychological danger, or may be prior to the court’s disposition;
- (2) No parent or other responsible adult known to the decision-maker is willing and able to provide the type and degree of supervision necessary to protect the minor from that danger;
- (3) No other secure facility is appropriate and available.

<sup>90</sup> Haw. Rev. Stat. Ann. § 571-31.1(a) defines “protection of the community” as,

[A] threat to, and a necessity to protect, the person or property of others from:



- (1) The severity of the violation or violations which the child is reasonably believed to have committed;
- (2) The frequency with which the child is reasonably believed to have committed such or other violations;
- (3) The child's age, character, physical, and mental health;
- (4) The interpersonal relationships between the child, the family, and the community; and
- (5) Any previous history of referrals to the court.

If a child is brought to a detention or shelter facility, under Haw. Rev. Stat. Ann. § 571-32(b) (Detention; shelter; release; notice),

Prior to acceptance of the child for detention or shelter care, a prompt inquiry must be made by a duly authorized staff member of the detention or shelter facility or officer of the court. Where it is deemed in the best interests of the child, the judge, officer, staff member, or the director of detention services may then order the child to be released, if possible, to the care of the child's parent, guardian, legal custodian, or other responsible adult, or the judge may order the child held in the facility subject to further order or placed in some other appropriate facility.

#### *IV. Adjudication or diversion*

##### *a. Adjudication*

Under Haw. Rev. Stat. Ann. §571-41(a) (Procedure in children's cases), the hearing may be informal and will take place without a jury in a process separate from the adult court process. The judge shall make findings of fact based on a beyond a reasonable doubt standard and using regularly applicable rules of evidence in civil procedure. Haw. Rev. Stat. Ann. §571-41(c)

##### *b. Diversion*

The child may receive informal adjustment under Haw. Rev. Stat. Ann. § 571-31.4(a) (Informal adjustment, law violators), which states,

When a child reasonably believed to come within section 571-11(1) is referred to the court or other designated agency, informal adjustment may be provided to the child by an intake officer duly authorized by the family court only where the facts reasonably appear to establish prima facie jurisdiction and are admitted and where a consent is obtained from the child's parent, guardian, or legal custodian, and the child, if of sufficient age and understanding.

These informal adjustments include community service, placement at a shelter; medical or physical examinations to detect aptitude, learning disabilities, or emotional dysfunction; and participation in community-based, neighborhood courts, youth-initiated programs, or restorative justice programs. Haw. Rev. Stat. Ann. § 571-31.4(b).

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- (1) A minor who is alleged to have committed an offense which caused physical harm, or a threat of physical harm, to another person; or
  - (2) A minor who is alleged to have committed an offense which caused damage to, or theft of, property; and
    - (A) The minor's record reveals a pattern of behavior which has caused damage to, or loss of, property; and
    - (B) Previous control measures have failed.

## V. Outcomes (final permanent placement)

Where the court determines that a child has violated a law, Haw. Rev. Stat. Ann. § 571-48 (Decree, if informal adjustment or diversion to a private or community agency or program has not been effected) provides that the court may fine the child, release the child on probation in his own home or another suitable facility subject to conditions imposed by the court, or transfer the child's custody to a correctional facility, agency, institution, or a private home. Haw. Rev. Stat. Ann. § 571-48(1).

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

## 5.5 *Child sex trafficking is identified as a type of abuse and neglect within child protection statutes.*<sup>91</sup>

For purposes of mandatory reporting under Chapter 350 (Child Abuse), Haw. Rev. Stat. Ann. § 350-1 (Child abuse) defines “child abuse or neglect” as the following:

[A]cts or omissions of any person who, or legal entity which, is in any manner or degree related to the child, is residing with the child, or is otherwise responsible for the child's care, that have resulted in the physical or psychological health or welfare of the child, who is under the age of eighteen, to be harmed, or to be subject to any reasonably foreseeable, substantial risk of being harmed. The acts or omissions are indicated for the purposes of reports by circumstances that include but are not limited to:

....

- (2) When the child has been the victim of sexual contact or conduct, including, but not limited to, sexual assault as defined in the Penal Code, molestation, sexual fondling, incest, or prostitution; obscene or pornographic photographing, filming, or depiction; or other similar forms of sexual exploitation, including but not limited to acts that constitute an offense pursuant to section 712-1202(1)(b) [Sex trafficking] . . .

For purposes of child protective services, Haw. Rev. Stat. Ann. § 350-2(a) (Action on reporting) provides, “Upon receiving a report concerning child abuse or neglect, the department shall proceed pursuant to chapter 587A [Child Protective Act] and the department's rules.” Under Haw. Rev. Stat. Ann. § 587A-5(1) (Jurisdiction) the juvenile court has “exclusive original jurisdiction . . . [i]n a child protective proceeding . . .,” the purpose of which is determine whether “the child's physical or psychological health or welfare is subject to imminent harm, has been harmed, or is subject to threatened harm by the acts or omissions of the child's family . . . .”

Haw. Rev. Stat. Ann. § 587A-4 (Definitions) defines “harm” to include children who are victims of sex trafficking. It states,

“Harm” means damage or injury to a child's physical or psychological health or welfare, where:

- (1) The child exhibits evidence of injury, including, but not limited to:
- (A) Substantial or multiple skin bruising;
  - (B) Substantial external or internal bleeding;
  - (C) Burn or burns;
  - (D) Malnutrition;

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<sup>91</sup> For more information regarding recent federal legislation impacting this component see: <http://go.sharedhope.org/stateimpactmemo>.

- (E) Failure to thrive;
- (F) Soft tissue swelling;
- (G) Extreme pain;
- (H) Extreme mental distress;
- (I) Gross degradation;
- (J) Poisoning;
- (K) Fracture of any bone;
- (L) Subdural hematoma; or
- (M) Death;
- (2) The child has been the victim of sexual contact or conduct, including sexual assault; sodomy; molestation; sexual fondling; incest; prostitution; obscene or pornographic photographing, filming, or depiction; or other similar forms of sexual exploitation, including but not limited to acts that constitute an offense pursuant to section 712-1202(1)(b) [Sex trafficking];.
- (3) The child's psychological well-being has been injured as evidenced by a substantial impairment in the child's ability to function;
- (4) The child is not provided in a timely manner with adequate food; clothing; shelter; supervision; or psychological, physical, or medical care;
- (5) The child is provided with dangerous, harmful, or detrimental drugs as defined in section 712-1240, except when a child's family administers drugs to the child as directed or prescribed by a practitioner as defined in section 712-1240;
- ....

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

A sex trafficked child may not be able to access the protection of child welfare in Hawaii because the statutes that govern child welfare’s involvement on behalf of a sex trafficked child, Chapter 350 (Child Abuse) and Chapter 587A (Child Protective Act) appear to require that the perpetrator of harm be a person responsible for the child’s care or be the result of the acts or omissions of the child’s family.<sup>92</sup>

For purposes of Chapter 350 which establishes the requirement to report child abuse and neglect, Haw. Rev. Stat. Ann. § 350-1 (Definitions) defines “child abuse or neglect” as “the acts or omissions of any person who, or legal entity which, is in any manner or degree related to the child, is residing with the child, or is otherwise responsible for the child’s care . . . .” For purposes of child welfare responding to a report of abuse, child abuse and neglect is not defined under Haw. Rev. Stat. Ann. § 587A-1 (Definitions), and the definition of “harm” does

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<sup>92</sup> Furthermore, Haw. Rev. Stat. Ann. § 587A-8(a) (Protective custody by police officer without court order) requires that the family, parent or caregiver be responsible for the harm or absent in order for a law enforcement officer to take the child into custody. It states,

A police officer shall assume protective custody of a child without a court order and without the consent of the child's family, if in the discretion of the police officer, the officer determines that:

- (1) The child is subject to imminent harm while in the custody of the child's family;
- (2) The child has no parent, as defined in this chapter, who is willing and able to provide a safe family home for the child;
- (3) The child has no caregiver, as defined in this chapter, who is willing and able to provide a safe and appropriate placement for the child; or
- (4) The child's parent has subjected the child to harm or threatened harm and the parent is likely to flee with the child.

not specify a perpetrator.<sup>93</sup> However, Haw. Rev. Stat. Ann. § 587-5(1) (Jurisdiction) indicates that it is the family court's role to make a "finding that the child's physical or psychological health or welfare is subject to imminent harm, has been harmed, or is subject to threatened harm by the acts or omissions of the child's family . . . ." Pursuant to Haw. Rev. Stat. Ann. § 587A-4 (Definitions),

"Family" means each legal parent of a child; the birth mother, unless the child has been legally adopted; the concerned birth father as provided in section 578-2(a)(5), unless the child has been legally adopted; each parent's spouse or former spouse; each sibling or person related by blood or marriage; each person residing in the dwelling unit; and any other person or legal entity with:

(1) Legal or physical custody or guardianship of the child, or

(2) Responsibility for the child's care.

For purposes of this chapter, the term "family" does not apply to an authorized agency that assumes the foregoing legal status or relationship with a child.

While the term "family" is broadly defined under Haw. Rev. Stat. Ann. § 587A-4, it not defined broadly enough to avoid creating a barrier to child welfare involvement when a commercially sexually exploited child was not abused or neglected by a parent or caregiver.

5.6.1 Recommendation: Amend Chapter 350 and Chapter 587A to allow child welfare protection for juvenile sex trafficking victims irrespective of the perpetrator of the abuse.

5.7 *Crime victims' compensation is specifically available to a child victim of sex trafficking or commercial sexual exploitation of children (CSEC).*<sup>94</sup>

Haw. Rev. Stat. Ann. § 712-1202 (Sex trafficking) is enumerated as a violent crime under Haw. Rev. Stat. Ann. § 351-32<sup>95</sup> (Violent crimes) which brings child sex trafficking victims within the definition of "victim" for purposes of crime victims compensation.<sup>96</sup> Hawaii's Crime Victim Compensation Act (Haw. Rev. Stat. Ann. § 351-1 *et. seq.*) was enacted to provide compensation for victims of specified crimes. Haw. Rev. Stat. Ann. § 351-2 (Definitions) defines "victim" as including the following:

(1) A person who is injured or killed by any act or omission of any other person coming within the criminal jurisdiction of the State;

(2) Any resident of the State who is injured or killed in another state by an act or omission of another person, which act or omission is within the description of any of the crimes specified in section 351-32 [Violent crimes];

....

However, ineligibility criteria under Haw. Rev. Stat. Ann. § 351-31(c) (Eligibility for compensation) may cause a child sex trafficking victim's compensation award to be reduced or denied. Haw. Rev. Stat. Ann. § 351-31(c) states,

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<sup>93</sup> See Component 5.5 for discussion of the definition of "harm" under Haw. Rev. Stat. Ann. § 587A-4 (Definitions).

<sup>94</sup> The analysis in this section is predicated upon the recommendation in 5.1 being simultaneously or previously enacted.

<sup>95</sup> The text of Haw. Rev. Stat. Ann. § 351-32 cited here and elsewhere in this report includes amendments made by the enactment of House Bill 1902 during the 2016 Regular Session 28th Legislature of the Hawaii Legislature (effective July 1, 2016).

<sup>96</sup> The analysis in this section is predicated upon the recommendation in 5.1 being simultaneously or previously enacted.

In determining whether to make an order under this section, the commission may consider any circumstances it determines to be relevant, and the commission shall consider the behavior of the victim, and whether, because of provocation or otherwise, the victim bears any share of responsibility for the crime that caused the victim's injury or death and the commission shall reduce the amount of compensation in proportion to the amount of responsibility for the crime which caused the victim's injury or death; provided that if the proportion is greater than the responsibility of the person who committed the act or omission or, in the case of more than one person, the aggregate responsibility of such persons because of whom compensation is sought, the commission shall not award any compensation to the victim.

- 5.7.1 Recommendation: Amend Haw. Rev. Stat. Ann. § 351-31(c) (Eligibility for compensation) to exempt child sex trafficking victims from the ineligibility criteria that may cause a compensation award to be reduced or denied.

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 statutorily provided for minor victim-witnesses. Haw. Rev. Stat. Ann. § 621-28 (Accompaniment of children at judicial proceedings) states,

A child less than fourteen years of age, involved in a judicial proceeding, including a grand jury proceeding, shall have the right to be accompanied by a parent, a victim/witness counselor, or other adult designated by the court. The accompanying person may be placed side by side with the child at the discretion of the presiding judge or court officer; provided that this position does not interfere with the proceedings of the court. The accompanying person shall not communicate in any manner with the child unless directed by the presiding judge or court officer.

In addition, the Hawaii Rules of Evidence (Haw. R. Evid.) include several provisions that afford children extra protections. Haw. R. Evid. 616 (Televised testimony of a child) provides,

In any prosecution of an abuse offense or sexual offense alleged to have been committed against a child less than eighteen years of age at the time of the testimony, the court may order that the testimony of the child be taken in a room other than the courtroom and be televised by two-way closed circuit video equipment to be viewed by the court, the accused, and the trier of fact, if the court finds that requiring the child to testify in the physical presence of the accused would likely result in serious emotional distress to the child and substantial impairment of the child's ability to communicate. During the entire course of such a procedure, the attorneys for the defendant and for the State shall have the right to be present with the child, and full direct and cross-examination shall be available as a matter of right.

Under Haw. Rev. Stat. Ann. § 353-136 (Automated victim information and notification system special fund; authorization of payment) and § 353-137 (Automated victim information and notification system governance committee), the automated victim information and notification system is programmed to immediately inform registered victims, families, or concerned community members about the status of an offender within the system.

The use of reputation or opinion evidence of the past sexual behavior of a victim of a sexual offense is limited. Under Haw. R. Evid. 412 (Sexual offense and sexual harassment cases; relevance of victim's past behavior), in criminal cases where the defendant is accused of a sexual offense, "reputation or opinion evidence of the past sexual behavior of an alleged victim of the sexual offense is not admissible to prove the character of the victim to show action in conformity therewith." Haw. R. Evid. 412(a). Furthermore, under Haw. R. Evid. 412(b),

Notwithstanding any other provision of law, in a criminal case in which a person is accused of a sexual offense, evidence of an alleged victim's past sexual behavior other than reputation or opinion evidence

is not admissible to prove the character of the victim to show action in conformity therewith, unless the evidence is:

- (1) Admitted in accordance with subsection (c)(1) and (2) and is constitutionally required to be admitted; or
- (2) Admitted in accordance with subsection (c) and is evidence of:
  - (A) Past sexual behavior with persons other than the accused, offered by the accused upon the issue of whether the accused was or was not, with respect to the alleged victim, the source of semen or injury; or
  - (B) Past sexual behavior with the accused and is offered by the accused upon the issue of whether the alleged victim consented to the sexual behavior with respect to which sexual assault is alleged.

Somewhat more limited protections exist in civil cases under Haw. R. Evid. 412(d), which provides,

In any civil action alleging conduct which constitutes a sexual offense or sexual harassment, opinion evidence, reputation evidence, and evidence of specific instances of plaintiff's sexual conduct, or any of such evidence, is not admissible by the defendant to prove consent by the plaintiff or the absence of injury to the plaintiff, unless the injury alleged by the plaintiff is in the nature of loss of consortium.

Haw. R. Evid. 412(d)'s prohibition is not "applicable to evidence of the plaintiff's sexual conduct with the alleged perpetrator," and if the victim introduces evidence, including testimonial evidence, relating to the victim's own sexual conduct, "the defendant may cross-examine the witness who gives the testimony and offer relevant evidence limited specifically to the rebuttal of the evidence introduced by the plaintiff or given by the plaintiff." Haw. R. Evid. 412(e), (f). Notably, these protections in civil cases do not extend to situations in which the defendant seeks to introduce evidence of the victim plaintiff's past sexual conduct to impeach the credibility of the victim-plaintiff. Haw. R. Evid. 412(g).

Additionally, pursuant to Haw. Rev. Stat. Ann. § 28-101(a)<sup>97</sup> (Witness security and protection)

The attorney general shall establish a statewide witness program through which the attorney general may fund or provide for the security and protection of a government witness or a potential government witness in an official proceeding or investigation where the attorney general determines that an offense described in section 710-1071 (intimidating a witness), 710-1072 (tampering with a witness), or 710-1072.2 (retaliating against a witness) is likely to be committed or involves great public interest. The attorney general may also fund or provide for the security and protection of the immediate family of, or a person otherwise closely associated with, the witness or potential witness if the family or person may also be endangered. In determining whether the funds or security and protection are to be provided, the attorney general shall give greatest priority to official proceedings or investigations involving pending or potential organized crime, racketeering activity, promoting prostitution, sex trafficking, or career criminal prosecutions.

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<sup>97</sup> The text of Haw. Rev. Stat. Ann. § 28-101 cited here and elsewhere in this report includes amendments made by the enactment of House Bill 1902 during the 2016 Regular Session 28th Legislature of the Hawaii Legislature (effective July 1, 2016).

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

Juvenile sex trafficking victims who are arrested but not adjudicated delinquent for prostitution offenses may expunge their records under Haw. Rev. Stat. Ann. § 571-88 (Orders expunging juvenile arrest records) which provides,

- (a) The court may issue an order expunging<sup>98</sup> a juvenile arrest record of a person upon written application by the person or, if the person is a minor, the minor's parent or guardian; provided the arrest was made pursuant to section 571-11(1)<sup>99</sup> or (2)<sup>100</sup> and the arrest record<sup>101</sup> meets the following criteria:
  - (1) The matter was not referred to the prosecuting attorney or the family court and:
    - (A) The person was not counseled and released by the police; or
    - (B) The person was counseled and released by the police and the person has become an adult; or
  - (2) The matter was referred to the prosecuting attorney or family court and:
    - (A) The person was not adjudicated responsible by the court; or
    - (B) The matter was dismissed with prejudice.
- (b) Before issuing an order to expunge an arrest record of a matter that was never referred to the court, the court shall consult with the prosecuting attorney in the appropriate circuit.

....

However, a juvenile sex trafficking victim who is adjudicated as a law violator for a prostitution offense would not be able to expunge the juvenile record under Haw. Rev. Stat. Ann. § 571-88. While Haw. Rev. Stat. Ann. § 712-1209.6<sup>102</sup> (Prostitution; motion to vacate conviction) allows for vacatur of prostitution convictions, it does not appear to be available to juvenile sex trafficking victims to vacate and expunge juvenile records related to their victimization. Pursuant to Haw. Rev. Stat. Ann. § 712-1209.6(1),

A person convicted of committing the offense of prostitution under section 712-1200, loitering for the purpose of engaging in or advancing prostitution under section 712-1206, street solicitation of prostitution in designated areas under section 712-1207, or convicted of a lesser offense when originally charged with a violation of section 712-1200, 712-1206, or 712-1207, may file a motion to vacate the conviction if the defendant's participation in the offense was the result of the person having been a victim of:

- (a) Sex trafficking under section 712-1202 or promoting prostitution under section 712-1203; or
- (b) A severe form of trafficking in persons as defined in title 22 United States Code section 7102(9)(A).

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<sup>98</sup> Haw. Rev. Stat. Ann. § 571-88(e) defines "expunge" as "a process defined by agency policy in which records are segregated and kept confidential, or destroyed."

<sup>99</sup> See *supra* Component 5.4.

<sup>100</sup> See *supra* Component 5.4.

<sup>101</sup> Haw. Rev. Stat. Ann. § 571-88(e) defines "arrest record" as "any record maintained by a county police department or the department of the attorney general under chapters 846 and 846D, relating to the arrest of the minor for a specific offense, including fingerprints taken during the arrest and maintained under section 846-2.5(b)."

<sup>102</sup> The text of Haw. Rev. Stat. Ann. § 712-1209.6 cited here and elsewhere in this report includes amendments made by the enactment of House Bill 1902 during the 2016 Regular Session 28th Legislature of the Hawaii Legislature (effective July 1, 2016).

- 5.9.1 Recommendation: Amend Haw. Rev. Stat. Ann. § 712-1209.6 (Prostitution; motion to vacate conviction) to allow a juvenile sex trafficking victim to expunge records relate to their trafficking victimization upon turning 18 or earlier.

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

Civil remedies are available under Chapter 663J (Liability for coercion into prostitution).<sup>103</sup> Haw. Rev. Stat. Ann. § 663J-3<sup>104</sup> (Cause of action for coercion into prostitution or sex trafficking) states,

An individual<sup>105</sup> has a cause of action against a person who:

- (1) Coerced<sup>106</sup> the individual into prostitution<sup>107</sup> or to remain in prostitution, or subjected the individual to sex trafficking<sup>108</sup>;
- (2) Used coercion to collect or receive any of the individual's earnings derived from prostitution or from being the subject of sex trafficking; or
- (3) Hired, or attempted to hire the individual to engage in prostitution, when a reasonable person would believe that the individual was coerced into prostitution by another person or was being subjected to sex trafficking.

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<sup>103</sup> Pursuant to Haw. Rev. Stat. Ann. § 663J-1 (Title), “This chapter may be cited as the Sex Trafficking and Prostitution Coercion Liability Act.” The text of Haw. Rev. Stat. Ann. § 663J-1 cited here and elsewhere in this report includes amendments made by the enactment of House Bill 1902 during the 2016 Regular Session 28th Legislature of the Hawaii Legislature (effective July 1, 2016).

<sup>104</sup> The text of Haw. Rev. Stat. Ann. § 663J-3 cited here and elsewhere in this report includes amendments made by the enactment of House Bill 1902 during the 2016 Regular Session 28th Legislature of the Hawaii Legislature (effective July 1, 2016).

<sup>105</sup> Pursuant to Haw. Rev. Stat. Ann. § 663J-6 (Joinder of Parties),

- (a) In the discretion of the court, two or more individuals may join in one action under this chapter as plaintiffs if their respective actions involve a person who engages in promoting prostitution by coercion or subjecting the individuals to sex trafficking.
- (b) In the discretion of the court, two or more persons may be joined in one action under this chapter as defendants if those persons may be liable to at least one plaintiff.

<sup>106</sup> Haw. Rev. Stat. Ann. § 663J-2 (Definitions) defines “[c]oerce” as,

[T]o use or threaten to use any form of domination, restraint, or control for the purpose of causing an individual to engage in or remain in prostitution or to relinquish earnings derived from prostitution. Coercion exists if the totality of the circumstances establish the existence of domination, restraint, or control that would have the reasonably foreseeable effect of causing an individual to engage in or remain in prostitution or to relinquish earnings derived from prostitution.

The text of Haw. Rev. Stat. Ann. § 663J-2 cited here and elsewhere in this report includes amendments made by the enactment of House Bill 1902 during the 2016 Regular Session, 28th Legislature of the Hawaii Legislature (effective July 1, 2016).

<sup>107</sup> Pursuant to Haw. Rev. Stat. Ann. § 663J-2 (Definitions), “‘Prostitution’ has the same meaning as provided in section 712-1200.” *See supra* note 106.

<sup>108</sup> Pursuant to Haw. Rev. Stat. Ann. § 663J-2 (Definitions), “‘Sex trafficking’ has the same meaning as provided in section 712-1202.” *See supra* note 106.



Damages are assessed pursuant to Haw. Rev. Stat. Ann. § 663J-5<sup>109</sup> (Damages), which states,

An individual entitled to bring an action under section 663J-3 may recover all of the following damages:

- (1) Economic damages proximately caused by coercion into prostitution or being the subject of sex trafficking;
- (2) Noneconomic damages proximately caused by coercion into prostitution or being the subject of sex trafficking;
- (3) Exemplary damages;
- (4) Reasonable attorney's fees; and
- (5) Costs of suit, including reasonable expenses for expert testimony.

Pursuant to Haw. Rev. Stat. Ann. § 663J-9<sup>110</sup> (Other remedies preserved),

The remedies provided under this chapter do not restrict the right of any individual to bring an action under other law, including common law, to recover damages arising out of the use of the individual in prostitution, or subjecting the individual to sex trafficking, or the coercion incident to the individual being used in prostitution or sex trafficking; nor does this chapter limit or restrict the liability of any person under other law.

A civil remedy is also available under Haw. Rev. Stat. Ann. § 657-1.8(a)(2) (Civil action arising from sexual offenses; application; certificate of merit), which states in subsection (a), "A civil cause of action for the sexual abuse of a minor shall be based upon sexual acts that constituted or would have constituted a criminal offense under part V or VI of chapter 707."<sup>111</sup> Subsection (b) further provides,

A claim may also be brought under this subsection against a legal entity if:

- (1) The person who committed the act of sexual abuse against the victim was employed by an institution, agency, firm, business, corporation, or other public or private legal entity that owed a duty of care to the victim; or
- (2) The person who committed the act of sexual abuse and the victim were engaged in an activity over which the legal entity had a degree of responsibility or control. Damages against the legal entity shall be awarded under this subsection only if there is a finding of gross negligence on the part of the legal entity.

Pursuant to subsection (c),

A defendant against whom a civil action is commenced may recover attorney's fees if the court determines that a false accusation was made with no basis in fact and with malicious intent. A verdict in favor of the defendant shall not be the sole basis for a determination that an accusation had no basis

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<sup>109</sup> The text of Haw. Rev. Stat. Ann. § 663J-5 cited here and elsewhere in this report includes amendments made by the enactment of House Bill 1902 during the 2016 Regular Session 28th Legislature of the Hawaii Legislature (effective July 1, 2016).

<sup>110</sup> The text of Haw. Rev. Stat. Ann. § 663J-9 cited here and elsewhere in this report includes amendments made by the enactment of House Bill 1902 during the 2016 Regular Session, 28th Legislature of the Hawaii Legislature (effective July 1, 2016).

<sup>111</sup> Offenses in part V or VI of chapter 707 include: Haw. Rev. Stat. Ann. § 707-733.6 (Continuous sexual assault of a minor under the age of fourteen years), § 707-750 (Promoting child abuse in the first degree), § 707-756 (Electronic enticement of a child in the first degree) and § 707-757 (Electronic enticement of a child in the second degree).

in fact and was made with malicious intent. The court shall make an independent finding of an improper motive prior to awarding attorney's fees under this section.

Additionally, subsection (d) provides,

In any civil action filed pursuant to subsection (a) or (b), a certificate of merit shall be filed by the attorney for the plaintiff, and shall be sealed and remain confidential. The certificate of merit shall include a notarized statement by a:

- (1) Psychologist licensed pursuant to chapter 465;
- (2) Marriage and family therapist licensed pursuant to chapter 451J;
- (3) Mental health counselor licensed pursuant to chapter 453D; or
- (4) Clinical social worker licensed pursuant to chapter 467E;

who is knowledgeable in the relevant facts and issues involved in the action, who is not a party to the action.

The notarized statement included in the certificate of merit shall set forth in reasonable detail the facts and opinions relied upon to conclude that there is a reasonable basis to believe that the plaintiff was subject to one or more acts that would result in an injury or condition specified in (a).

Pursuant to Haw. Rev. Stat. Ann. § 706-646 (Victim restitution),

....

(2) The court shall order the defendant to make restitution for reasonable and verified losses suffered by the victim or victims as a result of the defendant's offense when requested by the victim. The court shall order restitution to be paid to the crime victim compensation commission in the event that the victim has been given an award for compensation under chapter 351. If the court orders payment of a fine in addition to restitution or a compensation fee, or both, the payment of restitution and compensation fee shall have priority over the payment of the fine, and payment of restitution shall have priority over payment of a compensation fee.

(3) In ordering restitution, the court shall not consider the defendant's financial ability to make restitution in determining the amount of restitution to order. The court, however, shall consider the defendant's financial ability to make restitution for the purpose of establishing the time and manner of payment. The court shall specify the time and manner in which restitution is to be paid. Restitution shall be a dollar amount that is sufficient to reimburse any victim fully for losses, including but not limited to:

....

(b) Medical expenses; and

(c) Funeral and burial expenses incurred as a result of the crime.

(4) The restitution ordered shall not affect the right of a victim to recover under section 351-33 [Award for compensation] or in any manner provided by law; provided that any amount of restitution actually recovered by the victim under this section shall be deducted from any award under section 351-33.

Enacted House Bill 2561, Section 14<sup>112</sup> provides,

When a defendant is ordered to make payments pursuant to chapters 351 [Crime Victim Compensation], 706 [Disposition of Convicted Defendants], 846F [Internet Crimes Against Children],

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<sup>112</sup> The text of Haw. Rev. Stat. Ann. § 706-[] cited here and elsewhere in this report includes amendments made by the enactment of House Bill 2561 during the 2016 Regular Session, 28th Legislature of the Hawaii Legislature (effective July 1, 2016).

and 853 [Criminal Procedure: Deferred Acceptance of Guilty Plea, Nolo Contendere Plea], or as otherwise provided by law, payments shall be made in the following order of priority:

- (1) Restitution;
- (2) Crime victims compensation fee;
- (3) Probation services fee;
- (4) Human trafficking victim services fee;
- (5) Other fees, including but not limited to internet crimes against children fee and drug demand reduction assessment fee;
- (6) DNA analysis monetary assessment; and
- (7) Fines.

Furthermore, a person injured as a result of a travel agency or charter tour operator engaging in “promoting travel for prostitution” has a claim under Haw. Rev. Stat. Ann. § 468L-10 (Consumer right of action), which states the following:

Any person who suffers damage as a result of a violation of this chapter shall be entitled to injunctive relief restraining further violations, and may sue to recover damages in any circuit court of the State, and, if successful, shall recover three times the actual damages or \$1,000, whichever is greater. In any action brought under this chapter, the prevailing party shall be entitled to the recovery of costs of suit, including reasonable attorney’s fees.

Additionally, under Haw. Rev. Stat. Ann. § 468L-8 (Restitution), “Any person who engages in an act or practice that violates any provision of this chapter or rules adopted pursuant hereto may be ordered by a court of proper jurisdiction to make restitution to all persons injured by the act or practice.”

In addition, if the activities of a trafficker or facilitator of domestic minor sex trafficking are prohibited under Haw. Rev. Stat. Ann. Chapter 842 (Organized crime), the victim can sue the trafficker or facilitator to recover damages the victim has sustained under Haw. Rev. Stat. Ann. § 842-8(c) (Civil remedies), which reads in part, “[a]ny person injured in the person’s business or property by reason of a violation of this chapter [Organized crime] may sue therefor in any appropriate court and shall recover the damages the person sustains and the cost of the suit, including a reasonable attorney’s fee.”

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

With regard to criminal prosecutions, Haw. Rev. Stat. Ann. § 701-108 (Time limitations) states,

....

(2) Except as otherwise provided in this section, prosecutions for other offenses are subject to the following periods of limitation:

....

- (b) A prosecution for a class A felony must be commenced within six years after it is committed;
- (c) A prosecution for any felony under part IX of chapter 708 [Computer crime] must be commenced within five years after it is committed;
- (d) A prosecution for any other felony must be commenced within three years after it is committed;
- (e) A prosecution for a misdemeanor or parking violation must be commenced within two years after it is committed; and
- (f) A prosecution for a petty misdemeanor or a violation other than a parking violation must be commenced within one year after it is committed.

....

- (6) The period of limitation does not run:
- (a) During any time when the accused is continuously absent from the State or has no reasonably ascertainable place of abode or work within the State, but in no case shall this provision extend the period of limitation by more than four years from the expiration of the period of limitation prescribed in subsection (2);
  - (b) During any time when a prosecution against the accused for the same conduct is pending in this State; or
  - (c) For any felony offense under chapter 707, part V [Sexual offenses] or VI [Child abuse], during any time when the victim is alive and under eighteen years of age.

Thus, the statute of limitations for sexual offenses against minors under Haw. Rev. Stat. Ann. Chapter 707, part VI [Child abuse] which includes the CSEC offenses under Haw. Rev. Stat. Ann. § 707-756 (Electronic enticement of a child in the first degree) and Haw. Rev. Stat. Ann. § 707-750(1) (Promoting child abuse in the first degree), is tolled as long as the victim is alive and less than 18 years old. Haw. Rev. Stat. Ann. § 701-108(6)(c). Additionally, prosecutions for sexual assault in the first and second degree and continuous sexual assault of a minor under the age of fourteen years may be commenced any time. Haw. Rev. Stat. Ann. § 701-108(1).

With regard to civil actions, Haw. Rev. Stat. Ann. § 657-1.8 (Civil action arising from sexual offenses; application; certificate of merit) provides,

- (a) Notwithstanding any law to the contrary, no action for recovery of damages based on physical, psychological, or other injury or condition suffered by a minor arising from the sexual abuse of the minor by any person shall be commenced against the person who committed the act of sexual abuse more than:
- (1) Eight years after the eighteenth birthday of the minor or the person who committed the act of sexual abuse attains the age of majority, whichever occurs later; or
  - (2) Three years after the date the minor discovers or reasonably should have discovered that psychological injury or illness occurring after the age of minor's eighteenth birthday was caused by the sexual abuse . . . .
- (b) For a period of four years after April 24, 2012, a victim of child sexual abuse that occurred in this State may file a claim in a circuit court of this State against the person who committed the act of sexual abuse if the victim is barred from filing a claim against the victim's abuser due to the expiration of the applicable civil statute of limitations that was in effect prior to April 24, 2012.

Otherwise, pursuant to Haw. Rev. Stat. Ann. § 657-1(4) (Six years), "[p]ersonal actions of any nature whatsoever not specifically covered by the laws of the State" may be commenced within six years after the cause of action occurred. Under Haw. Rev. Stat. Ann. § 657-13 (Infancy, insanity, imprisonment), if any person "entitled to bring any action specified in this part," with certain exceptions, is under 18 or is incarcerated for a term less than life "at the time the cause of action accrued," that person is "at liberty to bring such actions within the respective times limited in this part, after the disability is removed or at any time while the disability exists." Haw. Rev. Stat. Ann. § 657-13(1), (3).

The statute of limitations for a civil claim under Haw. Rev. Stat. § 663J-3<sup>113</sup> (Cause of action for coercion into prostitution or sex trafficking), is set forth in Haw. Rev. Stat. Ann. § 663J-7<sup>114</sup> (Statute of limitations) which

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<sup>113</sup> See *supra* note 104.

<sup>114</sup> The text of Haw. Rev. Stat. Ann. § 663J-7 cited here and elsewhere in this report includes amendments made by the enactment of House Bill 1902 during the 2016 Regular Session 28th Legislature of the Hawaii Legislature (effective July 1, 2016).

states,

(a) A claim under this chapter may not be brought against a person more than six years after an act of promoting prostitution by coercion or sex trafficking by that person.

(b) The limitation period provided for in this chapter is tolled:

(1) During the minority of the individual who engages in prostitution; or

(2) Any time there is a criminal offense investigation being actively conducted against the defendant by a governmental agency or there is a criminal offense charge, information, or indictment pending against the defendant.

5.11.1 Recommendation: Amend Haw. Rev. Stat. Ann. § 701-108 (Time limitations) to eliminate the statute of limitations for commencing criminal prosecutions related to domestic minor sex trafficking.

**Legal Components:**

- 6.1 *Training on human trafficking and domestic minor sex trafficking for law enforcement is statutorily mandated or authorized.*
  - 6.2 *Single party consent to audiotaping is permitted in law enforcement investigations.*
  - 6.3 *Wiretapping is an available tool to investigate domestic minor sex trafficking.*
  - 6.4 *Using a law enforcement 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 or electronic communications to investigate buyers and traffickers is a permissible investigative technique.*
  - 6.6 *Law enforcement is mandated to promptly report missing and recovered children.*
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**Legal Analysis:**

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

Training on domestic minor sex trafficking is not mandated or authorized by law. However, Haw. Rev. Stat. Ann. § 350-1.15 (Orientation and training) requires the Hawaii Department of Social Services to “offer periodic orientation and training to those responsible for making child abuse and neglect reports pursuant to 350-1.1 [Reports].”

- 6.1.1 Recommendation: Amend Haw. Rev. Stat. Ann. § 350-1.15 (Orientation and training) to require or authorize the Department of Social Services to provide training specifically addressing domestic minor sex trafficking.

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

Single party consent to audiotaping is permissible in Hawaii. Under Haw. Rev. Stat. Ann. § 803-42(b)(4) (Interception, access, and disclosure of wire, oral, or electronic communications, use of pen register, trap and trace device, and mobile tracking device prohibited), it is not illegal “for a person acting under color of law to intercept a wire, oral, or electronic communication, when the person is a party to the communication or one of the parties to the communication has given prior consent to the interception.” Additionally, pursuant to Haw. Rev. Stat. Ann. § 803-42(b)(3)(A),

It shall not be unlawful under this part for a person not acting under color of law to intercept a wire, oral, or electronic communication when the person is a party to the communication or when one of the parties to the communication has given prior consent to the interception unless the communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of this State.

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

Hawaii law includes sex trafficking as a crime for which a wiretapping order may be issued. Under Haw. Rev. Stat. Ann. § 803-44<sup>115</sup> (Application for court order to intercept wire, oral, or electronic communications), certain persons, as set forth in the statute, can seek a court order for wiretapping for the following crimes:

- (1) Murder;
- (2) Kidnapping;
- (3) Labor trafficking in the first degree;
- (4) Labor trafficking in the second degree;
- (5) Felony criminal property damage involving the danger of bodily injury as defined in section 707-700;
- (6) Distribution of dangerous, harmful, or detrimental drugs; or
- (7) Conspiracy to commit one or more of the above; or involving
- (8) Involvement in organized crime and any of the following felony offenses:
  - (A) Extortion;
  - (B) Bribery of a juror, witness, or police officer;
  - (C) Receiving stolen property;
  - (D) Gambling; and
  - (E) Money laundering; and
  - (F) Sex trafficking.

- 6.3.1 Recommendation: Amend Haw. Rev. Stat. Ann. § 803-44 (Application for court order to intercept wire, oral, or electronic communications) to specifically authorize the prosecuting attorney to seek a court order authorizing the use of wiretapping where the interception may provide evidence of CSEC offenses.

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.*

Under Haw. Rev. Stat. § 712-1209.1(4) (Solicitation of a minor for prostitution), a defendant is expressly prohibited from raising a defense as to the use of law enforcement decoy in an investigation into the commercial sexual exploitation of a minor. Haw. Rev. Stat. Ann. § 712-1209.1(4) (Solicitation of a minor for prostitution) states that

a person eighteen years of age or older commits the offense of solicitation of a minor for prostitution if the person intentionally, knowingly, or recklessly offers or agrees to pay a fee to a minor or to a member of a police department, a sheriff, or a law enforcement officer who represents that person's self as a minor to engage in sexual conduct.

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<sup>115</sup> The text of Haw. Rev. Stat. Ann. § 803-44 cited here and elsewhere in this report includes amendments made by the enactment of House Bill 1902 during the 2016 Regular Session 28th Legislature of the Hawaii Legislature (effective July 1, 2016).

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

Under Haw. Rev. Stat. Ann. § 707-756(1) (Electronic enticement of a child in the first degree),

Any person who, using a computer or any other electronic device:

(a) Intentionally or knowingly communicates:

....

(iii) With another person who represents that person to be under the age of eighteen years;

(b) With the intent to promote or facilitate the commission of a felony:

....

(ii) That is a class A felony; or

(iii) That is another covered offense as defined in section 846E-1 [Definitions],

agrees to meet with the minor, or with another person who represents that person to be a minor under the age of eighteen years; and

(c) Intentionally or knowingly travels to the agreed upon meeting place at the agreed upon meeting time, is guilty of electronic enticement of a child in the first degree.

Haw. Rev. Stat. Ann. § 707-757(Electronic enticement of a child in the second degree) and § 707-759 (Indecent electronic display to a child) also use the phrase “another person who represents that person to be under the age of eighteen years,” which seems to indicate that decoys may be used.

6.6 *Law enforcement is mandated to promptly report missing and recovered children.*

Hawaii has established a Missing Child Center “to assist in the implementation of federal and state law relating to missing children.” Haw. Rev. Stat. Ann. § 28-121(a). Haw. Rev. Stat. Ann. § 28-121 (Missing child center-Hawaii; programs) states in part,

....

(b) The missing child center-Hawaii shall include programs to coordinate the efforts of state and county agencies with those of federal agencies in locating, recovering, and protecting missing children and to promote community awareness of the problem of missing children.

(c) The department of the attorney general shall employ, without regard to chapter 76, a coordinator and an assistant to the coordinator who shall coordinate existing public and private resources and further define and develop, to the extent of available resources, the most appropriate system for addressing the problem of missing children, which may include the following:

(1) A communication network among county and state law enforcement agencies and the National Crime Information Center in Washington, D.C.;

(2) A standardized reporting system in all counties developed in conjunction with law enforcement officials at all levels;

(3) Assistance in the establishment of trained search teams that can be activated in each county;

(4) Educational programs designed to prevent child abduction, enhance child safety, and raise public awareness about ways to prevent child abduction, molestation, and sexual exploitation;

(5) A directory of resources to assist in locating missing children including names, addresses, and services provided by public and private organizations; and

(6) A statewide centralized, uniform, and computerized information database relating to family-related and nonfamily-related child abductions, as well as runaways and children who are unwanted by their parents.

Haw. Rev. Stat. Ann. § 577-27(a) (Missing children; reporting) requires a law enforcement agency receiving a police report that a child is missing, filed by a parent or guardian, to do the following:



- (1) Immediately inform all on-duty law enforcement officers of the existence of the missing child report;
- (2) Report pertinent information about the missing child to any other law enforcement agency having jurisdiction in the county; and
- (3) Immediately transmit pertinent information on the missing child for inclusion within the state juvenile justice information system, and, if it appears that the juvenile has left the State or may leave the State, the National Crime Information Center system.”

6.6.1 Recommendation: Amend Haw. Rev. Stat. Ann. § 577-27(a) (Missing children; reporting) to require reporting of recovered children.

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