

# PROTECTED INNOCENCE CHALLENGE

STATE ACTION. NATIONAL CHANGE.

## 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 *Commercial sexual exploitation of children (CSEC) or prostitution statutes refer to the sex trafficking statute to identify the commercially sexually exploited minor as a trafficking victim.*
- 1.4 *The state racketeering or gang crimes statute includes sex trafficking and commercial sexual exploitation of children (CSEC) offenses as predicate acts allowing the statute to be used to prosecute trafficking crimes.*

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

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

Hawaii has not enacted a human trafficking law that includes the crime of sex trafficking. A labor trafficking law (HB 141) was passed and signed by the Governor in 2011. However, it specifically excludes sex trafficking by stating, “Prostitution-related and obscenity-related activities as set forth in chapter 712 are not forms of ‘services’ under this part.” 2011 Haw. Sess. Laws 146. The definition of “labor” also excludes “[p]rostitution-related and obscenity-related activities.”<sup>2</sup> 2011 Haw. Sess. Laws 146.

<sup>1</sup> Unless otherwise specified, all references to Hawaii statutes were taken from Hawaii Revised Statutes (LEXIS through the 2012 Reg. Sess.) and all federal statutes were taken from United States Code (LEXIS through PL 112-173, approved 8/16/12). All statutes numbers in brackets on Lexis have been assigned a number by the Hawaii Revisor of Statutes. KEN H. TAKAYAMA, HAWAII LEGISLATIVE DRAFTING MANUAL 23 (9th ed. 1996), available at <http://www.state.hi.us/lrb/rpts96/dftman.pdf>. This report includes legislation enacted before August 1, 2012.

<sup>2</sup> However, sexual assault is identified as a means to accomplish the labor trafficking in § 707-781 (Labor trafficking in the first degree). 2011 Haw. Sess. Laws 146.

- 1.1.1 Recommendation: Enact a human trafficking law that includes sex trafficking of minors, does not require proof of the use of force, fraud, or coercion to effect the trafficking of minors, and expressly identifies children who are commercially sexually exploited as domestic minor sex trafficking victims.<sup>3</sup>

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>4</sup> prohibited by law or which has been declared by rule of the director<sup>5</sup> to be hazardous for the minor." Haw. Rev. Stat. Ann. § 390-1 (Definitions) defines "adult entertainment" as the following:

[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>6</sup> not to exceed \$2,000. Haw. Rev. Stat. Ann. §§ 390-7, 706-663, 706-640(1)(d).<sup>7</sup>

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<sup>3</sup> Subsequent recommendations in this report that recommend amending provisions to refer to the sex trafficking law are predicated upon the recommendations contained in Section 1.1 being previously or simultaneously implemented.

<sup>4</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>5</sup> Haw. Rev. Stat. Ann. § 390-1(D) defines "director" as the "director of labor and industrial relations."

<sup>6</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>7</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); or

2. 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>8</sup> another person with intent to: . . . (c) Facilitate the commission of a felony<sup>9</sup> or flight thereafter; (d) Inflict bodily injury<sup>10</sup> upon that person or subject that person to a sexual offense; . . . or (g) Unlawfully obtain the labor<sup>11</sup> or services<sup>12</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.<sup>13</sup> Haw. Rev. Stat. Ann. §§ 707-720(2), 706-659, 706-640(1)(a).
3. 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>14</sup> or participates in the preparation of child pornography;<sup>15</sup> (b) Produces or participates in the preparation of pornographic material that employs, uses, or otherwise contains a minor<sup>16</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>17</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

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(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.

<sup>8</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 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>9</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>10</sup> Haw. Rev. Stat. Ann. § 707-700 defines “bodily injury” as “physical pain, illness, or any impairment of physical condition.”

<sup>11</sup> Haw. Rev. Stat. Ann. § 707-700 defines “labor” as “work of economic or financial value.”

<sup>12</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>13</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>14</sup> Haw. Rev. Stat. Ann. § 707-750(2) defines “produces” as “to produce, direct, manufacture, issue, publish, or advertise.”

<sup>15</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>16</sup> A “minor” is defined as “any person less than eighteen years old.” Haw. Rev. Stat. Ann. § 707-750(2).

<sup>17</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).

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).

4. Haw. Rev. Stat. Ann. § 712-1202(1)(b) (Promoting prostitution in the first degree) makes it a crime if a person knowingly “(b) [a]dvances<sup>18</sup> or profits<sup>19</sup> from prostitution of a person less than eighteen years old.” Promoting prostitution 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. §§ 712-1202(2), 706-659, 706-640(1)(a).

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

1. Haw. Rev. Stat. Ann. § 707-756 (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 as defined in section 846E-1 [Definitions; sex offenses; crime against minor],<sup>20</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), 706-640(1)(b).

2. 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:

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<sup>18</sup> Pursuant to Haw. Rev. Ann. Stat § 712-1201(1) (Definitions), “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.”

<sup>19</sup> Pursuant to Haw. Rev. Ann. Stat § 712-1201(2), “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.”

<sup>20</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.”

- (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(2), 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.”

3. 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).
4. 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 5 years and a possible fine not exceeding \$10,000. Haw. Rev. Stat. Ann. §§ 707-732(2), 706-660(2), 706-640(1)(c).

5. 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).

6. 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, or 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; or

(vii) 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 *Commercial sexual exploitation of children (CSEC) or prostitution statutes refer to the sex trafficking statute to identify the commercially sexually exploited minor as a trafficking victim.*

Hawaii has not enacted a human trafficking statute that includes sex trafficking.

1.3.1 Recommendation: Upon enacting a sex trafficking statute, amend the CSEC and prostitution laws to refer to the trafficking statute to ensure identification of minor trafficking victims.

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)<sup>21</sup> 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>22</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, in addition to the CSEC offenses of Haw. Rev. Stat. Ann. § 707-720(1) (Kidnapping) and Haw. Rev. Stat. Ann. § 712-1202(1)(b) (Promoting prostitution in the first degree) other CSEC offenses appear to fall within the definition of “racketeering activity.” However,

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<sup>21</sup> For additional information on organized crime statutes, see <http://www.sharedhope.org/wp-content/uploads/2012/11/SHI-WhitePaperFederalStateRacketeeringGangCrimeLaws.pdf>.

<sup>22</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.”

without expressly including these offenses in the definition of racketeering, the availability of the racketeering statute as a tool to combat these CSEC offenses is less clear.

To the extent that the racketeering statute is available to combat criminal enterprises that commit CSEC offenses, 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.”

- 1.4.1 Recommendation: Amend Haw. Rev. Stat. Ann. §§842-1 through 842-12 (Organized Crime) to expressly include the following crimes as racketeering activity: Haw. Rev. Stat. Ann. § 707-720(1) (Kidnapping), § 390-2(a) (Employment of minors under eighteen years of age), § 712-1202(1)(b) (Promoting prostitution in the first degree), and § 707-750(1) (Promoting child abuse in the first degree).

**Legal Components:**

- 2.1 *The state human trafficking law can be applied to buyers of commercial sex acts from a victim of domestic minor sex trafficking.*
  - 2.2 *Buyers of commercial sex acts with a minor can be prosecuted under commercial sexual exploitation of children (CSEC) laws.*
  - 2.3 *Solicitation 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 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 victim of domestic minor sex trafficking.*

Hawaii has not enacted a sex trafficking law.

- 2.1.1 Recommendation: Enact a sex trafficking law that includes language to clearly apply to buyers of commercial sex acts with minors.

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

Hawaii does not have a CSEC law that makes it a crime to buy sex acts with a minor. Various sexual offense laws could be applied to some buyers of sex from a minor, including Haw. Rev. Stat. Ann. § 707-730 (Sexual assault in the first degree), § 707-732 (Sexual assault in the third degree), § 707-756 (Electronic enticement of a child in the first degree), and § 707-757 (Electronic enticement of a child in the second degree). These crimes are felony offenses.<sup>23</sup>

- 2.2.1 Recommendation: Enact a law specifically criminalizing the purchase of sex acts with any minor under 18 and provide appropriately high penalties.

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<sup>23</sup> See discussion of relevant provisions *supra* Section 1.2.



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

The crime of buying sex with a minor is not distinct from the crime of buying sex with an adult. Haw. Rev. Stat. Ann. § 712-1200 (Prostitution) states in part, “(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 for a fee; or (b) Pays, agrees to pay, or offers to pay a fee to another to engage in sexual conduct.”<sup>24</sup>

- 2.3.1 Recommendation: Amend Haw. Rev. Stat. Ann. § 712-1200 (Prostitution) to distinguish between cases of purchasing sex with a minor and purchasing sex with an adult and provide heightened penalties when a minor is involved.

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

In the absence of a sex trafficking law or any CSEC laws that reach the actions of a buyer of sex acts with a minor, a buyer charged with soliciting prostitution under Haw. Rev. Stat. Ann. § 712-1200(4)(a), (b) (Prostitution), “[a] person convicted of committing the offense of prostitution shall be sentenced as follows:”

- (a) For the first offense, when the court has not deferred further proceedings pursuant to chapter 853 [Criminal procedure: deferred acceptance of guilty plea, nolo contendere plea], a mandatory fine of \$500 and the person may be sentenced to a term of imprisonment for not more than thirty days or probation; provided that in the event the convicted person defaults in payment of the \$500 fine, and the default was not contumacious, the court may sentence the person to perform services for the community as authorized by section 706-605(1).
- (b) For any subsequent offense, a mandatory fine of \$500 and a term of imprisonment for thirty days or probation, without possibility of deferral of further proceedings pursuant to chapter 853 and without possibility of suspension of sentence.

Some buyers of sex with minors could be prosecuted under several of Hawaii’s sexual offense and child abuse laws. These laws include Haw. Rev. Stat. Ann. § 707-730 (Sexual assault in the first degree) (a Class A felony), § 707-756 (Electronic enticement of a child in the first degree) (a Class B felony), § 707-732 (Sexual

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<sup>24</sup> See also, Haw. Rev. Stat. Ann. § 712-1207 (Street solicitation of prostitution; designated areas), which applies to buying sex within the Waikiki boundaries or other designated areas, stating, in part,

- (1) It shall be unlawful for any person within the boundaries of Waikiki and while on any public property to:
  - • •
  - (b) Pay, agree to pay, or offer to pay a fee to another person to engage in sexual conduct.
- (2) It shall be unlawful for any person within the boundaries of other areas in this State designated by county ordinance pursuant to subsection (3), and while on any public property, to:
  - • •
  - (b) Pay, agree to pay, or offer to pay a fee to another person to engage in sexual conduct.
- (3) Upon a recommendation of the chief of police of a county, that county may enact an ordinance that:
  - (a) Designates areas, each no larger than three square miles, as zones of significant prostitution-related activity that is detrimental to the health, safety, or welfare of the general public; or
  - (b) Alters the boundaries of any existing area under paragraph (a);provided that not more than four areas may be designated within the State.
- (4) Notwithstanding any law to the contrary, any person violating this section shall be guilty of a petty misdemeanor and shall be sentenced to a mandatory term of thirty days imprisonment. The term of imprisonment shall be imposed immediately, regardless of whether the defendant appeals the conviction, except as provided in subsection (5).
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assault in the third degree) (a Class C felony), and § 707-757 (Electronic enticement of a child in the second degree) (a Class C felony).

Class A felonies are 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. §§ 706-659, 706-640(1)(a). Class B felonies are punishable by imprisonment up to 10 years and a possible fine not to exceed \$25,000. Haw. Rev. Stat. Ann. §§ 706-660(1), 706-640(1)(b). Class C felonies are punishable by imprisonment up to 5 years and a possible fine not to exceed \$10,000. Haw. Rev. Stat. Ann. §§ 706-660(2), 706-640(1)(c). 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 or attempted 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).

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.

In contrast, if the victim is under the age of 14, a conviction under the TVPA<sup>25</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>26</sup> against a minor. To the extent buyers can be prosecuted under other federal CSEC laws,<sup>27</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>28</sup>

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<sup>25</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>26</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>27</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>28</sup> 18 U.S.C. §§ 2251A(b) (conviction punishable by imprisonment for 30 years to life and a fine), 2251(e) (conviction punishable by imprisonment for 15–30 years and a fine), 2423(a) (conviction punishable by imprisonment for 10 years to life and a fine), 2422(a) (conviction punishable by a fine, imprisonment up to 20 years, or both), 2252(a)(2), (4) (stating that a conviction under subsection (a)(2) is punishable by imprisonment for 5–20 years and a fine, while a conviction under subsection (a)(4) is punishable by imprisonment up to 10 years, a fine, or both.); *see also* 18 U.S.C §§ 3559(a)(1) (classifying all of the above listed offenses as felonies), 3571(b)(3) (providing a fine up to \$250,000 for any felony conviction).

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

Hawaiian law separately criminalizes the use of the Internet to commit certain felonies, which can include luring, enticing, recruiting, or purchasing commercial sex acts with a minor. Haw. Rev. Stat. Ann. § 707-756 (Electronic enticement of a child in the first 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;
  - (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],<sup>29</sup> 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), 706-640(1)(b), 707-756(2).

Haw. Rev. Stat. Ann. § 707-757 (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,

- (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(2), 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

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<sup>29</sup> See *supra* note 20.

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, or 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.*

The Hawaii Code is silent on the availability of a defense of age mistake in a prosecution of a buyer of commercial sex acts with a minor.

2.6.1 Recommendation: Ensure a prohibition on age mistake defense is included in the enacted sex trafficking law.

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

There are no separate laws making the purchase of commercial sex acts with a minor a crime distinct from the age-neutral solicitation of prostitution offense, which has an insufficient penalty for the crime of commercially sexually exploiting a child.<sup>30</sup>

## 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 not specific to CSEC or domestic minor sex trafficking. A buyer of prostitution is subject to a mandatory fine of \$500. Haw. Rev. Stat. Ann. § 712-1200(4).<sup>31</sup> A buyer might be convicted of several sexual offenses that carry fines ranging from a possible \$50,000 under Haw. Rev. Stat. Ann. § 707-730 (Sexual assault in the first degree) to a possible \$10,000 under Haw. Rev. Stat. Ann. § 707-732 (Sexual assault in the third degree) and § 707-757 (Electronic enticement of a child in the second degree). Haw. Rev. Stat. Ann. §§ 707-730(2), 707-732(2), 707-757(2), 706-640(1)(a), (c). Haw. Rev. Stat. Ann. § 707-756 (Electronic enticement of a child in the first degree) is punishable by a possible fine not to exceed \$25,000. Haw. Rev. Stat. Ann. §§ 707-756(2), 706-640(1)(b).

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,

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<sup>30</sup> See *supra* Section 2.2.

<sup>31</sup> Haw. Rev. Stat. Ann. § 712-1200(4)(a) clarifies, “For the first offense, when the court has not deferred further proceedings pursuant to chapter 853, a mandatory fine of \$500 and the person may be sentenced to a term of imprisonment of not more than thirty days or probation; provided that in the event the convicted person defaults in payment of the \$500 fine, and the default was not contumacious, the court may sentence the person to perform services for the community as authorized by section 706-605(1).”

(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<sup>32</sup> 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-4 (Covered offenses), "Offenses for which property is subject to forfeiture under this chapter" include "electronic enticement of a child that is chargeable as a felony offense under state law . . ." Haw. Rev. Stat. Ann. § 712A-4(b). Haw. Rev. Stat. Ann. § 712A-5(1) (Property subject to forfeiture; exemption) states, subject to certain exceptions,

(1) 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

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<sup>32</sup> For additional information on asset forfeiture and seizure procedure, see <http://www.sharedhope.org/wp-content/uploads/2012/11/SHIStateAssetForfeitureLawsChart.pdf>.

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.

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.

As a Class C felony, this offense is punishable by imprisonment up to 5 years and a possible fine not to exceed \$10,000. Haw. Rev. Stat. Ann. §§ 706-660(2), 706-640(1)(c), 707-752(4).<sup>33</sup>

Where 30 or more images, or certain types of images are possessed, Haw. Rev. Stat. Ann. § 707-751(1)(e)<sup>34</sup> (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:

- . . . .
- (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.

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<sup>33</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>34</sup> Here and elsewhere in this report that Haw. Rev. Stat. Ann. § 707-751 is quoted or cited, it has been updated to reflect the amendments added by the passage of Senate Bill 2221. 2012 Leg., 26th Sess. Act 212 (effective July 3, 2012).

A conviction for promoting child abuse in the second degree 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), 706-640(1)(b), 707-751(4).

In comparison, a federal conviction for possession of child pornography<sup>35</sup> is generally punishable by imprisonment for 5–20 years and a fine not to exceed \$250,000.<sup>36</sup> Subsequent convictions, however, are punishable by imprisonment up to 40 years and a fine not to exceed \$250,000.<sup>37</sup>

2.9.1 Recommendation: Amend Haw. Rev. Stat. Ann. § 707-752(1) (Promoting child abuse in the third degree) to raise the penalty to align with federal penalties.

## 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 “sexual offense” to include crimes committed pursuant to the following provisions: Haw. Rev. Stat. Ann. § 707-730(1)(b) (Sexual assault in the first degree, where the victim is less than 14 years old); § 707-730(1)(c) (Sexual assault in the first degree, where the victim is between 14–15 years old and the offender is not less than 5 years older than the victim); § 707-732(1)(b) (Sexual assault in the third degree, where the victim is less than 14 years old); and § 707-732(1)(c) (Sexual assault in the third degree, where the victim is between 14–15 years old and the offender is not less than 5 years older than the victim). However, conduct under these provisions does not fall under the definition of sexual offense if the conduct “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.” Haw. Rev. Stat. Ann. § 846E-1.

Pursuant to the definition of “sexual offense” in Haw. Rev. Stat. Ann. § 846E-1, a buyer of sex with a minor also would be required to register if convicted of the following:

- (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;

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

- (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 to practice prostitution;
- . . . .
- (6) An act, as described in Chapter 705 [Inchoate crimes], that is an attempt, criminal solicitation, or criminal conspiracy to commit one of the offenses designated in paragraphs (1) through (5).



***Legal Components:***

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

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

Although Hawaii has not enacted a human trafficking law, traffickers of a child for sexual exploitation could be prosecuted under various laws carrying substantial penalties. Traffickers could be prosecuted under Haw. Rev. Stat. Ann. § 712-1202<sup>38</sup> (Promoting prostitution in the first degree), and if convicted would be guilty of 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. §§ 712-1202(b)(2), 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 10 years and a possible fine not to exceed \$25,000. Haw. Rev. Stat. Ann. §§ 706-660(1), 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 10 years and a possible fine not to exceed \$25,000. Haw. Rev. Stat. Ann. §§ 706-660(1), 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 5 years and a possible fine not to exceed \$10,000. Haw. Rev. Stat. Ann. §§ 706-660(2), 706-640(1)(c), 707-757(2).

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<sup>38</sup> See *supra* Section 1.2 for the relevant substantive provisions of the statutes listed in this Section.

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,

- (1) 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 5 years and a possible fine not exceeding \$10,000. Haw. Rev. Stat. Ann. §§ 706-660(2), 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>39</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>40</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>41</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>42</sup> against a minor.

<sup>39</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>40</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>41</sup> See *supra* note 25.

<sup>42</sup> See *supra* note 26.

### 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>43</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>44</sup> against a minor. Additionally, a federal conviction for distribution of child pornography<sup>45</sup> is generally punishable by imprisonment for 5–20 years and a fine not to exceed \$250,000.<sup>46</sup> Subsequent convictions, however, are punishable by imprisonment up to 40 years and a fine not to exceed \$250,000.<sup>47</sup>

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

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

- (1) Any person who, using a computer or any other electronic device:

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<sup>43</sup> See *supra* note 15 for the definition of child pornography.

<sup>44</sup> See *supra* note 26.

<sup>45</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>46</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>47</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).

- (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,<sup>48</sup>
 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 exceeding \$25,000. Haw. Rev. Stat. Ann. §§ 707-756(2), 706-660(1), 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(2), 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, or 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,

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<sup>48</sup> See *supra* note 20.

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. 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). Possible fines for exploiting a child through prostitution under Haw. Rev. Stat. Ann. § 712-1202 (Promoting prostitution in the first degree) may not exceed \$50,000. Haw. Rev. Stat. Ann. §§ 712-1202(2), 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.

General forfeiture laws may also apply to traffickers. Forfeiture shall apply, provided there is probable cause to initiate proceedings. Pursuant to Haw. Rev. Stat. Ann. § 712A-4 (Covered offenses), “[o]ffenses for which property is subject to forfeiture under this chapter [Forfeiture]” include “kidnapping, . . . promoting child abuse, or electronic enticement of a child that is chargeable as a felony offense under state law . . . promoting

pornography, promoting pornography for minors, or promoting prostitution, 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,

- (1) 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,

- (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.

### 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 “sexual offense” to include Haw. Rev. Stat. Ann. § 712-1202(1)(b) (Promoting prostitution in the first

degree, where the person advances or profits from the prostitution of a person less than 18 years old). Haw. Rev. Stat. Ann. § 846E-1.

Pursuant to the definition of “sexual offense” in Haw. Rev. Stat. Ann. § 846E-1, an adult trafficker of sex with a minor also would be required to register if convicted of the following:

- (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 to practice prostitution;
- .....
- (6) An act, as described in chapter 705 [Inchoate crimes], that is an attempt, criminal solicitation, or criminal conspiracy to commit one of the offenses designated in paragraphs (1) through (5).

3.5.1 Recommendation: Amend the definition of “covered offense” and “sexual offense” to expressly include domestic minor sex trafficking as an offense for which the perpetrator must register.

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

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.

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

- (b) 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;
    - .....

However, 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<sup>49</sup> 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: Expressly include convictions under Haw. Rev. Stat. Ann. § 707-730 (Sexual assault in the first degree), § 707-731 (Sexual assault in the second degree), § 707-732 (Sexual assault in the third degree), § 707-733.6 (Continuous sexual assault of a minor under the age of fourteen years), the promoting prostitution offense under Haw. Rev. Stat. Ann. § 712-1202 (Promoting prostitution in the first degree), § 707-750(1) (Promoting child abuse in the first degree), and domestic minor sex trafficking as grounds for terminating parental rights under Haw. Rev. Stat. Ann. § 571-61 (Termination of parental rights; petition).

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<sup>49</sup> Here and elsewhere in this report that Haw. Rev. Stat. Ann. § 587A is quoted or cited, it has been updated to reflect the amendments added by the passage of House Bill 2533. 2012 Leg., 26th Sess. (transmitted to governor on May 7, 2012).

***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 has not enacted a sex trafficking law. However, Haw. Rev. Stat. Ann. § 712-1202 (Promoting prostitution in the first degree) may apply to facilitators of domestic minor sex trafficking. Haw. Rev. Stat. Ann. § 712-1202 makes it a crime for a person to knowingly “[a]dvance[]<sup>50</sup> or profit[]<sup>51</sup> from prostitution of a person less than eighteen years old.” A conviction under Haw. Rev. Stat. Ann. § 712-1202 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), 712-1202(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) 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>52</sup> Haw. Rev. Stat. Ann. § 708A-3(4)(a), (b).

- 4.1.1 Recommendation: Enact a law that criminalizes the act of knowingly assisting, enabling, or financially benefitting from domestic minor sex trafficking in the sex trafficking law.

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<sup>50</sup> See *supra* note 18 for the definition of “advances prostitution.”

<sup>51</sup> See *supra* note 19 for the definition of “profits from prostitution.”

<sup>52</sup> See discussion of relevant provisions *supra* Section 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.*

Facilitators face fines if convicted of promoting prostitution under Haw. Rev. Stat. Ann. § 712-1202 (Promoting prostitution in the first degree) which carries a possible fine not exceeding \$50,000. Haw. Rev. Stat. Ann. §§ 706-659, 706-640(1)(a), 712-1202(2).

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."

General forfeiture laws<sup>53</sup> may also apply to facilitators. Forfeiture shall apply, provided there is probable cause to initiate proceedings. Pursuant to Haw. Rev. Stat. Ann. § 712A-4 (Covered offenses), “[o]ffenses for which property is subject to forfeiture under this chapter [Forfeiture]” include “promoting prostitution, 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,

- (1) 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.

#### 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>54</sup> that include or facilitate travel for the purpose of engaging in what would 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 5 years and a possible fine not exceeding \$10,000. Haw. Rev. Stat. Ann.

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<sup>53</sup> For additional information on asset forfeiture, see <http://www.sharedhope.org/wp-content/uploads/2012/11/SHIStateAssetForfeitureLawsChart.pdf>.

<sup>54</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 accept: (1) Consumer monies for services other than their own; or (2) Commissions or any other form of consideration.”

§§ 706-660(2), 706-640(1)(c), 712-1208(3). 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.”

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

Under Haw. Rev. Stat. Ann. § 707-751<sup>55</sup> (Promoting child abuse in the second degree),

(1) 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>56</sup> child pornography;<sup>57</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 10 years and a possible fine not to exceed \$25,000. Haw. Rev. Stat. Ann. §§ 706-660(1), 706-640(1)(b), 707-751(4).

Under Haw. Rev. Stat. Ann. § 712-12--<sup>58</sup> (Promoting minor-produced sexual images in the first and 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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<sup>55</sup> See *supra* note 34.

<sup>56</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>57</sup> See *supra* note 15.

<sup>58</sup> Here and elsewhere in this report that Haw. Rev. Stat. Ann. § 712-12-- is quoted or cited, it has been updated to reflect the amendments added by the passage of Senate Bill 2222. 2012 Leg., 26th Sess. Act 213 (Effective 7/3/2012) (note yet codified)**Error! Bookmark not defined.**

**Legal Components:**

- 5.1 *Statutorily-mandated victim services define “victim” to specifically include victims of domestic minor sex trafficking or commercial sexual exploitation of children (CSEC) to ensure prompt identification and access to victims’ rights and services.*
- 5.2 *The state sex trafficking statute expressly prohibits a defendant from raising consent of the minor to the commercial sex acts as a defense.*
- 5.3 *Prostitution laws apply only to adults, making minors under 18 specifically immune from this offense.*
- 5.4 *Child victims of sex trafficking or commercial sexual exploitation are provided with a child protection response, including specialized shelter and services, and are not detained in juvenile detention facilities.*
- 5.5 *Commercial sexual exploitation or sex trafficking is identified as a type of abuse and neglect within child protection statutes.*
- 5.6 *The definition of “caregiver” (or similar term) in the child welfare statutes is broad enough to include a trafficker who has custody or control of a child in order to bring a trafficked child into the protection of child protective services.*
- 5.7 *Crime victims’ compensation is specifically available to a child victim of sex trafficking or commercial sexual exploitation of children (CSEC) without regard to ineligibility factors.*
- 5.8 *Victim-friendly procedures and protections are provided in the trial process for minors under 18.*
- 5.9 *Expungement or sealing of juvenile delinquency records resulting from arrests or adjudications for prostitution-related offenses committed as a result of, or in the course of, the commercial sexual exploitation of a minor is available within a reasonable time after turning 18.*
- 5.10 *Victim restitution and civil remedies for victims of domestic minor sex trafficking or commercial sexual exploitation of children (CSEC) are authorized by law.*
- 5.11 *Statutes of limitations for civil and criminal actions for child sex trafficking or commercial sexual exploitation of children (CSEC) offenses are eliminated or lengthened sufficiently to allow prosecutors and victims a realistic opportunity to pursue criminal action and legal remedies.*

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**Legal Analysis:**

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

Under Haw. Rev. Stat. Ann. § 801D-4 (Basic bill of rights for victims and witnesses) victims have the right “[t]o be informed by the police, victim/witness counselor, or other criminal justice personnel, of financial assistance and other social services available as a result of being a witness to or a victim of crime, including information on how to apply for the assistance and services. . . .” Haw. Rev. Stat. Ann. § 801D-4(4). Under Chapter 801D (Rights of Victims and Witnesses in Criminal Proceedings), “[v]ictim’ means a person against whom a crime has been committed by either an adult or a juvenile,” and “[c]rime’ means an act or omission committed by an adult or juvenile that would constitute an offense against the person under the Penal Code of this State.” Haw. Rev. Stat. Ann. § 801D-2 (Definitions).

Pursuant to Haw. Rev. Stat. Ann. § 706-646 (Victim restitution), the term “victim” is defined as including “(a) The direct victim of a crime including a business entity, trust, or governmental entity.”

Haw. Rev. Stat. Ann. § 351-2 (Definitions) under Chapter 351 (Crime victim compensation) defines “victim” as including:

- (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<sup>59</sup> [Violent crimes];
- . . . .

5.1.1 Recommendation: Amend the definition of “victim” in Haw. Rev. Stat. Ann. § 706-646 (Restitution), § 801D-2 (Definitions— Basic bill of rights for victims and witnesses) and § 351-2 (Definitions—Crime victim compensation) to expressly include trafficking and CSEC victims.

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

CSEC laws do not refer to a defense based on the minor’s consent to the commercial sex act. However, Hawaii law does not specifically prohibit a defendant from raising such a defense.

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. § 702-233 (Consent; general) to prohibit a defense based on the consent of the minor to a commercial sex act.

5.3 *Prostitution laws apply only to adults, making minors under 18 specifically immune from this offense.*

Haw. Rev. Stat. Ann. § 712-1200 (Prostitution) and § 712-1206 (Loitering for the purpose of engaging in or advancing prostitution) do not exempt minors from prosecution for prostitution offenses.

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 make minors involved in

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<sup>59</sup> The crimes specified in Haw. Rev. Stat. Ann. § 351-32 include “(11) Kidnapping (section 707-720); (12) Sexual assault in the first degree (section 707-730); (13) Sexual assault in the second degree (section 707-731); (14) Sexual assault in the third degree (section 707-732); (15) Sexual assault in the fourth degree (section 707-733); . . . .”

prostitution immune from prosecution under these statutes and to expressly identify minors engaged in prostitution as victims of sex trafficking.

5.4 *Child victims of sex trafficking or commercial sexual exploitation are provided with a child protection response, including specialized shelter and services, and are not detained in juvenile detention facilities.*

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.

Haw. Rev. Stat. Ann. § 587A-11 (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) 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;
- (3) Resolve the matter in an informal fashion that it deems appropriate under the circumstances;
- (4) 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;
- (5) 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. . . .

- (6) Assume temporary foster custody of the child and file a petition with the court within three days, excluding Saturdays, Sundays, and holidays, after the date on which the department assumes temporary foster custody of the child, with placement preference being given to an approved relative; or
- (7) File a petition or ensure that a petition is filed by another appropriate authorized agency in court under this chapter.

Additionally, 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) 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.

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. § 587-9(a)(1). Pursuant to Haw. Rev. Stat. Ann. § 587-9(a)(5) (Temporary foster custody without court order), the Department also must within three business days return the child to the parents, obtain a voluntary placement agreement for foster care from the parents, or file a petition with the court.

Pursuant to Haw. Rev. Stat. Ann. § 571-31(a) (Taking children into custody; release; notice), a law enforcement officer also may take a child into custody if the child falls within Haw. Rev. Stat. Ann. § 571-11(1) or (2) (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;
- (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.

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.

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

- (a) 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, or youth-initiated programs. Haw. Rev. Stat. Ann. § 571-31.4(b). Also, 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).

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). 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.

In determining whether the “immediate welfare”<sup>60</sup> or the protection of the community”<sup>61</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.

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<sup>60</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>61</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.

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

[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.

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. 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.

Additionally, in determining whether a secure or nonsecure placement is appropriate, the court will “consider the minor’s background, degree of involvement in illegal and anti-social activities, current behavior patterns, and any other relevant criteria to determine placement.” Haw. Rev. Stat. Ann. § 571-33 (Detention and shelter facilities).

Where the court determines that a child falls within Haw. Rev. Stat. Ann. § 571-11(1) or (2), 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 after a child is adjudicated under Haw. Rev. Stat. Ann. § 571-11(1) for violating a law, 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). 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).

- 5.4.1 Recommendation: Establish a mandatory response law directing any minor who is a victim of sex trafficking away from the criminal justice system and into a child protective services system.

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

Under Chapter 588 (Children’s Justice Program), Haw. Rev. Stat. Ann. § 588-2 (Definitions of child abuse) defines, “child sexual abuse” as including “any of the offenses described under chapter 707, part V [Sexual offenses], when committed against a person under the age of eighteen years or as set forth in paragraph (2) of the definition of ‘harm’ in section 587A-4.”<sup>62</sup>

Under Chapter 350 (Child Abuse), Haw. Rev. Stat. Ann. § 350-1 (Definitions) 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;

....

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 587-2 [now 587A-4].”

However, the definitions section under Hawaii’s Child Protective Act, codified at Haw. Rev. Stat. Ann. § 587A-4, does not expressly define abuse or neglect.

5.5.1 Recommendation: Amend Haw. Rev. Stat. Ann. § 587A-4 (Definitions) to refer to the definition of “child abuse or neglect” found under Haw. Rev. Stat. Ann. § 350-1 (Child abuse).

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

Under Chapter 587A (Child Protective Act), Haw. Rev. Stat. Ann. §587A-4 (Definitions) defines a “caregiver” as “an adult who is not a child’s parent or legal and physical custodian, and with whom the child has been residing for at least six months with the verbal or written consent of the child’s legal and physical custodian. The status of ‘caregiver’ as used in this chapter does not pertain to court-ordered or voluntary foster placement.” Unless the consent requirement is interpreted broadly, or a trafficker has obtained consent from the child’s legal or physical custodian, this definition may not be broad enough to cover all situations in which the trafficker is in control of a child.

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<sup>62</sup> Haw. Rev. Stat. Ann. § 587A-4 defines “harm” in the second paragraph as “damage or injury to a child’s physical or psychological health or welfare, where: . . . (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.”

5.6.1 Recommendation: Amend Haw. Rev. Stat. Ann. §587A-4 (Definitions) to broaden the definition of “caregiver” to include a person who has control over a minor without parental consent.

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

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) under Chapter 351 (Crime Victim Compensation) 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<sup>63</sup> [Violent crimes];
- ....

Certain crimes specified in Haw. Rev. Stat. Ann. § 351-32 could apply to prostituted children, including Haw. Rev. Stat. Ann. § 707-730 (Sexual assault in the first degree), § 707-732 (Sexual assault in the third degree), and § 707-720 (Kidnapping).

However, Haw. Rev. Stat. Ann. § 351-31(c) (Eligibility for compensation) presents ineligibility criteria that threaten victims of domestic minor sex trafficking. Haw. Rev. Stat. Ann. § 351-31(c) states,

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 make an exception for victims of commercial sexual exploitation of children to ensure these victims will not be found to bear responsibility for the crimes committed as a result of their trafficking.

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

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<sup>63</sup> See *supra* note 59.

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 enacted House Bill 2226, a new provision added to Chapter 353 (Corrections),<sup>64</sup> the automated victim information and notification system is programmed to immediately to 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).

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<sup>64</sup> Here and elsewhere in this report that Haw. Rev. Stat. Ann. § 353 is quoted or cited, it has been updated to reflect the amendments added by the passage of House Bill 2226. 2012 Leg., 26th Sess. (Effective July 1, 2012).

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).

5.8.1 Recommendation: Amend Haw. R. Evid. 412 (Sexual offense and sexual harassment cases; relevance of victim's past behavior) to expressly include within its protections testifying victims of domestic minor sex trafficking and commercial sexual exploitation crimes.

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.*

Pursuant to Haw. Rev. Stat. Ann. § 571-88 (Orders expunging juvenile arrest records),

(a) The court may issue an order expunging<sup>65</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>66</sup> or (2)<sup>67</sup> and the arrest record<sup>68</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.

....

5.9.1 Recommendation: Enact a law that allows for the expungement of arrest records incurred by domestic minor sex trafficking victims as a result of their being trafficked.

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). Haw. Rev. Stat. Ann. § 663J-3 (Cause of action for coercion into prostitution) states,

An individual has a cause of action against a person who:

- (1) Coerced<sup>69</sup> the individual into prostitution;
- (2) Coerced the individual to remain in prostitution;

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<sup>65</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>66</sup> See *supra* Section 5.4.

<sup>67</sup> See *supra* Section 5.4.

<sup>68</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>69</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.

- (3) Used coercion to collect or receive any of the individual's earnings derived from prostitution; or
- (4) 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. Paragraph (3) shall not apply to minor children who are dependent on the individual and who may have benefited from or been supported by the individual's earnings derived from prostitution.

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

A person 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;
- (2) Noneconomic damages proximately caused by coercion into prostitution;
- (3) Exemplary damages;
- (4) Reasonable attorney's fees; and
- (5) Costs of suit, including reasonable expenses for expert testimony.

A civil remedy is also available under a newly enacted section of Chapter 657 (Civil action arising from sexual offenses; application; certificate of merit),<sup>70</sup> 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>71</sup> Subsection (b) further provides,

A claim may also be brought under this subsection against a legal entity, except the State or its political subdivisions, 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 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:

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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.

<sup>70</sup> Here and elsewhere in this report that Haw. Rev. Stat. Ann. § 657 is quoted or cited, it has been updated to reflect the amendments added by the passage of Senate Bill 2588. 2012 Leg., 26th Sess. (effective Apr. 25, 2012).

<sup>71</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).



- (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.

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 is tolled as long as the victim is alive and less than 18 years old. Haw. Rev. Stat. Ann. § 701-108(6)(c).

With regard to civil actions, enacted Senate Bill 2588 adds a new provision to Chapter 657<sup>72</sup> (Civil action arising from sexual offenses; application; certificate of merit) which 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, whichever comes later.

....

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<sup>72</sup> See *supra* note 70.

(b) For a period of two years after the effective date of [this Act] a victim of child sexual abuse that occurred in this State who had been 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 the effective date of [this Act] may file a claim in a circuit court of this State against the person who committed the act of sexual abuse.

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 (Cause of action for coercion into prostitution), is set forth in Haw. Rev. Stat. Ann. § 663J-7 (Statute of limitations) which states,

- (a) A claim under this chapter may not be brought against a person more than two years after an act of promoting prostitution by coercion 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.

***Legal Components:***

- 6.1 *Training on human trafficking and domestic minor sex trafficking for law enforcement is statutorily mandated.*
  - 6.2 *Single party consent to audiotaping is permitted in law enforcement investigations.*
  - 6.3 *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 to investigate buyers and traffickers is a permissible investigative technique.*
  - 6.6 *Law enforcement and child welfare agencies are mandated to promptly report missing and recovered children.*
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***Legal Analysis:***

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

Training on domestic minor sex trafficking is not mandated 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 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),

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.*

Offenses related to domestic minor sex trafficking are not included as crimes for which a wiretapping order may be issued. Under Haw. Rev. Stat. Ann. § 803-44 (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.

However, if a law enforcement officer does discover information on another crime, such as domestic minor sex trafficking related offenses, while investigating an approved offense, the officer may disclose this information “to another investigative or law enforcement officer to the extent that the disclosure is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure” or “while giving testimony under oath or affirmation in any proceeding in any court or before the grand jury in this State.” Haw. Rev. Stat. Ann. § 803-45(a), (c), (e).

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 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.*

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

- (1) 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],<sup>73</sup> 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. It appears that police may use a decoy to investigate electronic enticement of a child. The Hawaii Code does not expressly state that law enforcement may use a decoy to investigate prostitution or sex trafficking. Haw. Rev. Stat. Ann. § 702-237(1) (Entrapment) provides the following:

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<sup>73</sup> See *supra* note 20.

In any prosecution, it is an affirmative defense that the defendant engaged in the prohibited conduct or caused the prohibited result because the defendant was induced or encouraged to do so by a law enforcement officer, or by a person acting in cooperation with a law enforcement officer, who, for the purpose of obtaining evidence of the commission of an offense, either:

- (a) Knowingly made false representations designed to induce the belief that such conduct or result was not prohibited; or
- (b) Employed methods of persuasion or inducement which created a substantial risk that the offense would be committed by persons other than those who are ready to commit it.

6.4.1 Recommendation: Adopt language that clarifies that law enforcement may use a decoy to investigate prostitution or sex trafficking. Also include language explicitly stating that use of a decoy is not a defense to electronic enticement of a child, indecent electronic display to a child, or to purchasing sex with a minor.

6.5 *Using the Internet 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),

(1) 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],<sup>74</sup>

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.

6.5.1 Recommendation: Amend Haw. Rev. Ann. § 707-756 (Electronic enticement of a child in the first degree), § 707-757 (Electronic enticement of a child in the second degree), and § 707-759 (Indecent electronic display to a child) to expressly authorize the use of the Internet to investigate buyers and traffickers in domestic minor sex trafficking investigations.

6.6 *Law enforcement and child welfare agencies are 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.

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<sup>74</sup> See *supra* note 20.

(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: Add a requirement to report rescued children in order to identify frequent missing children as being at high-risk for sex trafficking.

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