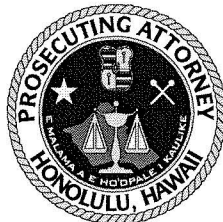


DEPARTMENT OF THE PROSECUTING ATTORNEY  
CITY AND COUNTY OF HONOLULU

ALII PLACE  
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LATE TESTIMONY

PETER B. CARLISLE  
PROSECUTING ATTORNEY



DOUGLAS S. CHIN  
FIRST DEPUTY  
PROSECUTING ATTORNEY

**THE HONORABLE MAILE SHIMABUKURO, CHAIR  
HOUSE COMMITTEE ON HUMAN SERVICES**

**TWENTY-FOURTH STATE LEGISLATURE  
REGULAR SESSION OF 2008**

**HEARING: Thursday, February 7, 2008  
8:30A.M., Conference Room 329**

**RE: HOUSE BILL 2765, RELATING TO CRIME**

Good morning Chair Shimabukuro and members of the Human Services Committee, the Department of Prosecuting Attorney provides the following testimony **in strong support of H.B. 2765 with amendments**, which proposes to enact a comprehensive series of amendments to facilitate the prosecution of offenses relating to “human trafficking” under the Hawaii Penal Code.

We greatly appreciate the efforts made to develop this bill by the Act 260 Task Force. As such, we view this bill as an important step in a positive direction. Establishment of a criminal offense for human trafficking under our existing penal code is desirable for many reasons. The most compelling is the practical reality posed by the current practices of federal investigative and prosecutorial agencies. Due to their own resource limitations, not all human trafficking cases are prosecuted under the federal criminal statutes. Typically, in cases that are limited in scope, for example involving only a single victim, or where the nature of the trafficking is not particularly egregious, they may defer prosecution. And while such cases may encompass criminal offenses under existing Hawaii statutes, the underlying offenses, as they are currently constituted, may not always reflect the full seriousness of this type of conduct, thus leaving a gap in the effectiveness of the potential criminal remedies. For this reason we favor the provisions of H.B. 2765, which is the product of dedicated and arduous efforts of members of the Task Force over the past two years.

At the end of the 2007 legislative session we supported a proposed Senate Draft of H.B. 1784, the basic provisions of which are reflected in the Senate Judiciary hearing (3/16/07) testimony submitted by the Department of the Attorney General as excerpted below:

*The Hawaii Anti-trafficking Task Force surveyed Hawaii's existing criminal*

*laws to determine whether they include prohibitions on involuntary servitude, kidnapping, false imprisonment, and extortion. While Hawaii's criminal laws do contain these prohibitions, the task force determined that creating separately defined anti-trafficking criminal provisions should result in increased use of such statutes. However, unlike in other states that have passed legislation similar to the federal anti-human trafficking law, Hawaii has distinct case law that would make the establishment of separately defined anti-trafficking criminal provisions difficult.*

*Specifically, the proposed offense of Human Trafficking [in H.B. No. 1784, H.D. 2] is problematic because it attempts to create trafficking crimes that already have been established under our current penal code. Most of the new proposed crimes are the same or very similar to existing extortion, kidnapping, child abuse and promoting prostitution offenses. The significant overlap with existing offenses raises concerns that the proposed, higher grade offenses will violate the "Modica Rule." In State v. Modica, 58 Haw. 249, 567 P.2d 420 (1977), the Hawaii Supreme Court held the following:*

*[W]here the same act committed under the same circumstances*

*is punishable either as a felony or as a misdemeanor, under either of two statutory provisions, and the elements of proof essential to either conviction are exactly the same, a conviction under the felony statute would constitute a violation of the defendant's rights to due process and the equal protection of the laws.*

*This rule applies not only to felony and misdemeanors, but to any crimes with differing grades of offense. In a Modica type of situation, the prosecutors would be compelled to prosecute under the lesser grade offense. Therefore, when a proposed Human Trafficking crime and an existing penal code crime would require the same elements of proof; the prosecution would be required to prosecute the lesser charge.*

*In order to ensure that trafficking crimes are properly prosecuted and not downgraded based upon the existence of an identical lesser grade offense, we recommend the attached proposed S.D. 1 that amends the existing trafficking criminal statutes, specifically the kidnapping, extortion, and promoting prostitution statutes, and creates the new offense of exploitation of minors. All of these offenses, as amended, would constitute human trafficking offenses and would enable the successful prosecution of these heinous offenses.*

At the conclusion of the 2007 legislative session the Act 260 Task Force began working toward a consensus proposal that ultimately tracked much of the outline proposed in the excerpted testimony of the Attorney General above. H.B. 2765 incorporates these changes to avoid the Modica issues raised last session. In order to ensure that trafficking crimes are properly prosecuted and not downgraded based upon the existence of an identical lesser grade offense, this bill would amend the existing criminal statutes, specifically the

Kidnapping, Extortion, and Promoting Prostitution statutes, that are likely to be used to prosecute human trafficking cases. In addition, the bill creates the new offense of Sexual Exploitation of a Minor. This bill requires that a perpetrator be held strictly liable with respect to the attendant circumstance of the victim's age in cases involving Sexual Exploitation of a Minor or Promoting Prostitution in the First Degree involving a minor. All of these offenses, as amended, would enable the prosecution of human trafficking offenses under Hawaii law in a manner that is roughly equivalent to prosecutions under the federal Trafficking Victims Protection Act of 2000 (Public Law 106-386) (TVPA), and would facilitate the successful prosecution of human trafficking offenses. It would also amend Hawaii Revised Statutes Section 351-32 to change the definition of "Violent crimes," to include sexual exploitation of a minor and promoting prostitution in the first degree, so that the new "human trafficking" victims would be eligible for crime victim compensation. The bill proposes to establish eligibility for crime victims' compensation for all human trafficking victims whose cases occur within the state of Hawaii. It also amends H.R.S. Section 842-1, so that the definition of "racketeering activity," includes the new offense of Sexual Exploitation of a Minor.

HB 2765 further improves the protections for minors by eliminating the distinction within the Promoting Prostitution statute between minors under sixteen and minors under eighteen, thus mirroring provisions of the TVPA. Promoting Prostitution of any minor is the equivalent of human trafficking. This elevates the penalty for Promoting Prostitution of sixteen and seventeen-year-olds to the same level that currently exists for all other minors. It also changes the term "prostitutes" in HRS Section 712-1203(a), "Promoting Prostitution in the Second Degree," to "prostituted persons" reflecting the premise that trafficking victims are, by definition, not deemed to be "prostitutes" voluntarily.

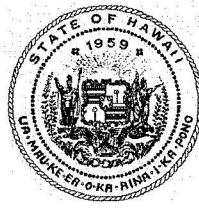
As to the proposed amendments to the bill, we support the following revisions that we believe will be proposed by the Department of the Attorney General in their testimony:

(1) The definition of "labor and services" as defined in H.R.S. Section 707-720 should be included under definitions in H.R.S. Section 707-700, since it would also apply to Extortion under H.R.S. Section 707-764. (2) H.R.S. Sections 707-765, 707-766 and 707-767 would also be amended to include labor, and (3) Under Sexual Exploitation of a Minor, the last part of the definition of "nude" should be "...or any clothing that exposes the areola or through which the areola can be viewed".

In summary, **we strongly support H.B. 2765, with our proposed amendments**, and recommend your favorable consideration of this critically important legislation.

Thank you for your time and consideration.

LINDA LINGLE  
GOVERNOR



STATE OF HAWAII  
**CRIME VICTIM COMPENSATION  
COMMISSION**

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Chair

REBECCA S. WARD  
Commissioner

THOMAS WATTS  
Commissioner

PAMELA FERGUSON-BREY  
Executive Director

LATE TESTIMONY

TESTIMONY ON HOUSE BILL 2765  
RELATING TO CRIME

by

Pamela Ferguson-Brey, Executive Director  
Crime Victim Compensation Commission

Committee on Human Services and Housing  
Representative Maile S. L. Shimabukuro, Chair  
and

Committee on Labor and Public Employment  
Representative Alex M. Sonson, Chair

Thursday, February 7, 2008; 8:30 AM  
State Capitol, Conference Room 329

Good morning Chair Shimabukuro, Chair Sonson, and Members of the Joint House Committee on Human Services and Housing, and Labor and Public Employment. Thank you for providing the Crime Victim Compensation Commission (the "Commission") with the opportunity to testify before you today. The Commission supports the passage of House Bill 2765. This bill establishes, defines, and clarifies criminal offenses relating to human trafficking, and provides for the award of compensation for victims of human trafficking who are victims of sexual exploitation of a minor, or victims of promoting prostitution in the first degree.

The Commission was established in 1967 to mitigate the suffering and financial impact experienced by victims of violent crime by providing compensation to pay unreimbursed crime-related expenses. Many victims of violent crime could not afford to pay their medical bills, receive needed mental health or rehabilitative services, or bury a loved one, if compensation were not available from the Commission.



In 2006 the legislature established the Hawaii Anti-Trafficking Task Force (HATTF II) to investigate ways to combat human trafficking and to look at the social service needs of human trafficking victims. During its review of the statutes HATTF II members determined that not all human trafficking victims are eligible to receive crime victim compensation.

The Commission is currently unable to provide compensation for crime-related expenses, including mental health counseling services, to some victims of human trafficking. Section 351-32, Hawaii Revised Statutes, provides strict limitations on the type of crimes for which the Commission may award compensation. Compensation may only be awarded to victims of the following enumerated violent crimes: Murder, Manslaughter, Negligent Homicide and Injury (First and Second Degree), Assault (First, Second and Third Degree), Kidnapping, Sexual Assault (First, Second, Third and Fourth Degree), Abuse of Family and Household Member, and International Terrorism.

The Commission believes that human trafficking victims should be eligible for compensation to cover their unreimbursed crime-related expenses. House Bill 2765 will help to ensure that human trafficking victims will have ready access to the medical treatment, or mental health counseling services, they need to recover.

Thank you for providing the Commission with the opportunity to testify in support of this measure. The Commission urges you to support passage of this measure.

LINDA LINGLE  
GOVERNOR



LILLIAN B. KOLLER  
DIRECTOR

HENRY OLIVA  
DEPUTY DIRECTOR

STATE OF HAWAII  
DEPARTMENT OF HUMAN SERVICES  
P. O. Box 339  
Honolulu, Hawaii 96809-0339

February 7, 2008

LATE TESTIMONY

MEMORANDUM

TO: The Honorable Maile S. L. Shimabukuro, Chair  
House Committee on Human Services and Housing

The Honorable Alex M. Sonson, Chair  
House Committee on Labor and Public Employment

FROM: Lillian B. Koller, Director

SUBJECT: **H.B. 2765 - RELATING TO CRIME**  
Hearing: Thursday, February 7, 2008; 8:30 a.m.  
Conference Room 329, State Capitol

**PURPOSE:** The purpose of H.B. 2765 is to enable prosecution of human trafficking under Hawaii law by creating the new offense of sexual exploitation of a minor, amending existing kidnapping, extortion, and prostitution offenses, and including sexual exploitation of a minor in the definition of racketeering. It eliminates the distinction between minors under 18 and minors under 16 for purposes of promoting prostitution and makes victims of sexual exploitation of a minor and promoting prostitution in the first degree eligible for crime victim compensation.

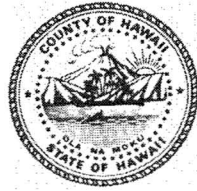
**DEPARTMENT'S POSITION:** As a member of the Act 260 Hawaii Anti-Trafficking Task Force II (HATTF II), the Department of Human Services (DHS) stands in support of this HATTF II bill. We defer to the Department of the Attorney General, convenor of the Task Force, for further comment.

Thank you for the opportunity to testify on this bill.

AN EQUAL OPPORTUNITY AGENCY

**JAY T. KIMURA**  
PROSECUTING ATTORNEY

**CHARLENE Y. IBOSHI**  
FIRST DEPUTY  
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**OFFICE OF THE PROSECUTING ATTORNEY**

**Testimony In Support of HB 2765**  
**Relating to Crime, Human Trafficking**

Hearing before the House Committees on Human Services and Housing, Labor and Public  
Employment

Thursday, February 7, 2008, 8:30 a.m.

Deliver to Committee Clerk, House Conference Room 329

Submitted by Charlene Y. Iboshi, First Deputy Prosecuting Attorney for  
Jay T. Kimura, Prosecuting Attorney

TO: Chairs Shimabukuro and Sonson, and Members of the Committees:

Our Office is a member of the Hawaii Human Anti-Trafficking Task Forces. We fully agree with the purpose and explanation of House Bill 2765 in Section 1. The proposed changes will enhance the prosecution of Human Trafficking cases by increasing the penalty for “involuntary servitude” as Kidnapping; by amending the extortion law to provide another means to “extort” services by concealing identification papers or passports; by creating a new offense of sexual exploitation of a minor (nude dancing) and equally protecting all minors who are prostituted, even if they are older than sixteen.

Additionally, the bill provides for compensation for the victims of Human Trafficking, and takes away the profit from “organized” criminal activity enterprises through changes in the “racketeering” law.

We have reviewed the Testimony of the Attorney General and agree with their minor changes for clarity of the law. We also recommend that the definitions of “labor” and “services”, along with the explanation that the definition “services” does not legalize prostitution, be included in the General Provisions relating to the Offenses against Property Rights under Section 708-800, H.R.S. This insures consistent definitions when dealing with Theft of Services and the Crimes against Persons under Section 707-700, which cover extortion and kidnapping offenses.

In conclusion, we support the House Bill 2763, with the recommended changes, to enhance our ability to prosecute Human Trafficking cases. Thank you for considering our testimony.

LATE TESTIMONY

# NĀ LOIO

LATE TESTIMONY

## Immigrant Rights and Public Interest Legal Center

TESTIMONY IN SUPPORT OF THE INTENT

H.B. 2765

Committee on Human Services and Housing  
Committee on Labor and Public Employment

Thursday, February 7, 2008

8:30 a.m., Conference Room 329

To: The Honorable Maile S.L. Shimabukuro, Chair Human Services and Housing  
The Honorable Karl Rhoads, Vice Chair Human Services and Housing  
The Honorable Alex M. Sonson, Chair Committee on Labor and Public  
Employment  
The Honorable Bob Nakasone, Vice Chair Committee on Labor and Public  
Employment

From: Patricia McManaman

Na Loio – Immigrant Rights and Public Interest Legal Center

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Na Loio – Immigrant Rights and Public Interest Legal Center is a non-profit legal services organization committed to providing immigration legal services and advocacy in the public interest with a particular emphasis on serving poor and low-income immigrants and their families. Since the passage of the federal Trafficking Victims Protection Act in 2000, Na Loio has provided legal representation in over 40 cases involving human trafficking victims seeking certification, a trafficking or “T” visa, or adjustment of status following three years in “T” visa status. We actively screen all requests for legal services to determine if elements of trafficking are present, and we actively collaborate with local and federal law enforcement and other social service providers in cases giving rise to the prospect of human trafficking.

Human trafficking occurs in epidemic proportions across the globe, and the United Nations estimates that there are 12.3 million persons enslaved in force labor, bonded labor, forced child labor, sexual servitude, and involuntary servitude at any given point in time. Hawaii is not an exception as evidenced by *United States v. Maka*, a federal case involving Tongan males who were illegally transported to Hawaii to build lava rock walls and held in servitude. The Maka trafficking victims were compelled to live in substandard housing, subjected to routine beatings, often went without food, and received wages on an intermittent basis. In Maka and other cases, Na Loio has seen first hand the devastating consequences of human trafficking and witnessed the trauma suffered by its victims. Na Loio supports the intent of H.B. 2765, but has significant concerns regarding the bill’s sweeping proposal to create a new offense entitled, “Sexual exploitation of a minor” that strays far beyond the scope of trafficking and the bill’s mischaracterization of sexually trafficked persons as “prostitutes.” Na Loio also offers other proposed amendments.

International traffickers are increasingly placing victims in strip bars and clubs rather than prostitution as demonstrated by recent federal cases involving persons held in servitude for purposes of sexually explicit performances such as “exotic dancing.”<sup>1</sup> And while this growing trend needs to be addressed, the proposed measure strays far beyond the bounds of trafficking by criminalizing behavior that does not involve a commercial activity. For example, the proposed legislation would criminalize conduct where a partially clothed minor was persuaded by her/his partner to engage in nude dancing. This follows from the explicit language found in H.B. 2765, which criminalizes conduct where a person, “causes, entices, persuades, induces, or otherwise aids a minor to engage in activity as an...exotic or nude dancer.” Under the proposal, “exotic or nude dancer” is defined a person “performing, dancing or entertaining in the nude and includes patrons participating in a contest or receiving instruction in nude dancing.”

In lieu of the proposed statute, Na Loio suggests the adoption of the language or similar language found in the Model State Anti-Trafficking Criminal Statute which is attached. Additionally, Na Loio also suggests that only those who engage “knowingly” in the prohibited activity be subjected to the proposed criminal penalty. The “knowing” standard is again consistent with the Model State Anti-Trafficking Criminal Statute and Hawai’i’s pornography/promoting child abuse law. A “knowing” state of mind also reaffirms that traffickers are fully aware and involved participants in the commercial exploitation of minors. Should the state wish to criminalize other instances involving the sexual exploitation of a minor, it should do so independently of a measure intended address human trafficking.

Section 6 of the proposal extends Hawai’i’s extortion statutes to include offenses that involve coerced labor or services. Na Loio proposes that Section 707-764 (k) include the phrase “or **other immigration document.**” In addition to passports and government issued identification documents, other documents traffickers withhold may include written decisions by an immigration court or documents issued by the United States Citizenship and Immigrant Services authorizing legal status in the United States or extending the period of lawful admission. Additionally, Na Loio also suggests that Section 707-764 (e) be broadened to state, “**abusing or threatening to abuse the law or the legal process.**” At present, Section 707-764 (e) is limited to accusing the victim of a penal offense or causing a penal charge to be instituted against a victim. Traffickers do not merely threaten their victims with criminal charges. They also threaten to have the victims and their family members deported, assert that their children will be removed from their custody, or that as “foreigners” they are not entitled to call the police or access the courts. Broadening the language will capture the full extent of a trafficker’s coercive tactics. In further support, Na Loio notes the Model State Anti-Trafficking Statute also employs the phrase “abusing or threatening to abuse the law or the legal process.”

Section 7 of H.B. 2765 is particularly troubling. This section proposes to address sexual servitude, but does so in the context of prostitution. Over the past several years, Na Loio has worked with multiple trafficking victims held in sexual servitude. These victims already struggle with guilt, depression, and trauma as a result of being trafficked. They believe the community looks upon them as prostitutes and not victims. If the proposed language stands, it will further traumatize victims and confirm their worst self-doubts. Na Loio also notes the commentary to Sections 712-1201 and 1204 dealing with prostitution states, “[t]hese four sections deal with the non-prostitutes who derive financial gain from the work of prostitutes.” Thus, the legislative intent confirms a trafficking victims worst self-doubts.

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<sup>1</sup> Model State Anti-Trafficking Criminal Statute, U.S. Department of Justice, Commentary at 9.

Na Loio suggests that the term prostitution or prostitute be replaced with “commercial sex worker,” a term that does not carry the stigma of “prostitute” or “prostitution.” Alternatively, Na Loio suggests that Hawai’i adopt the Model State Anti-Trafficking Statute in its entirety. It is noteworthy that the vast majority of states that have adopted human trafficking laws, have followed models proposed and suggested by the U.S. Department of Justice. These models create new offenses clearly and exclusively focused on human trafficking and as such do not violate the holding found in State v. Modica, 58 Haw. 249, 567 P.2d 420 (1977). The uniform model also has the benefit of employing language familiar to federal law enforcement or government officials who are in the position to grant continued presence or certification for an immigrant victim.

Finally, Na Loio recommends that a final section be added to the proposal requiring law enforcement officials to certify in writing to federal authorities that an investigation or prosecution involving human trafficking under Hawai’i laws has begun and that the individual who is a likely victim of the crime is willing to cooperate or is cooperating in the investigation. Such language might state:

Certification. The Attorney General, state or local law enforcement agencies, or other state or county agencies having criminal investigative jurisdiction in their respective areas of expertise shall forthwith certify in writing to the United States Department of Justice or other federal agency, such as the United States Department of Homeland Security, that an investigation or prosecution has begun and the individual who is a likely victim of human trafficking as described under Hawai’I law and is willing to cooperate or is cooperating with the investigation to enable the individual, if eligible under federal law, to qualify for an appropriate special immigrant visa and to access available federal benefits. Cooperation with law enforcement shall not be required of victims of human trafficking who are under 18 years of age. This certification shall be made available to the victim and his or her designated legal representative.

Thank you for the opportunity to testify on this important measure.

MODEL STATE ANTI-TRAFFICKING CRIMINAL STATUTE

\*\*\*\*\*

AN ACT relating to criminal consequences of conduct  
that involves certain trafficking of persons and involuntary servitude.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF \_\_\_\_\_:

(A) TITLE \_\_\_\_\_, PENAL CODE, is amended by adding Article XXX to read as follows:

ARTICLE XXX: TRAFFICKING OF PERSONS AND INVOLUNTARY SERVITUDE

SEC. XXX.01. DEFINITIONS. In this Article:

- (1) "Blackmail" is to be given its ordinary meaning as defined by [state blackmail statute, if any] and includes but is not limited to a threat to expose any secret tending to subject any person to hatred, contempt, or ridicule.
- (2) "Commercial sexual activity" means any sex act on account of which anything of value is given, promised to, or received by any person.
- (3) "Financial harm" includes credit extortion as defined by [state extortion statute, if any], criminal violation of the usury laws as defined by [state statutes defining usury], or employment contracts that violate the Statute of Frauds as defined by [state statute of frauds].
- (4) "Forced labor or services" means labor, as defined in paragraph (5), infra, or services, as defined in paragraph (8), infra, that are performed or provided by another person and are obtained or maintained through an actor's:
  - (A) causing or threatening to cause serious harm to any person;
  - (B) physically restraining or threatening to physically restrain another person;
  - (C) abusing or threatening to abuse the law or legal process;
  - (D) knowingly destroying, concealing, removing, confiscating or possessing any actual or purported passport or other immigration document, or any other actual or purported government identification document, of another person;
  - (E) blackmail; or
  - (F) causing or threatening to cause financial harm to [using financial control over]



any person.

- (5) "Labor" means work of economic or financial value.
- (6) "Maintain" means, in relation to labor or services, to secure continued performance thereof, regardless of any initial agreement on the part of the victim to perform such type of service.
- (7) "Obtain" means, in relation to labor or services, to secure performance thereof.
- (8) "Services" means an ongoing relationship between a person and the actor in which the person performs activities under the supervision of or for the benefit of the actor. Commercial sexual activity and sexually-explicit performances are forms of "services" under this Section. Nothing in this provision should be construed to legitimize or legalize prostitution.
- (9) "Sexually-explicit performance" means a live or public act or show intended to arouse or satisfy the sexual desires or appeal to the prurient interests of patrons.
- (10) "Trafficking victim" means a person subjected to the practices set forth in Sections XXX.02(1) (involuntary servitude) or XXX.02(2) (sexual servitude of a minor), or transported in violation of Section XXX.02(3) (trafficking of persons for forced labor or services).

#### SEC. XXX.02. CRIMINAL PROVISIONS.

- (1) INVOLUNTARY SERVITUDE. Whoever knowingly subjects, or attempts to subject, another person to forced labor or services shall be punished by imprisonment as follows, subject to Section (4), infra:
  - (A) by causing or threatening to cause physical harm to any person, not more than 20 years;
  - (B) by physically restraining or threatening to physically restrain another person, not more than 15 years;
  - (C) by abusing or threatening to abuse the law or legal process, not more than 10 years;
  - (D) by knowingly destroying, concealing, removing, confiscating or possessing any actual or purported passport or other immigration document, or any other actual or purported government identification document, of another person, not more than 5 years,

- (E) by using blackmail, or using or threatening to cause financial harm to [using financial control over] any person, not more than 3 years.
- (2) **SEXUAL SERVITUDE OF A MINOR.** Whoever knowingly recruits, entices, harbors, transports, provides, or obtains by any means, or attempts to recruit, entice, harbor, provide, or obtain by any means, another person under 18 years of age, knowing that the minor will engage in commercial sexual activity, sexually-explicit performance, or the production of pornography (see [relevant state statute] (defining pornography)), or causes or attempts to cause a minor to engage in commercial sexual activity, sexually-explicit performance, or the production of pornography, shall be punished by imprisonment as follows, subject to the provisions of Section (4), infra:
- (A) in cases involving a minor between the ages of [age of consent] and 18 years, not involving overt force or threat, for not more than 15 years;
  - (B) in cases in which the minor had not attained the age of [age of consent] years, not involving overt force or threat, for not more than 20 years;
  - (C) in cases in which the violation involved overt force or threat, for not more than 25 years.
- (3) **TRAFFICKING OF PERSONS FOR FORCED LABOR OR SERVICES.** Whoever knowingly (a) recruits, entices, harbors, transports, provides, or obtains by any means, or attempts to recruit, entice, harbor, transport, provide, or obtain by any means, another person, intending or knowing that the person will be subjected to forced labor or services; or (b) benefits, financially or by receiving anything of value, from participation in a venture which has engaged in an act described in violation of Sections XXX.02(1) or (2) of this Title, shall, subject to the provisions of Section (4) infra, be imprisoned for not more than 15 years.
- (4) **SENTENCING ENHANCEMENTS.**
- (A) Statutory Maximum - Rape, Extreme Violence, and Death. If the violation of this Article involves kidnaping or an attempt to kidnap, aggravated sexual abuse or the attempt to commit aggravated sexual abuse, or an attempt to kill, the defendant shall be imprisoned for any term of years or life, or if death results, may be sentenced to any term of years or life [or death].
  - (B) Sentencing Considerations Within Statutory Maximums.
    - (1) Bodily Injury. If, pursuant to a violation of this Article, a victim

suffered bodily injury, the sentence may be enhanced as follows:  
(1) Bodily injury, an additional \_\_\_\_ years of imprisonment; (2) Serious Bodily Injury, an additional \_\_\_\_ years of imprisonment; (3) Permanent or Life-Threatening Bodily Injury, an additional \_\_\_\_ years of imprisonment; or (4) If death results, defendant shall be sentenced in accordance with Homicide statute for relevant level of criminal intent).

(2) Time in Servitude. In determining sentences within statutory maximums, the sentencing court should take into account the time in which the victim was held in servitude, with increased penalties for cases in which the victim was held for between 180 days and one year, and increased penalties for cases in which the victim was held for more than one year.

(3) Number of Victims. In determining sentences within statutory maximums, the sentencing court should take into account the number of victims, and may provide for substantially-increased sentences in cases involving more than 10 victims.

(5) **RESTITUTION.** Restitution is mandatory under this Article. In addition to any other amount of loss identified, the court shall order restitution including the greater of 1) the gross income or value to the defendant of the victim's labor or services or 2) the value of the victim's labor as guaranteed under the minimum wage and overtime provisions of the Fair Labor Standards Act (FLSA) and [corresponding state statutes if any].

(B) **TRAFFICKING VICTIM PROTECTION**

1) **ASSESSMENT OF VICTIM PROTECTION NEEDS**

(A) The Attorney General, in consultation with the [Department of Health and Social Services] shall, no later than one year from the effective date of this statute, issue a report outlining how existing victim/witness laws and regulations respond to the needs of trafficking victims, as defined in XXX.01(8) of the Criminal Code, and suggesting areas of improvement and modification.

(B) The [Department of Health and Social Services], in consultation with the Attorney General, shall, no later than one year from the effective date of this statute, issue a report outlining how existing social service programs respond or fail to respond to the needs of trafficking victims, as defined in XXX.01(8) of the Criminal Code, and the interplay of such existing programs with federally-funded victim service programs, and suggesting areas of improvement and modification.

[Such inquiry shall include, but not be limited to, the ability of state programs and licensing bodies to recognize federal T non-immigrant status for the purposes of benefits, programs, and licenses.]

## Explanatory Notes

### Purpose

\_\_\_\_\_ This Model Law is offered to help criminal law policymakers at the state level address the phenomenon of modern-day slavery, often termed “trafficking in persons.” In the course of researching this proposal, it became clear that many states already have laws on their books that directly address this crime problem. For instance, many trafficking-like crimes may be codified in seemingly-unrelated parts of a state code, such as the kidnaping or prostitution sections. Unfortunately, by being codified in disparate parts of the criminal code, it may unclear to prosecutors that the behaviors are trafficking in persons crimes and may be charged as such. Research into these existing state statutes revealed that they are often archaic, little-known, or underutilized, and do not necessarily reflect the current understanding of slavery and trafficking in persons.

The Thirteenth Amendment to the U.S. Constitution mandates that:

Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction....

Under the Trafficking Victims Protection Act of 2000, Pub. L. 106-386 (“TVPA”), a “severe form of trafficking in persons” is defined as:

- (A) sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or
- (B) the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.

In the international arena, the United Nations Convention Against Transnational Organized Crime, supplemental Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children defines trafficking in persons as:

[T]he recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs[.]

Federal criminal provisions specific to trafficking in persons are codified at Title 18, United States Code, Chapter 77, Peonage, Slavery, and Trafficking in Persons. Some of these statutes are newly-enacted provisions of the TVPA; some of these statutes date from the Civil War era. All of these federal criminal civil rights statutes are rooted in the 13<sup>th</sup> Amendment's guarantee of freedom. The other federal criminal civil rights statutes, such as 42 U.S.C. §3631 (Interference with Housing Rights) and 18 U.S.C. §242 (Deprivation of Rights Under Color of Law), have corresponding state statutes. E.g., Indiana Code, § 22-9.5-10-1 (criminalizing interference with another's rights) and Texas Penal Code §39.03 (criminalizing official oppression). Such federal/state overlap allows for more prosecutions to be brought and allows local prosecutors to respond most appropriately to crime problems in their own jurisdictions. State prosecutors' increased prosecution of racial violence cases in the last 20 years can serve as a model for increased enforcement of the U.S. Constitution's guarantee of freedom from involuntary servitude.

Many state constitutions mirror the federal constitutional prohibition against involuntary servitude, see, e.g. Arkansas Const. Art. 2, § 27, and some states have involuntary servitude statutes on their books. See, e.g., Cal. Penal Code § 181 (Slavery, infringement of personal liberty; purchase of custody). Other states have similar statutes. North Carolina adopted a state involuntary servitude statute in the wake of several high-profile federal migrant labor prosecutions. See N.C.G.S.A. § 14-43.2. Arizona's criminal code, for example, includes kidnaping for involuntary servitude in its kidnaping statute, A.R.S. §13-1304, and a crime of taking a child for prostitution in its prostitution statutes. A.R.S. §13-3206. It is unclear whether such statutes are well-known by police and prosecutors, and to what extent they are being used to combat trafficking in persons.

The Model Penal Code recommends creation of an involuntary servitude crime as part of its overall kidnaping chapter. MPC 212.3(b), Felonious Restraint (third degree felony for holding a person in involuntary servitude). While the U.S. Department of Justice has not surveyed the field to determine how many states adopted this proposal, Nebraska is an example of one state that has this Model Penal Code provision on the books. See Neb.Rev.St. §28-314.

Certainly, experience at the federal level indicates that more comprehensive trafficking in persons statutes are needed to address the wide range of coercive tactics that traffickers use to obtain and maintain the labor and services of their victims. The proposed Model Law seeks to provide a tool for drafting modern anti-trafficking crimes, based on the Justice Department's experience in investigating and litigating these cases. Additionally, there is a strong need for uniformity in definitions and concepts across state lines to minimize confusion as trafficking victims in state prosecutions begin to seek the victim protections available through the federal Departments of Health and Human Services and of Homeland Security.

States and territories interested in adopting anti-trafficking legislation should survey their existing criminal codes to determine whether they include prohibitions on involuntary servitude, kidnaping, or false imprisonment, which have simply not been brought to bear against trafficking

in persons. Such a survey will assist in incorporating relevant portions of a modern anti-trafficking statute into existing law, and could result in increased use of such statutes. Bundling of appropriate statutes into a Slavery/Trafficking chapter, as in the federal criminal code, will make it more likely that such crimes are recognized and charged.

### **Definitions**

The heart of the concept of “trafficking in persons” is the denial of the liberty of another. Accordingly, the transportation of a person is a secondary inquiry, the apparent meaning of “trafficking” aside. Thus, the definitions section and the criminal provisions focus on the coercive nature of the service, rather than the movement of the victim or the type of underlying service.

The definitions are in alphabetical order.

Section XXX.01(1) defines blackmail in a manner identical to the Model Penal Code’s Criminal Coercion statute, Section 212.5(1)(c).

Section XXX.01(2), “commercial sexual activity,” tracks the definition of commercial sexual activity in the TVPA.

Section XXX.01(3) defines “financial harm” to reflect the TVPA and the UN Protocol’s inclusion of “debt bondage” as a form of trafficking in persons. In order to differentiate a debt that has the effect of coercion, as opposed to simply a bad bargain, the proposal adopts the usury laws of the relevant jurisdiction to illustrate debts that contravene public policy and may thus appropriately be considered to be coercive. On the federal level, an example of this type of law can be found at 18 U.S.C. § 892 (Making Extortionate Extension of Credit).

Section XXX.01(4) defines “forced labor or services” as those obtained or maintained through coercion, and lists the forms of coercion that would, if used to compel forced labor or services, justify a finding that the labor or service was involuntary.

Section XXX.01(5), which defines “labor,” covers work activities which would, but for the coercion, be otherwise legitimate and legal. The legitimacy or legality of the work is to be determined by focusing on the job, rather than on the legal status or work authorization status of the worker.

Section XXX.01(6)’s “maintain” builds upon the Model Penal Code’s definition of “obtain” and incorporates the principle in federal anti-slavery caselaw that a person’s initial agreement to perform a particular activity or type of service is not a waiver of any coercion aimed at keeping that person from leaving the service.

Section XXX.01(7), “obtain” tracks the definition set forth at Model Penal Code’s Theft



statute, Section 223.0(5)(b).

Section XXX.01(8), which defines "services," incorporates activities that are akin to an employment relationship but are in market sectors that are not legitimate forms of "labor." Notable in this area is commercial sexual activity, which is criminalized in almost every jurisdiction in the United States. Differentiation between "labor" and "services" makes it clear that this Model Law does not legitimize or legalize prostitution.

The notion that commercial sexual activity or concubinage can be "service" for the purposes of involuntary servitude statutes is reflected in case law. See, e.g. Pierce v. United States, 146 F.2d 84, 85-86 (5th Cir. 1944) (upholding conviction for forcing women to commit "immoral acts" at roadhouse to pay off debts); Bernal v. United States, 241 F. 339, 341 (5th Cir. 1917) (outlining as a crime when a woman was lured to house of prostitution under false pretenses and required to serve as prostitute or maid to pay debt); and the recent prosecutions, U.S. v. Cadena (SD FL 1998); U.S. v. Kwon (D. CNMI 1999); U.S. v. Pipkins (ND GA 2000); and U.S. v. Soto (SD TX 2003). See also Neal Kumar Katyal, Men Who Own Women: A Thirteenth Amendment Critique of Forced Prostitution, 103 YALE L.J. 791 (1993). Non-sexual forms of "service" might include rings that hold children for street begging or petty theft.

Section XXX.01(9) introduces the concept of "sexually-explicit performance." A number of recent federal cases have involved persons being held in servitude for purposes of sexually-explicit performances such as "exotic dancing." Unlike prostitution, which is typically illegal and involves commercial sexual activity, sexually-explicit performance may be legal, absent any coercion. Inclusion of sexually-explicit performance in this Model Law recognizes that such activity can have an impact on victims similar to sexual abuse, and reflects federal experience in which international traffickers are increasingly placing their victims into strip clubs rather than prostitution. The proposed criminal statutes provide expanded coverage for minors who are held in sexual performance as opposed to prostitution.

Section XXX.01(10) defines "trafficking victim," not for the purposes of the criminal statutes so much as to provide a working definition for state and local agencies who subsequently establish or modify programs to serve victims of these crimes.

### **Trafficking/Servitude Chapter**

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The Slavery/Trafficking crimes in this Article are arranged in a particular order that reflects the Department of Justice's experiences and understanding of the interplay between slavery/involuntary servitude and the transportation of persons for illicit purposes.

First, Involuntary Servitude, which focuses on the denial of a victim's liberty, applies to all persons held in compelled service, regardless of age, type of service, and whether they are transported or not. This approach de-links the crime from the nationality of the victim or the underlying morality of the service. All adults in coerced service are protected by this Section.

Second, a provision specific to minors in sexually-related activities sets forth a lesser standard of coercion – recognizing that sexual activities are conceptually different when minors are involved – by casting as Sexual Servitude those activities which involve minors but are not the result of coercion. This Section is the equivalent of Statutory Rape laws, which obviate the need to prove coercion when a victim is under the age of legal consent. This Section would allow for trafficking prosecutions in cases in which minors are kept in prostitution because of their circumstances but overt force is not used, such as is common in cases involving runaway U.S. citizen youth. As noted above, this provision extends the concept of proving sexual exploitation without a concomitant need to find coercion to include sexually-explicit performance and child pornography, as well as sexual acts.

Finally, Trafficking of Persons for Forced Labor or Services punishes the trade in coerced labor or services, but focuses on the recruiting, moving, and harboring for these practices. Conceptually, these actions are illegal if done for the purpose of the exploitation captured by the servitude offenses previously set forth.

Section XXX.02(1) (Involuntary Servitude) provides a baseline offense that is graded according to the severity of the coercion used against the victim. Rather than the federal approach, in which there are separate crimes based on the level of coercion (a function of the development of the federal anti-slavery laws over the course of almost 200 years), the proposed offense – the obtaining or maintaining another person in service through coercion – outlines different statutory maximums for cases involving force, threats, document confiscation, blackmail, etc. For drafting purposes, jurisdictions that prefer to codify each crime separately could easily do so by referring to Appendix A, Optional Servitude Offenses, which sets the proposed crimes out in a different manner. States with guidelines sentencing may want to adopt a simple involuntary servitude statute with a 20-year statutory maximum and then incorporate gradations by level of coercion within their guidelines instead of adopting a multi-part statute or multiple servitude statutes. Such a statute is set forth in Appendix B, Alternative Servitude Offense.

Statutory maximums are provided as an illustration of a graduated approach based on the type and level of coercion used against the victim. Many jurisdictions simply designate particular levels of a crime as a Class A, B, or C Felony or as a First, Second, or Third Degree Felony, rather than assigning a specific statutory maximum within the actual offense. Statutory maximums are provided in this Model Law as an example of relative culpability. The statutory maximums should be reviewed and incorporated in keeping with the sentencing structure of the criminal code of the particular state or territory.

Each of the crimes punishes attempts as well as completed offenses. Criminalizing attempts allows prosecutors to focus on a defendant's objectively observable intent to use coercion for compulsory service rather than on a victim's subjective response to the coercion. For instance, a victim flees after a beating intended to hold her, rather than staying and submitting to the "master"; in this instance, the enslavement is attempted but not completed.

Nonetheless, by criminalizing the attempt, a prosecutor may charge the defendant with his intended enslavement instead of having to wait for the victim actually to be enslaved (or to feel coerced). Such an approach has obvious benefits from the perspective of public safety: no victim should have to remain in a dangerous situation in order for the wrong done to him or her to be prosecutable. Note that the particular attempt language in the Model Law should be reviewed to ensure that it reflects an individual state's approach to attempts.

### Penalties

The proposal's sentencing section sets forth two main concepts. First, the proposal reflects the notion that statutory maximum sentences should be increased in particularly violent instances of trafficking in persons, especially where the crime involves sexual abuse. Second, the actual sentences should reflect the time the victim was held and the various levels of injury suffered by a victim, as well as the number of victims harmed in a particular case. Additionally, gradation in sentences is appropriate among situations involving minors, especially those involving minors under the age of consent.

In the federal system these offense characteristics are incorporated into the U.S. Sentencing Guidelines, *see* U.S.S.G. §2H4.1, and have different effects depending on the other adjustments that are applied. Thus, the Model Law sets out offense characteristics which should be considered, but does not assign them values.

All of the offense characteristics offered for particular consideration should be reviewed and incorporated in keeping with the sentencing structure of the criminal code of a particular state or territory.

### Restitution

The proposed measure of restitution tracks the federal restitution provision of the TVPA, codified at 18 U.S.C. §1594. Mandatory restitution allows prosecutors to recover money that the victims can use to assist them in their recovery. Unlike theft cases, there is typically little identifiable out-of-pocket loss in a trafficking case – the victims themselves are the objects that are stolen. Accordingly, this provision fixes the actual loss to the victim as either 1) the value of their services to the trafficker, or 2) the minimum wage for hours worked. The first measure of restitution, the value to the trafficker of the victim's labor or services, not only prevents the traffickers from profiting from their crime, but also avoids the unpalatable situation of assigning a wage valuation to instances of forced prostitution. The second measure of loss, the minimum wage calculation, is a handy tool in cases where victims did not receive any pay for their work, or sub-minimum wage, or in certain sex trafficking cases where the defendants hold their victims in concubinage rather than selling them as prostitutes (in which there is therefore no other identifiable measure of the value of the sexual services to the traffickers).

### Trafficking Victim Protection

Federal experience has shown that prosecution without victim protection is unworkable. At the federal level, there is a variety of benefits and services available to trafficking victims. Accordingly, this Model Law provides a mechanism through which a state could determine how well current state programs serve the needs of trafficking victims. In addition, a state may want to consider optional Model Law language regarding the incorporation of federal T non-immigrant status as a basis through which certain state benefits, programs, and licenses could be accessed by alien trafficking victims.

## APPENDIX A - Optional Servitude Offenses

[This formulation would also obviate the need for Section (4)(A), statutory maximum sentences.]

### SEC. XXX.02. CRIMINAL PROVISIONS.

#### (1) INVOLUNTARY SERVITUDE OFFENSES.

(A) INVOLUNTARY SERVITUDE. Whoever knowingly subjects, or attempts to subject, another person to forced labor or services by causing or threatening to cause physical harm to any person shall be punished by imprisonment for not more than 20 years; but if the violation involves kidnaping or an attempt to kidnap, aggravated sexual abuse or the attempt to commit aggravated sexual abuse, or an attempt to kill, the defendant shall be imprisoned for any term of years or life, or if death results, may be sentenced to any term of years or life [or death].

(B) UNLAWFUL RESTRAINT FOR FORCED LABOR. Whoever knowingly subjects, or attempts to subject, another person to forced labor or services by physically restraining or threatening to physically restrain another person, shall be punished by imprisonment for not more than 15 years; but if the violation involves kidnaping or an attempt to kidnap, aggravated sexual abuse or the attempt to commit aggravated sexual abuse, or an attempt to kill, the defendant shall be imprisoned for any term of years or life, or if death results, may be sentenced to any term of years or life, [or death].

(C) LEGAL COERCION FOR FORCED LABOR. Whoever knowingly subjects, or attempts to subject, another person to forced labor or services by abusing or threatening to abuse the law or legal process shall be punished by imprisonment for not more than 10 years; but if the violation involves kidnaping or an attempt to kidnap, aggravated sexual abuse or the attempt to commit aggravated sexual abuse, or an attempt to kill, the defendant shall be imprisoned for any term of years or life, or if death results, may be sentenced to any term of years or life, [or death].

(D) DOCUMENT SERVITUDE. Whoever knowingly subjects, or attempts to subject, another person to forced labor or services by knowingly destroying, concealing, removing, confiscating or possessing any actual or purported passport or other immigration document, or any other actual or purported government identification document, of another person, shall be punished by imprisonment for not more than 5 years; but if the violation involves kidnaping or an attempt to kidnap, aggravated sexual abuse or the attempt to commit aggravated sexual abuse, or an attempt to kill, the defendant shall be imprisoned for any term of years or life, or if death results, may be sentenced to any term of years or life, [or death].

(E) DEBT BONDAGE. Whoever knowingly subjects, or attempts to subject, another person to forced labor or services by blackmail, or by using or threatening to cause financial harm to [using financial control over] any person, shall be punished by imprisonment for not more than 3 years; but if the violation involves kidnaping or an attempt to kidnap, aggravated sexual abuse or the attempt to commit aggravated sexual abuse, or an attempt to kill, the defendant shall be imprisoned for any term of years or life, or if death results, may be sentenced to any term of years or life, [or death].

## Appendix B - Alternative Servitude Offense

[Use sentencing guidelines to differentiate among levels of coercion and other aggravating factors.]

### SEC. XXX.02. CRIMINAL PROVISIONS.

(1) INVOLUNTARY SERVITUDE. Whoever knowingly subjects, or attempts to subject, another person to forced labor or services shall be punished by imprisonment for not more than 20 years; but if the violation involves kidnaping or an attempt to kidnap, aggravated sexual abuse or the attempt to commit aggravated sexual abuse, or an attempt to kill, the defendant shall be imprisoned for any term of years or life, or if death results, may be sentenced to any term of years or life, [or death].