CHAPTER 712
OFFENSES AGAINST PUBLIC HEALTH AND MORALS

Part I. Prostitution, Promoting Prostitution, and Sex Trafficking

Section

Part II. Offenses Related to Obscenity

Note

L 2001, c 91, §4 purports to amend this chapter.

Cross References

Display of adult entertainment products for sale, see §489X-1.
Habitual solicitation of prostitution, see §712-1209.5.

"PART I. PROSTITUTION, PROMOTING PROSTITUTION, AND SEX TRAFFICKING

Note

Part heading amended by L 2016, c 206, §11.

Cross References

Liability for coercion into prostitution, see chapter 663J.

§712-1200 Prostitution. (1) A person commits the offense of prostitution if the person:

(a) Engages in, or agrees or offers to engage in, sexual conduct with another person in return for a fee; or

(b) Pays, agrees to pay, or offers to pay a fee to another to engage in sexual conduct.

(2) As used in this section:

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

"Sexual conduct" means "sexual penetration", "deviate sexual intercourse", or "sexual contact", as those terms are defined in section 707-700, or "sadomasochistic abuse" as defined in section 707-752.

(3) Prostitution is a petty misdemeanor; provided that:

(a) If the person who commits the offense under subsection (1)(a) is a minor, prostitution is a violation; and

(b) If the person who commits the offense under subsection (1)(b) does so in reckless disregard of the fact that the other person is a victim of sex trafficking, prostitution is a class C felony.

(4) A person convicted of committing the offense of prostitution as a petty misdemeanor shall be sentenced as follows:

(a) For the first offense, when the court has not deferred further proceedings pursuant to chapter 853, a fine of not less than $500 but not more than $1,000 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 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 fine of not less than $500 but not more than $1,000 and a term of imprisonment of thirty days or probation, without possibility of deferral of further proceedings pursuant to chapter 853 and without possibility of suspension of sentence.

(c) For the purpose of this subsection, if the court has deferred further proceedings pursuant to chapter 853, and notwithstanding any provision of chapter 853 to the contrary, the defendant shall not be eligible to apply for expungement pursuant to section 831-3.2 until four years following discharge. A plea previously entered by a defendant under section 853-1 for a violation of this section shall be considered a prior offense. When the court has ordered a sentence of probation, the court may impose as a condition of probation that the defendant complete a course of prostitution intervention classes; provided that the court may only impose the condition for one term of probation.

(5) This section shall not apply to any member of a police department, a sheriff, or a law enforcement officer acting in the course and scope of duties, unless engaged in sexual penetration or sadomasochistic abuse.

(6) A minor may be taken into custody by any police officer without order of the judge when there are reasonable grounds to believe that the minor has violated ~~subsection~~ (1)(a). The minor shall be released, referred, or transported pursuant to section 571-31(b). The minor shall be subject to the jurisdiction of the family court pursuant to section 571-11(1), including for the purposes of custody, detention, diversion, and access to services and resources. [L 1972, c 9, pt of §1; am L 1981, c 110, §1; am L 1986, c 314, §§73, 74; am L 1990, c 204, §1; am L 1993, c 130, §1; am L 1998, c 177, §2; am L 2011, c 145, §7; am L 2012, c 216, §3; am L 2013, c 247, §3; am L 2014, c 114, §3; am L 2016, c 206, §12 and c 231, §51; am L 2016, c 206, §12 and c 231, §51]

Revision Note

Pursuant to §23G-15, in:

(1) Subsection (2), definitions rearranged; and

(2) Subsection (6), in the first sentence, "paragraph" changed to "subsection" and in the second sentence, "subsection" changed to "section".

COMMENTARY ON §712-1200

History has proven that prostitution is not going to be abolished either by penal legislation nor the imposition of criminal sanctions through the vigorous enforcement of such legislation. Yet the trend of modern thought on prostitution in this country is that "public policy" demands that the criminal law go on record against prostitution.[1] Defining this "public policy" is a difficult task. Perhaps it more correctly ought to be considered and termed "public demand"--a widespread community attitude which the penal law must take into account regardless of the questionable rationales upon which it is based.

A number of reasons have been advanced for the suppression of prostitution, the most often repeated of which are: "the prevention of disease, the protection of innocent girls from exploitation, and the danger that more sinister activities may be financed by the gains from prostitution."[2] These reasons are not convincing. Venereal disease is not prevented by laws attempting to suppress prostitution. If exploitation were a significant factor, the offense could be dealt with solely in terms of coercion. Legalizing prostitution would decrease the prostitute's dependence upon and connection with the criminal underworld and might decrease the danger that "organized crime" might be financed in part by criminally controlled prostitution.

Our study of public attitude in this area revealed the widespread belief among those interviewed that prostitution should be suppressed entirely or that it should be so restricted as not to offend those members of society who do not wish to consort with prostitutes or to be affronted by them. Making prostitution a criminal offense is one method of controlling the scope of prostitution and thereby protecting those segments of society which are offended by its open existence. This "abolitionist" approach is not without its vociferous detractors. There are those that contend that the only honest and workable approach to the problem is to legalize prostitution and confine it to certain localities within a given community. While such a proposal may exhibit foresight and practicality, the fact remains that a large segment of society is not presently willing to accept such a liberal approach. Recognizing this fact and the need for public order, the Code makes prostitution and its associate enterprises criminal offenses.

This section makes the offense of prostitution contingent on the commission by a male or female of at least one of three acts: (1) engaging in sexual conduct with another person for a fee, or (2) agreeing to engage in sexual conduct with another person for a fee, or (3) an offer to engage in sexual conduct with another person for a fee. Under this section the sex of the parties or prospective parties is immaterial. It is no defense under this section that: (a) both parties were of the same sex, or (b) the party who accepted, agreed to accept, or solicited the fee was a male and the party who tendered or agreed or offered to tender the fee was a female. To emphasize the immateriality of the sex of the parties, the phrase "he or she" is used for the actor in subsection (1), albeit under chapter 701 "he" includes any natural person. The word "person" is also used in order to denote either the masculine or feminine gender as the particular case demands.

Subsection (2) defines "sexual conduct." As used in subsection (1) it is given a wide scope, meaning "sexual intercourse," "deviate sexual intercourse," or "sexual contact," as those terms are defined in §707-700. Subsection (3) provides that the offense is a petty misdemeanor.

The Code's provision on prostitution is similar to previous Hawaii law insofar as it applies to both male and female prostitution.[3] However, unlike prior law, the Code does not cover indiscriminate sexual intercourse without hire.[4] Instead of the vague word "lewdness,"[5] the Code gains some specificity by employing statutorily defined phrases. In the area of penalty, previous law imposed a fine of not more than $1,000 or imprisonment of not more than one year, or both. The Code lowers these maxima to $500 and 30 days, respectively, by making the offense a petty misdemeanor. This has been done on the recommendation of some judges and with the concurrence of the Honolulu Police Department. Since the sentences presently imposed do not, in fact, generally exceed those authorized for a petty misdemeanor, the Code is in accord with present practice.

SUPPLEMENTAL COMMENTARY ON §712-1200

Act 110, Session Laws 1981, added subsection (4) to specify the sentencing alternatives upon conviction of a defendant. The legislature felt that some form of mandatory sentence was necessary to curb prostitution and the attendant crimes of violence and crimes against property. Senate Conference Committee Report No. 15, House Conference Committee Report No. 25.

Act 204, Session Laws 1990, amended this section to clarify that the customer of a prostitute would also be committing the

crime of prostitution. The legislature felt that buyers and sellers of illegal business transactions should be targets for prosecution. House Standing Committee Report No. 1205-90.

Act 130, Session Laws 1993, amended this section to permit deferred pleas under chapter 853 in first-offense prostitution cases and to prohibit expungement pursuant to §831-3.2 until four years following discharge. The Act also provided that a plea previously entered by a defendant under §853-1 for prostitution is considered a prior offense. Conference Committee Report No. 62.

Act 177, Session Laws 1998, amended this section to provide that any offense for which a person is convicted of prostitution is probationable, and that the court may impose prostitution intervention classes for only one term of probation. The legislature found that prostitution was a multi-faceted problem which required efforts to encourage persons involved in the sex industry to seek alternative lifestyles and employment options. The legislature further found that persons involved in prostitution were often not capable of exploring those options, and thus, those persons needed assistance in finding educational and employment opportunities that would support their desire to leave prostitution. Conference Committee Report No. 155.

Act 145, Session Laws 2011, amended this section by extending the offense of prostitution to include those who pay, agree to pay, or offer to pay a fee to another person to engage in sexual conduct. Conference Committee Report No. 76.

Act 216, Session Laws 2012, amended the language in subsection (4) that established a mandatory fine of $1,000 for the commission of the first and any subsequent offense of prostitution to establish instead a minimum fine of $500 for the commission of the first and any subsequent offense of prostitution. Conference Committee Report No. 109-12.

Act 247, Session Laws 2013, amended this section to clarify the minimum and maximum fine for a person convicted of committing the offense of prostitution. Conference Committee Report No. 64.

Act 114, Session Laws 2014, amended subsection (2) by adding sadomasochistic abuse as an element of the offense of prostitution. Act 114 also amended subsection (5) by clarifying that the law enforcement exemption from the offense of prostitution excludes acts of sadomasochistic abuse and sexual penetration. The legislature believed that it was unnecessary for a law enforcement officer to engage in sexual intercourse in order to make an arrest for prostitution because it is the financial transaction that makes the act illegal under the offense of prostitution. Senate Standing Committee Report No. 3249, Conference Committee Report No. 41-14.

Act 206, Session Laws 2016, amended this section, among others, to establish a victim and survivor-centered approach to comprehensive anti-sex trafficking laws. Specifically, Act 206 amended this section by: (1) establishing a class C felony for the act of paying for sex in reckless disregard of the fact that the other person is a victim of sex trafficking; and (2) specifying that when a minor under the age of eighteen commits the act of engaging in or offering to engage in sexual conduct with another person for a fee, it is not a criminal offense, but rather a violation that subjects the minor to the jurisdiction of the family court. The legislature found that the existing laws relating to prostitution and promoting prostitution may not have been suitable to address certain circumstances in which coercion or other inability to consent is present. Act 206 allowed Hawaii to join other states that had adopted comprehensive anti-sex trafficking legislation. Conference Committee Report No. 147-16, Senate Standing Committee Report No. 3450.

Act 231, Session Laws 2016, amended subsection (1) to implement recommendations made by the Penal Code Review Committee convened pursuant to House Concurrent Resolution No. 155, S.D. 1 (2015).

Law Journals and Reviews

The Protection of Individual Rights Under Hawai‘i's Constitution. 14 UH L. Rev. 311 (1992).

Criminal Procedure Rights Under the Hawaii Constitution Since 1992. 18 UH L. Rev. 683 (1996).

Prostitution: Protected in Paradise? 30 UH L. Rev. 193 (2007).

Hawai‘i's Right to Privacy. 33 UH L. Rev. 669 (2011).

Case Notes

Evidence did not sufficiently prove whether money was given as a gift or as a fee. 56 H. 409, 538 P.2d 1206 (1975).

Subsection (4) eliminates power of court to grant deferred acceptance of guilty pleas. 66 H. 101, 657 P.2d 1026 (1983).

Applicable to sex for fee in a private apartment. 66 H. 616, 671 P.2d 1351 (1983).

Prohibition is gender-neutral; even if not, section did not deny equal protection. 67 H. 608, 699 P.2d 983 (1985).

Deferred acceptance of no-contest plea or deferred acceptance of guilty plea cannot be accepted under this section. 74 H. 75, 837 P.2d 776 (1992).

Because maximum authorized term of imprisonment for a prostitution offense is thirty days, prostitution is presumptively a petty offense to which right to a trial by jury does not attach; defendant did not have a right to jury trial on prostitution charges. 77 H. 162, 883 P.2d 83 (1994).

District court imposed illegal sentences, where defendant pleaded guilty to six offenses of prostitution, pleading guilty to each offense in reverse chronological order, and defendant was sentenced, in reverse chronological order, to fines of $500 for each offense. 77 H. 394, 885 P.2d 1135 (1994).

Under the plain meaning of §707-700 and this section, touching the sexual or other intimate parts of another person, for a fee, constitutes prostitution, even if the touching occurs through clothing. 88 H. 19, 960 P.2d 1227 (1998).

Subsection (4) does not require that a "subsequent" offense occur on a separate day. 90 H. 262, 978 P.2d 700 (1999).

As the exception in subsection (5) would negative the prostitution offense defendant was charged with, it constituted a defense; in order to claim the benefit of this defense, evidence that defendant fell within the exception must have been adduced; where defendant did not adduce any such evidence at trial, the prosecution was not required to disprove the defense until there was evidence that the defendant fell within subsection (5). 114 H. 1, 155 P.3d 1102 (2007).

In prostitution case, application of this section (2006) to defendant was not unconstitutional. 114 H. 1, 155 P.3d 1102 (2007).

A "fee" is not explicitly limited to monetary compensation, but includes payment in the form other than money and, therefore, under this section, is money or a "material gain" for sexual conduct; under the facts of the case, the forty-dollar drinks constituted a fee under subsection (1). 123 H. 251, 231 P.3d 968 (2010).

Where the record did not support the prosecution's conclusion that defendant had "an implicit understanding" that officer's purchase of the forty-dollar drinks was for sexual contact, given the totality of circumstances, the prosecution failed to prove beyond a reasonable doubt that defendant "engaged in sexual conduct for a fee". 123 H. 251, 231 P.3d 968 (2010).

"Convicted" in subsection (4) is used in pre-sentence context, and means ascertainment of guilt. 9 H. App. 165, 827 P.2d 1156 (1992).

Whether the men responded to defendant's offers and the substance of their responses were irrelevant under prostitution statute; defendant merely had to offer to engage in sex in exchange for a fee. There was substantial evidence for trial

judge to find that defendant offered to engage in sexual conduct in exchange for money. 79 H. 123 (App.), 899 P.2d 406 (1995).

As court had no discretion under subsection (4)(b) in imposing stiffer sentence on defendant once it was established that defendant was a subsequent prostitution offender, defendant was not required to raise a good-faith challenge to the prior conviction in order to trigger the State's burden to prove that defendant was represented by counsel or waived such representation at the time of defendant's prior conviction. 89 H. 492 (App.), 974 P.2d 1082 (1998).

Where officer testified to a prior arrest of defendant, defendant admitted to prior arrest by officer, trial court was able to evaluate and match physical identifying information in criminal history abstract with defendant, abstract set out the prior prostitution conviction of a defendant with the same name, and defendant had rather unusual name for person in Hawaii, evidence was sufficient to establish beyond a reasonable doubt that defendant had a prior prostitution conviction for purposes of subsection (4). 89 H. 492 (App.), 974 P.2d 1082 (1998).

As the First Amendment does not protect speech which is part of a course of criminal conduct, and defendant's words were an integral part of defendant's conduct in violating a valid statute prohibiting offers or agreements to engage in sex for a fee (this section), defendant's prosecution did not violate the First Amendment. 107 H. 360 (App.), 113 P.3d 811 (2005).

This section does not proscribe constitutionally protected conduct and was not overbroad as applied to defendant's actual conduct; the language of this section also was sufficiently clear that defendant was not required to guess at its meaning, this section gave defendant fair warning that defendant was prohibited from offering or agreeing to engage in sex for a fee. 107 H. 360 (App.), 113 P.3d 811 (2005).

Trial court's factual findings pertaining to defendant's offer and agreement to engage in sex for $200 were not clearly erroneous and there was sufficient evidence to support defendant's prostitution conviction under this section. 107 H. 360 (App.), 113 P.3d 811 (2005).

§711-1200 Commentary:

1. Prop. Del. Cr. Code, comments at 427.

2. Id. See also, M.P.C., Tentative Draft No. 9, comments at 171 (1959).

3. See H.R.S. §768-51.

4. See id. §768-52(1).

5. See id. §768-52(2).

" **§712-1201 Advancing prostitution; profiting from prostitution; definition of terms.** In sections 712-1202 and 712-1203:

(1) 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.

(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. [L 1972, c 9, pt of §1; am L 2011, c 145, §2]

Note

Section heading amended by L 2016, c 206, §13.

" **§712-1202 Sex trafficking.** (1) A person commits the offense of sex trafficking if the person knowingly:

(a) Advances prostitution by compelling or inducing a person by force, threat, fraud, or intimidation to engage in prostitution, or profits from such conduct by another; or

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

(2) Sex trafficking is a class A felony.

(3) As used in this section:

"Fraud" means making material false statements, misstatements, or omissions.

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

"Threat" means any of the actions listed in section 707-764(1). [L 1972, c 9, pt of §1; am L 1993, c 130, §2; am L 2008, c 147, §8; am L 2011, c 145, §3; am L 2016, c 206, §14]

" **§712-1203 Promoting prostitution.** (1) A person commits the offense of promoting prostitution if the person knowingly advances or profits from prostitution.

(2) Promoting prostitution is a class B felony. [L 1972, c 9, pt of §1; am L 1993, c 130, §3; am L 2008, c 147, §9; am L 2011, c 145, §4; am L 2016, c 206, §15]

Case Notes

Statements made by women constituted verbal acts and were admissible against defendant charged under subsection (1)(a). 59 H. 401, 581 P.2d 1171 (1978).

Section 701-109(1)(d) prohibits conviction under both this section and §842-2(2), as both this section and §842-2(2) seek to redress the same conduct--the control of an enterprise involved in criminal activity. In such case, this section, the specific statute, governs over the general statute, §842-2(2). 88 H. 19, 960 P.2d 1227 (1998).

Cited: 58 H. 299, 568 P.2d 504 (1977).

SUPPLEMENTAL COMMENTARY ON §§712-1201 TO 712-1204

Act 206, Session Laws 2016, amended §712-1201 by amending the section heading to conform to amendments made to other sections in the Hawaii Revised Statutes by Act 206.

Act 206, Session Laws 2016, amended §712-1202, among others, to establish a victim and survivor-centered approach to comprehensive anti-sex trafficking laws. Specifically, Act 206 amended §712-1202 by: (1) replacing the offense of promoting prostitution in the first degree with sex trafficking, a class A felony and violent crime; and (2) specifying that the offense of sex trafficking requires proof of negligence with respect to the victim's age when the victim of sex trafficking is under eighteen years of age. The legislature found that the existing laws relating to prostitution and promoting prostitution may not have been suitable to address certain circumstances in which coercion or other inability to consent is present. Act 206 allowed Hawaii to join other states that had adopted comprehensive anti-sex trafficking legislation. Conference Committee Report No. 147-16, Senate Standing Committee Report No. 3450.

Act 206, Session Laws 2016, amended §712-1203 to change the offense of promoting prostitution in the second degree to the offense of promoting prostitution. Senate Standing Committee Report No. 3450.

" **§712-1204 REPEALED.** L 2011, c 145, §6.

COMMENTARY ON §§712-1201 TO 712-1204

These four sections deal with the non-prostitutes who derive financial gain from the work of prostitutes. The real danger presented by this class of people is that its members have a motive to coerce women or men into prostitution. Through their promotion of prostitution activities they magnify the extent to which prostitution is practiced. Aside from coercion into and the promotion of prostitution, these promoters often gain a vicious hold over the prostitutes under their control.

Section 712-1201 defines the types of conduct which are the gravamen of the offense of promoting prostitution. These types of conduct are termed "advancing prostitution" and "profiting from prostitution." The sections following, §§712-1202, 1203, and 1204, delineate various degrees of the offense of promoting prostitution.

Promoting prostitution in the first degree, as defined by §712-1202, is the most serious offense in this trilogy. The aggravating circumstances are the criminal coercion of the prostitute or the young age of the prostitute. The offense is a class B felony.

Section 712-1203, promoting prostitution in the second degree, deals with two less serious aggravating circumstances in this type of activity: (a) advancing or profiting by operating or owning a house of prostitution or a prostitution business or enterprise involving prostitution by two or more prostitutes, or (b) advancing or profiting from prostitution of a person less than 18 years of age. This section provides penalties against the "madam" of a house of prostitution, those persons who run and control "call girl rings", and lessors and owners of real property who knowingly rent or permit premises to be used for prostitution purposes. It also penalizes those who take under their control for prostitution purposes girls under the age of 18 years. Promoting prostitution in the second degree is made a class C felony.

Section 712-1204 defines the offense of promoting prostitution in the third degree, that is, knowingly advancing or profiting from prostitution. This section strikes at the small scale promoter. The taxicab driver who pimps for a prostitute, the bartender who sets up customers for a prostitute, and the hotel

clerk who regularly furnishes the prostitute and his or her customer with accommodations would all come within the ambit of this provision. Of course, if any of the aggravating attendant circumstances previously discussed exist, §§712-1202 or 1203 would apply. Promoting prostitution in the third degree is a misdemeanor.

The previous law dealt both with the criminal coercion of a person to become a prostitute as well as what is commonly referred to as "procuring" a person for the practice of prostitution.[1] The sanction provided was roughly equivalent to a class C felony. These sections also consider other factors, namely the youth of the prostitute and the number of prostitutes involved in the operation. In addition, it provides for three degrees of the offense; the highest degree, presenting the most serious aggravations, is made a class B felony, a more severe sanction than that provided by prior law. The least serious case, promotion in the third degree, is a misdemeanor, the same sanction provided for what was previously termed "soliciting." The best that can be said for the former statutes in this area is that they were inartfully drawn. They probably bordered on vagueness which may have been unconstitutional. The Code achieves greater clarity than the previous law and provides for sanctions which are more realistically addressed to the circumstances involved in the offenses.

SUPPLEMENTAL COMMENTARY ON §§712-1201 TO 712-1204

Act 130, Session Laws 1993, amended §712-1202 to raise, from fourteen to sixteen, the age of exploited minors that would subject a perpetrator to a first degree charge for the offense of promoting prostitution. The Act also amended §§712-1202 and 712-1203 to make the language in these sections gender neutral. The legislature found that there was a need to enlarge the scope of persons subject to increased criminal penalties for promoting teen-age prostitution. Conference Committee Report No. 62.

Act 147, Session Laws 2008, amended §712-1202 by adding a reference to "force, threat, or intimidation" and deleting "criminal coercion." Act 147 also applied the offense to a person who knowingly advances or profits from prostitution of a person less than eighteen, rather than sixteen, years old. The legislature strengthened the laws on prostitution and related offenses to deter and punish sexual exploitation of minors, including obscenity-related activities. Conference Committee Report No. 38-08.

Act 147, Session Laws 2008, amended §712-1203(1) by adding a reference to "prostituted persons." Conference Committee Report No. 38-08.

Act 145, Session Laws 2011, amended §712-1201 by making conforming and nonsubstantive amendments.

Act 145, Session Laws 2011, amended §712-1202 by adding inducing a person to act by specified means and including the use of fraud as elements of promoting prostitution in the first degree. Act 145 also increased the penalty for the offense to a class A felony. Conference Committee Report No. 76.

Act 145, Session Laws 2011, repealed §712-1204, promoting prostitution in the third degree, and amended §712-1203, promoting prostitution in the second degree, by incorporating conduct previously prohibited under §712-1204 within the second degree offense. Act 145 increased the penalty for the second degree offense to a class B felony. Senate Standing Committee Report No. 1137, Conference Committee Report No. 76.

§§712-1201 To 712-1204 Commentary:

1. H.R.S. §768-56.

2. Id. §§768-53, 768-54.

" **§712-1205 REPEALED.** L 1996, c 14, §2.

" **[§712-1206] Loitering for the purpose of engaging in or advancing prostitution.** (1) For the purposes of this section, "public place" means any street, sidewalk, bridge, alley or alleyway, plaza, park, driveway, parking lot or transportation facility or the doorways and entrance ways to any building which fronts on any of the aforesaid places, or a motor vehicle in or on any such place.

(2) Any person who remains or wanders about in a public place and repeatedly beckons to or repeatedly stops, or repeatedly attempts to stop, or repeatedly attempts to engage passers-by in conversation, or repeatedly stops or attempts to stop motor vehicles, or repeatedly interferes with the free passage of other persons for the purpose of committing the crime of prostitution as that term is defined in section 712-1200, shall be guilty of a violation.

(3) Any person who remains or wanders about in a public place and repeatedly beckons to, or repeatedly stops, or repeatedly attempts to engage passers-by in conversation, or repeatedly stops or attempts to stop motor vehicles, or repeatedly interferes with the free passage of other persons for the purpose of committing the crime of advancing prostitution as that term is defined in section 712-1201(1) is guilty of a petty misdemeanor. [L 1991, c 275, §1]

COMMENTARY ON §712-1206

Act 275, Session Laws 1991, prohibits loitering in a public place for the purpose of engaging in or advancing prostitution. This section was created to help protect unwilling victims from repeated harassment, interference and assault by aggressive prostitutes in our public places. Senate Standing Committee Report No. 1050.

" **§712-1207 Street solicitation of prostitution; designated areas.** (1) It shall be unlawful for any person within the boundaries of Waikiki and while on any public property to:

(a) Offer or agree to engage in sexual conduct with another person in return for a fee; or

(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:

(a) Offer or agree to engage in sexual conduct with another person in return for a fee; or

(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).

(5) As an option to the mandatory term of thirty days imprisonment, if the court finds the option is warranted based upon the defendant's record, the court may place the defendant on probation for a period not to exceed six months, subject to the mandatory condition that the defendant observe geographic restrictions that prohibit the defendant from entering or

remaining on public property, in Waikiki and other areas in the State designated by county ordinance during the hours from 6 p.m. to 6 a.m. Upon any violation of the geographic restrictions by the defendant, the court, after hearing, shall revoke the defendant's probation and immediately impose the mandatory thirty-day term of imprisonment. Nothing contained in this subsection shall be construed as prohibiting the imposition of stricter geographic restrictions under section 706-624(2)(h).

(6) Any person charged under this section may be admitted to bail, pursuant to section 804-4, subject to the mandatory condition that the person observe geographic restrictions that prohibit the defendant from entering or remaining on public property, in Waikiki and other areas in the State designated by county ordinance during the hours from 6 p.m. to 6 a.m. Notwithstanding any other provision of law to the contrary, any person who violates these bail restrictions shall have the person's bail revoked after hearing and shall be imprisoned forthwith. Nothing contained in this subsection shall be construed as prohibiting the imposition of stricter geographic restrictions under section 804-7.1.

(7) Notwithstanding any other law to the contrary, a police officer, without warrant, may arrest any person when the officer has probable cause to believe that the person has committed a violation of subsection (5) or (6), and the person shall be detained, without bail, until the hearing under the appropriate subsection can be held, which hearing shall be held as soon as reasonably practicable.

(8) For purposes of this section:

"Area" means any zone within a county that is defined with specific boundaries and designated as a zone of significant prostitution by this section or a county ordinance.

"Public property" includes any street, highway, road, sidewalk, alley, lane, bridge, parking lot, park, or other property owned or under the jurisdiction of any governmental entity or otherwise open to the public.

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

"Waikiki" means that area of Oahu bounded by the Ala Wai canal, the ocean, and Kapahulu avenue.

(9) This section shall apply to all counties; provided that if a county enacts an ordinance to regulate street solicitation for prostitution, other than an ordinance designating an area as a zone of significant prostitution-related activity, the county ordinance shall supersede this section and no person shall be convicted under this section in that county. [L 1998, c 149, §2; am L 2000, c 143, §1; am L 2011, c 145, §8]

COMMENTARY ON §712-1207

Act 149, Session Laws 1998, added this section to require that as a mandatory condition of probation and bail, defendants are to observe geographic restrictions prohibiting them from entering or walking on the public streets or sidewalks of Waikiki during the hours from 6 p.m. to 6 a.m. Defendants that live in Waikiki and choose to remain in Waikiki during the prohibited hours are required to stay off the streets and sidewalks during those hours. The legislature believed that although the restriction covered a large physical space, it was narrowly tailored to cover only the hours most closely associated with the crime. Also, the restriction was sufficiently definite to provide adequate notice of the behavior that is prohibited. Act 149 also allowed the counties to enact ordinances regulating street solicitation that shall supersede the provisions of this section. Conference Committee Report No. 83.

Act 143, Session Laws 2000, amended this section by expanding the prohibition of street solicitation of prostitution from Waikiki to other areas designated by the council of the appropriate county, but to not more than four areas of the State. The legislature found that allowing counties to designate additional areas as "prostitution-free zones" could provide counties with a way to address the proliferation of prostitution beyond the Waikiki area. This Act also provided for the denial of bail to those persons arrested for violating the terms of bail or probation upon entering the prohibited designated areas. Conference Committee Report No. 72.

Act 145, Session Laws 2011, amended this section by extending the offense of solicitation of prostitution to include those who pay, agree to pay, or offer to pay a fee to another person to engage in sexual conduct. Conference Committee Report No. 76.

Case Notes

By the express terms of subsections (4) and (5), the offense of street solicitation under subsection (1) is probationable, and thus not excludable under §853-4(5); appeals court therefore erred in affirming trial court's refusal to consider defendant's motion for a deferred acceptance of no contest plea. 116 H. 519, 174 P.3d 358 (2007).

Based on the clear and unambiguous language of this section, the offense of street solicitation of prostitution can only be committed by the person who offers or agrees to engage in sexual conduct with another person in a prohibited area "in return for

a fee"; thus it is only the recipient of the fee, and not the payor of the fee, who can commit the offense. 120 H. 478 (App.), 210 P.3d 1 (2009).

" **[§712-1208] Promoting travel for prostitution.** (1) A person commits the offense of promoting travel for prostitution if the person knowingly sells or offers to sell travel services that include or facilitate travel for the purpose of engaging in what would be prostitution if occurring in the State.

(2) "Travel services" has the same meaning as in section 468L-1.

(3) Promoting travel for prostitution is a class C felony. [L 2004, c 82, §2]

COMMENTARY ON §712-1208

Act 82, Session Laws 2004, added this section, making it a class C felony to sell or offer to sell travel services promoting prostitution. The legislature found that the sex industry has expanded to include people in the travel industry arranging for travelers to take advantage of prostitution overseas. These profiteers should not be promoting in Hawaii overseas activities that are illegal in this State. The legislature found that establishing a new offense of promoting travel for prostitution recognizes that travel businesses should be held accountable for their roles, if any, in encouraging prostitution and the consequent abuse and exploitation of women. Conference Committee Report No. 28-04, House Standing Committee Report No. 494-04.

" **[§712-1209] Solicitation of prostitution near schools or public parks.** (1) A person commits the offense of solicitation of prostitution near schools or public parks if, within seven hundred fifty feet of a school or public park, the person offers or agrees to pay a fee to another person to engage in sexual conduct.

(2) Solicitation of prostitution near schools or public parks is a misdemeanor.

(3) For purposes of this section:

"School" has the same meaning as in section 712-1249.6(6).

"Sexual conduct" has the same meaning as in section 712-1200(2). [L 2011, c 74, §1]

COMMENTARY ON §712-1209

Act 74, Session Laws 2011, added this section, establishing a misdemeanor offense for solicitation of prostitution near

schools or public parks if, within seven hundred fifty feet of a school or a public park, a person offers or agrees to pay a fee to another person to engage in sexual conduct. Act 74 was a means of ensuring that the public was not subjected to viewing acts of prostitution near schools and public parks, where children are often present. Senate Standing Committee Report No. 1104, Conference Committee Report No. 68.

" **§712-1209.1 Solicitation of a minor for prostitution.** (1) A person eighteen years of age or older commits the offense of solicitation of a minor for prostitution if the person intentionally, knowingly, or recklessly offers or agrees to pay a fee to a minor or to a member of a police department, a sheriff, or a law enforcement officer who represents that person's self as a minor to engage in sexual conduct.

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

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

(4) This section shall not apply to any member of a police department, a sheriff, or a law enforcement officer who offers or agrees to pay a fee to a minor while acting in the course and scope of duties.

(5) The state of mind requirement for this offense is not applicable to the fact that the person solicited was a minor. A person is strictly liable with respect to the attendant circumstance that the person solicited was a minor.

(6) For purposes of this section:

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

"Sexual conduct" has the same meaning as in section 712-1200(2). [L 2013, c 247, §1; am L 2014, c 114, §4]

COMMENTARY ON §712-1209.1

Act 247, Session Laws 2013, added this section, establishing the offense of solicitation of a minor for prostitution as a class C felony for offenders eighteen years of age or older. Act 247 also established a mandatory fine for a person convicted of the offense of solicitation of a minor for prostitution. The legislature found that Act 247 strengthened the laws and penalties for crimes that exploit children subjected to prostitution. Conference Committee Report No. 64.

Act 114, Session Laws 2014, amended this section by: (1) clarifying that the offense of solicitation of a minor for

prostitution applies to intentional, knowing, or reckless conduct; (2) specifying that the offense applies to solicitation of a person who represents that person's self as a minor only if that person is a member of a police department, a sheriff, or a law enforcement officer; (3) increasing the minimum fine imposed on a person convicted of the offense; (4) providing an exemption for law enforcement acting in the course and scope of duties; and (5) making the offense of solicitation of a minor for prostitution a strict liability offense in regards to age. The legislature unequivocally intended the solicitation of a minor for prostitution to be a strict liability offense with regard to the age of the minor. Any specified state of mind listed therein does not apply to the age of a victim solicited under this section. Therefore, a defendant charged under this section may not defend as to the defendant's state of mind concerning the age of the victim, and will be strictly liable with respect to the age of the victim and the attendant circumstance of the victim's age. Conference Committee Report No. 41-14, Senate Standing Committee Report No. 3249.

" **[§712-1209.5] Habitual solicitation of prostitution.** (1) A person commits the offense of habitual solicitation of prostitution if the person is a habitual prostitution offender and pays, agrees to pay, or offers to pay a fee to another person to engage in sexual conduct.

(2) For the purposes of this section, a person has the status of a "habitual prostitution offender" if the person, at the time of the conduct for which the person is charged, had two or more convictions within ten years of the instant offense for:

(a) Prostitution, in violation of section 712-1200(1)(b);

(b) Street solicitation of prostitution, in violation of section 712-1207(1)(b);

(c) Habitual solicitation of prostitution, in violation of this section;

(d) An offense of any other jurisdiction that is comparable to one of the offenses in paragraph (a), (b), or (c); or

(e) Any combination of the offenses in paragraph (a), (b), (c), or (d).

A conviction for purposes of this section is a judgment on the verdict or a finding of guilt, or a plea of guilty or nolo contendere. The convictions must have occurred on separate dates and be for separate incidents on separate dates. At the time of the instant offense, the conviction must not have been expunged by pardon, reversed, or set aside.

(3) Habitual solicitation of prostitution is a class C felony. [L 2008, c 192, §§1, 3; am L 2010, c 95, §1; am L 2011, c 145, §§9, 10]

COMMENTARY ON §712-1209.5

Act 145, Session Laws 2011, permanently established §712-1209.5, the offense of habitual solicitation of prostitution, by deleting the sunset date of Act 192, Session Laws 2009 [as amended by Act 95, Session Laws 2010]. Act 145 also amended the habitual solicitation of prostitution offense to apply to those who habitually pay, agree to pay, or offer to pay a fee to another person to engage in sexual conduct and raised the offense to a class C felony. Conference Committee Report No. 76, Senate Standing Committee Report No. 1137.

" **§712-1209.6 Prostitution; motion to vacate conviction.** (1) A person convicted of committing the offense of prostitution under section 712-1200, loitering for the purpose of engaging in or advancing prostitution under section 712-1206, street solicitation of prostitution in designated areas under section 712-1207, or convicted of a lesser offense when originally charged with a violation of section 712-1200, 712-1206, or 712-1207, may file a motion to vacate the conviction if the defendant's participation in the offense was the result of the person having been a victim of:

(a) Sex trafficking under section 712-1202 or promoting prostitution under section 712-1203; or

(b) A severe form of trafficking in persons as defined in title 22 United States Code section 7102(9)(A).

(2) A motion filed under this section shall:

(a) Be in writing;

(b) Be signed and sworn to by the petitioner;

(c) Be made within six years after the date that the person ceases to be a victim as described in subsection (1), subject to reasonable concerns for the safety of the defendant, family members of the defendant, or other victims of the trafficking that may be jeopardized by the bringing of a motion, or for other reasons consistent with the purpose of this section;

(d) Describe all the grounds and evidence for vacation of a conviction which are available to the petitioner and of which the petitioner has or by the exercise of reasonable diligence should have knowledge, and provide copies of any official documents showing that

the defendant is entitled to relief under this section; and

(e) Be subject to the review and written approval of the state agency or county prosecutor responsible for prosecuting the offense that is the subject of the motion to vacate conviction.

(3) The court shall hold a hearing on a motion filed under this section if the motion satisfies the requirements of subsection (2); provided that the court may dismiss a motion without a hearing if the court finds that the motion fails to assert grounds on which relief may be granted.

(4) If the court grants a motion filed under this section, the court shall vacate the conviction.

(5) A person making a motion to vacate pursuant to this section has the burden of proof by a preponderance of the evidence.

(6) This section shall not apply to a motion to vacate a conviction under this chapter for:

(a) Sex trafficking under section 712-1202;

(b) Promoting prostitution under section 712-1203; or

(c) A person who pays, agrees to pay or offers a fee to another person to engage in sexual conduct. [L 2012, c 216, §2; am L 2015, c 35, §29; am L 2016, c 206, §16]

COMMENTARY ON §712-1209.6

Act 216, Session Laws 2012, added this section to: (1) authorize a person convicted of committing the offense of prostitution to file a motion to vacate the conviction under certain circumstances; and (2) establish procedures for the motion to vacate the conviction. The legislature found that human trafficking, consisting of the subjugation, recruitment, harboring, or transportation of people for the purpose of forced labor or services, or commercial sexual exploitation, was one of the fastest growing criminal industries. Act 216 would assist in combating human trafficking by allowing trafficking victims who were forced into prostitution to file a motion to have their prostitution convictions vacated from their records. Conference Committee Report No. 109-12.

Act 35, Session Laws 2015, amended subsection (1)(b) by changing: (1) the phrase "severe form of trafficking" to "severe form of trafficking in persons"; and (2) "title 22 United States Code section 7102(13)" to "title 22 United States Code section 7102(9)(A)."

Act 206, Session Laws 2016, amended this section to conform to amendments made to other sections in the Hawaii Revised Statutes by Act 206. Senate Standing Committee Report No. 3450.

"PART II. OFFENSES RELATED TO OBSCENITY

§712-1210 Definitions of terms in this part. In this part, unless a different meaning is required:

"Age verification records of sexually exploited individuals" means individually identifiable records pertaining to every sexually exploited individual provided to patrons or customers of a public establishment or in a private club or event. Such records shall include:

(1) Each sexually exploited individual's name and date of birth, as ascertained by an examination of the individual's valid driver's license, official state identification card, or passport;

(2) A certified copy of each sexually exploited individual's driver's license, official state identification card, or passport; and

(3) Any name ever used by each sexually exploited individual including but not limited to maiden name, aliases, nicknames, stage names, or professional names.

"Age verification records of sexual performers" means individually identifiable records pertaining to every sexual performer portrayed in a visual depiction of sexual conduct, which include:

(1) Each performer's name and date of birth, as ascertained by the producer's personal examination of a performer's valid driver's license, official state identification card, or passport;

(2) A certified copy of each performer's valid driver's license, official state identification card, or passport; and

(3) Any name ever used by each performer including, but not limited to, maiden name, alias, nickname, stage name, or professional name.

"Community standards" means the standards of the State.

"Disseminate" means to manufacture, issue, publish, sell, lend, distribute, transmit, exhibit, or present material or to offer or agree to do the same.

"Erotic or nude massager" means a nude person providing massage services with or without a license.

"Exotic or nude dancer" means a person performing, dancing, or entertaining in the nude, and includes patrons participating in a contest or receiving instruction in nude dancing.

"Intent to profit" means the intent to obtain monetary gain.

"Material" means any printed matter, visual representation, or sound recording, and includes but is not limited to books, magazines, motion picture films, pamphlets, newspapers, pictures, photographs, drawings, sculptures, and tape or wire recordings.

"Minor" means any person less than sixteen years old.

"Nude" means unclothed or in attire, including but not limited to sheer or see-through attire, so as to expose to view any portion of the pubic hair, anus, cleft of the buttocks, genitals or any portion of the female breast below the top of the areola.

"Performance" means any play, motion picture film, dance, or other exhibition performed before an audience.

"Pornographic". Any material or performance is "pornographic" if all of the following coalesce:

(a) The average person, applying contemporary community standards would find that, taken as a whole, it appeals to the prurient interest.

(b) It depicts or describes sexual conduct in a patently offensive way.

(c) Taken as a whole, it lacks serious literary, artistic, political, or scientific merit.

"Pornographic for minors". Any material or performance is "pornographic for minors" if:

(1) It is primarily devoted to explicit and detailed narrative accounts of sexual excitement, sexual conduct, or sadomasochistic abuse; and:

(a) It is presented in such a manner that the average person applying contemporary community standards, would find that, taken as a whole, it appeals to a minor's prurient interest; and

(b) Taken as a whole, it lacks serious literary, artistic, political, or scientific value; or

(2) It contains any photograph, drawing, or similar visual representation of any person of the age of puberty or older revealing such person with less than a fully opaque covering of his or her genitals and pubic area, or depicting such person in a state of sexual excitement or engaged in acts of sexual conduct or sadomasochistic abuse; and:

(a) It is presented in such a manner that the average person, applying contemporary community standards, would find that, taken as a whole, it appeals to a minor's prurient interest; and

(b) Taken as a whole, it lacks serious literary, artistic, political, or scientific value.

"Produces" means to manufacture or publish any pornographic performance, book, magazine, periodical, film, videotape, computer image, or other similar matter and includes the duplication, reproduction, or reissuing of any such matter, but does not include mere distribution or any other activity that does not involve hiring, contracting for, managing, or otherwise arranging for the participation of the performers depicted.

"Sadomasochistic abuse" means flagellation or torture by or upon a person as an act of sexual stimulation or gratification.

"Sexual conduct" means acts of masturbation, bestiality, sexual intercourse or physical contact with a person's clothed or unclothed genitals, pubic area, buttocks, or the breast or breasts of a female for the purpose of sexual stimulation, gratification, or perversion.

"Sexual excitement" means the condition of the human male or female genitals when in a state of sexual stimulation or arousal.

"Sexually exploited individuals" means erotic or nude massagers and exotic or nude dancers.

"Sexual performer" includes any person portrayed in a pornographic visual depiction engaging in, or assisting another person to engage in, sexual conduct. [L 1972, c 9, pt of §1; am L 1981, c 106, §1; am L 2002, c 240, §4; am L 2005 c 10, §; am L 2016, c 16, §41]

COMMENTARY ON §712-1210

Act 106, Session Laws 1981, added the definition of "community standards," to mean a statewide standard. It also amended the definitions of "pornographic" and "pornographic to minors." The conference committee stated in its report (Senate Conference Committee Report No. 14 and House Conference Committee Report No. 12) that the amendments were merely to conform the definitions to the holdings of the United States Supreme Court in Miller v. California, 413 U.S. 15 (1973) and the Hawaii supreme court in State v. Manzo, 58 Haw. 440 (1978).

Act 240, Session Laws 2002, amended this section by adding definitions to comport with sexual exploitation of a minor offenses created by the Act.

Act 10, Session Laws 2005, amended this section by repealing the superfluous definition of "sexual conduct" added by Act 240, Session Laws 2002. This section already provided a sufficient definition of "sexual conduct." House Standing Committee Report No. 1281.

Act 16, Session Laws 2016, amended this section by amending the definition of the term "sexual conduct" as that term is used in the penal code for offenses related to obscenity, by removing

unnecessary and archaic language regarding sexual orientation. House Standing Committee Report No. 1124-16.

Law Journals and Reviews

State v. Kam: The Constitutional Status of Obscenity in Hawaii. 11 UH L. Rev. 253 (1989).

Case Notes

Grand jury was presented with sufficient information to determine the existence of probable cause that material distributed to minor by defendant was pornographic for minors under paragraph (7)(a). 82 H. 474, 923 P.2d 891 (1996).

Based on the plain language and legislative history of §707-700 and construing the definition of "sexual contact" with reference to other definitions relating to sexual relations in §707-700 and this section, contact with the interior of the mouth constitutes "touching of intimate parts" under the definition of "sexual contact" in §707-700. 108 H. 279, 118 P.3d 1222 (2005).

Where the definition of "sexual conduct" under this section includes "physical contact with a person's clothed or unclothed … buttocks … for the purposes of sexual stimulation, gratification, or perversion", an in pari materia reading of this section as well as the legislative history of §707-700 supports the conclusion that the legislature intended the buttocks to be an "intimate part" for purposes of "sexual contact" as that phrase is defined in §707-700. 125 H. 1, 249 P.3d 1141 (2011).

Pornographic.

Construed; provision not unconstitutional for overbreadth or void for vagueness. 58 H. 440, 573 P.2d 945 (1977).

Material held to be "utterly without redeeming social value". 63 H. 418, 629 P.2d 1130 (1981).

Cited: 413 U.S. 15.

" **§712-1211 Displaying indecent matter.** (1) A person commits the offense of displaying indecent matter if the person knowingly or recklessly displays on any sign, billboard, or other object visible from any street, highway, or public sidewalk, a photograph, drawing, sculpture, or similar visual representation of any person of the age of puberty or older:

(a) Which reveals the person with less than a fully opaque covering over his or her genitals, pubic area, or buttocks, or depicting the person in a state of sexual

excitement or engaged in an act of sexual conduct or sadomasochistic abuse;

(b) Which is presented in such a manner as to exploit lust; and

(c) Which lacks serious literary, artistic, political, or scientific value.

(2) Displaying indecent material is a petty misdemeanor.

[L 1972, c 9, pt of §1; am L 1981, c 106, §2; am L 1982, c 147, §26; gen ch 1993]

Revision Note

In subsection (1)(a), "and" deleted pursuant to §23G-15.

Cross References

Display of adult entertainment products for sale, see §489X-1.

COMMENTARY ON §712-1211

Section 712-1211 restates previous Hawaii law regulating public display of matter which would be deemed offensive by a substantial segment of the public. Although nudity and near-nudity now have gained wide acceptance, many people would be affronted by a public display of the sort here prohibited. The precedent for regulating public display is well established. Mr. Justice Brennan has commented,

> I may say that whatever theory of the first amendment's scope is championed, all schools of thought ... are in substantial agreement ... that government has some power to regulate the "how" and "where" of the exercise of the freedom; government is not powerless to say that you cannot blare by loudspeaker the words of the rust amendment in a residential neighborhood in the dead of night, or litter the streets with copies of the text. In other words, though the speech itself be under the first amendment, the manner of its exercise or its collateral aspects may fall beyond the scope of the amendment.[1]

And Mr. Justice Stewart, after underscoring the sanctity of freedom of expression, remarked in his Ginsburg dissent that:

> Different constitutional questions would arise in a case involving an assault upon individual privacy by publication in a manner so blatant or obtrusive as to make it difficult or impossible for an unwilling individual to avoid exposure to it.[2]

Displaying indecent matter is a petty misdemeanor. This relatively light penalty is based on the small amount of harm done, but it is thought desirable to have a brief jail sentence

available as an unpleasant reminder that society does not favor such conduct. The section requires the mental state of knowledge or recklessness as a minimum basis for prosecution. Thus negligence would be insufficient. This is in accord with United States Supreme Court case law in the area of dissemination of obscene books? The area of prohibited display is limited to areas which the general public cannot avoid if affronted by the display. Thus it is not as broad as the definition of "public place" in §711-1100(2).

Section 712-1211 contains special requirements that the display be presented in such a manner as to exploit lust and that it be utterly without redeeming social importance. Arguably neither requirement is constitutionally necessary because of the limited area of prohibition, but particularly since certain works of art would otherwise be included it seems wise to include such a limitation on liability.

SUPPLEMENTAL COMMENTARY ON §712-1211

Act 106, Session Laws 1981, amended subsection (1)(c) to conform to the revised definition of "pornographic" in §712-1210.

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§712-1211 Commentary:

1. Brennan, The Supreme Court and the Meiklejohn Interpretation of the First Amendment, 79 Harv. L. Rev. 1, 5 (1965).

2. Ginzburg v. United States, 383 U.S. 463 (1966).

3. Smith v. California, 361 U.S. 147 (1959).

" **§712-1212 REPEALED.** L 1973, c 136, §10.

" **§712-1213 Displaying indecent material; prima facie evidence.** The fact that a person engaged in the conduct specified by section 712-1211 is prima facie evidence that the person engaged in that conduct with knowledge of or in reckless disregard of the character, content, or connotation of the material which is displayed. [L 1972, c 9, pt of §1; am L 1987, c 176, §5]

Cross References

Prima facie evidence, see §701-117.

COMMENTARY ON §712-1213

This section is derived from the proposed statute in Richard Kuh's influential book on pornography.[1] The purpose of the section is to ease the burden on the prosecutor of making a prima facie case on the issue of mens rea in cases involving violation of §712-1211. It makes proof of a prohibited display prima facie evidence of the requisite state of mind; however, it does not change the prosecutor's ultimate burden of proof beyond a reasonable doubt.

§712-1213 Commentary:

1. Kuh, Foolish Figleaves? 267 (1967).

" **§712-1214 Promoting pornography.** (1) A person commits the offense of promoting pornography if, knowing its content and character, the person:

(a) Disseminates for monetary consideration any pornographic material;

(b) Produces, presents, or directs pornographic performances for monetary consideration; or

(c) Participates for monetary consideration in that portion of a performance which makes it pornographic.

(2) Promoting pornography is a misdemeanor. [L 1972, c 9, pt of §1; gen ch 1993]

Revision Note

In subsection (1)(a), "or" deleted pursuant to §23G-15.

COMMENTARY ON §712-1214

Section 712-1214 imposes a general penalty upon the commercial dissemination of pornography, regardless of the form of the "material" [§712-1210] or "performance" [§712-1210].

The definition of "pornographic" [§712-1210] is derived from a series of United States Supreme Court cases,[1] other proposed or enacted codifications,[2] and the Model Penal Code.[3] The usual reference with respect to "predominant appeal" test and the "limits of candor" test is to the "ordinary adult"; however, the definition is flexible to the extent that, on the first test, where the material or performance in question is addressed to a particular, clearly defined audience, such as homosexuals and sexual sadists, the reference is to the "special interest group."[4] Special problems relating to minors are handled separately in §712-1215.

References in United States Supreme Court opinions to "contemporary community standards" have proven troublesome for the Court and for lower courts that have tried to follow its decisions. In Roth the Court applied "contemporary community standards" to the predominant appeal test.[5] In Memoirs, the Court applied "contemporary community standards" to the limits of candor test,[6] but not to the predominant appeal test.[7] In Ginzburg the Court applied the concept of community standards in determining whether the material had social value for the audience (general public) to which it was directed.[8] It should, however, be noted that the Court in Ginzburg was sharply divided and that in most decisions the applications of "contemporary community standards" has been only to the predominant appeal and limits of candor tests.

The most serious problem in the application of "contemporary community standards" is the uncertain nature and size of the "community" referred to. On this too, the Court is divided. Mr. Justice Harlan has said:

> There must first be decided the relevant "community" in terms of whose standards of decency the issue must be judged. We think that the proper test under this federal statute, reaching as it does to all parts of the United States whose population reflects many different ethnic and cultural backgrounds, is a national standard of decency. We need not decide whether Congress could constitutionally prescribe a lesser geographical framework for judging this issue which would not have the intolerable consequence of denying some sections of the country access to material, there deemed acceptable, which in others might be considered offensive to prevailing community standards of decency. Cf. Butler v. Michigan, 352 U.S. 380.[9]

This "national community" standard has been echoed by Mr. Justice Brennan:

> We do not see how any "local" definition of the "community" could properly be employed in delineating the area of expression that is protected by the Federal Constitution. ...It is true that Manual Enterprises dealt with the federal statute banning obscenity from the mails. But the mails are not the only means by which works of expression cross local community lines in this country. It can hardly be assumed that all the patrons of a particular library, bookstand, or motion picture theater are residents of the smallest local "community" that can be drawn around that establishment. Furthermore, to sustain the suppression of a particular book or film in one locality would deter its dissemination in other localities where it might be held not obscene, since sellers and exhibitors

would be reluctant to risk criminal conviction in testing the variation between the two places....

It is true that local communities throughout the land are in fact diverse, and that in cases such as this one the Court is confronted with the task of reconciling the rights of such communities with the rights of individuals. Communities vary, however, in many respects other than their toleration of alleged obscenity, and such variances have never been considered to require or justify a varying standard for application of the Federal Constitution. The Court has regularly been compelled, in reviewing the criminal convictions challenged under the Due Process Clause of the Fourteenth Amendment, to reconcile the conflicting rights of the local community which brought the prosecution and of the individual defendant. Such a task is admittedly difficult and delicate, but it is inherent in the Court's duty of determining whether a particular conviction worked a deprivation of rights guaranteed by the Federal Constitution. The Court has not shrunk from discharging that duty in other areas, and we see no reason why it should do so here. The Court has explicitly refused to tolerate a result whereby "the constitutional limits of free expression in the Nation would vary with state lines," Pennekamp v. Florida, supra, 328 U.S., at 335; we see even less justification for allowing such limits to vary with town or county lines. We thus reaffirm the position taken in Roth to the effect that the constitutional status of an allegedly obscene work must be determined on the basis of a national standard. It is, after all, a national Constitution we are expounding.[10]

On the other hand, former Chief Justice Warren, dissenting in Jacobellis, thought the standard should be the "local" community:

It is my belief that when the Court said in Roth that obscenity is to be defined by reference to "community standards," it meant community standards not a national standard, as is sometimes argued. I believe that there is no provable "national standard," and perhaps there should be none. At all events, this Court has not been able to enunciate one, and it would be unreasonable to expect local courts to divine one. It is said that such a "community" approach may well result in material being proscribed as obscene in one community but not in another, and, in all probability, that is true. But communities throughout the Nation are in fact diverse, and it must be remembered that, in cases such as this one, the Court is confronted with the

> task of reconciling conflicting rights of the diverse communities within our society and of individuals.[11]

The disagreement within the Court is all the more difficult to understand because the standard provided in Roth, Manual Enterprises, Jacobellis, Memoirs, Mishkin, and other cases, was derived from the Model Penal Code,[12] which clearly intended that a national standard be applied.[13]

In the wake of the Supreme Court's failure to provide a clear rule, the state and lower federal courts have split three ways: applying either a "local,"[14] "state,"[15] or "national"[16] standard.

It appears to us that there is little to be gained by using the phrase "contemporary community standards"--which the Code deliberately does not employ. The reference will have to be made to contemporary standards of ordinary adults--but the use of the word "community" in this context has posed more problems than it has solved. It seems that the reference is at least statewide and probably national--but to use the word "community" at either level adds little or nothing. In any event, the Code's definition of "pornographic" will not prejudice further case development on this issue.

The Code limits the offense of promoting pornography to activity carried on for monetary consideration. It is commercial exploitation and not private tastes that are the gravamen of the offense. As the drafters of the Michigan proposed revision have pointed out:

> ... [T]he emphasis in this area should be on commercial distribution of pornographic material. We should not open up to prosecution, police investigation, search, etc. every person who in the privacy of his home exhibits pornographic materials to a few friends [cf. Redmond v. United States, 384 U.S. 264, 86 S.Ct. 1415, 16 L.Ed. 2d 521 (1966)].[17]

Moreover, making criminal private possession of materials, and possibly private expressions through performances, albeit pornographic in nature, appears to be unconstitutional.[18]

It should be pointed out that the definition of the offense provides that the accused must act knowingly with respect to the pornographic context and character of the material the accused disseminates or the performance the accused presents, directs, or in which the accused participates. This meets the constitutionally imposed requirement of mens rea in this type of case[19] and is in accord with the general principles set forth in chapter 702 of this Code.

The previous Hawaii law relating to pornographic and other condemned publications was set forth in HRS §727-8. No extended discussion is required to demonstrate that this section of the Code is to be preferred to previous law. In line with the

Code's limitation to commercial exploitation, the available penalty has been increased.[20]

Law Journals and Reviews

State v. Kam: The Constitutional Status of Obscenity in Hawaii. 11 UH L. Rev. 253 (1989).

The Lum Court and the First Amendment. 14 UH L. Rev. 395 (1992).

Privacy Outside of the Penumbra: A Discussion of Hawai‘i's Right to Privacy After State v. Mallan. 21 UH L. Rev. 273 (1999).

Case Notes

Subsection (1)(a) is not unconstitutional for overbreadth or void for vagueness. 58 H. 440, 573 P.2d 945 (1977).

Jury must find that community standard exists and defendant violated it. 68 H. 631, 726 P.2d 263 (1986).

Section unconstitutional as applied to sale of pornographic materials to person intending to use items in privacy of own home, but was not unconstitutionally vague or overbroad. 69 H. 483, 748 P.2d 372 (1988).

§712-1214 Commentary:

1. Roth v. United States, 354 U.S. 476 (1957); Manual Enterprises v. Day, 370 U.S. 478 (1962); Jacobellis v. Ohio, 378 U.S. 184 (1964); A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Massachusetts, 383 U.S. 413 (1966); Mishkin v. New York, 383 U.S. 502 (1966); Ginzburg v. United States, 383 U.S. 463 (1966); and Redrup v. New York, 386 U.S. 767 (1967). Insofar as Ginzburg can be read to render pornographic materials which would not otherwise be so but for defendant's salesmanship ("pandering"), the Code chooses not to incorporate this aspect into the standard definition provided.

2. Prop. Mich. Rev. Cr. Code §6301(f) and N.Y.R.P.L. §235.00.

3. M.P.C. §251.4.

4. Cf. Mishkin v. New York, supra.

5. Roth v. United States, supra at 489: "...whether to the average person, applying contemporary community standards, the

dominant theme of the material taken as a whole appeals to prurient interest."

6. Memoirs v. Massachusetts, supra at 418: "...the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters."

7. Id.

8. Ginzburg v. United States, supra at 472: "The Government does not seriously contest the claim that the book has worth in such a controlled, or even neutral environment [members of medical associations]. Petitioners, however, did not sell the book to such a limited audience, or focus their claims for it on its supposed therapeutic or educational value; rather, they deliberately emphasized the sexually provocative aspects of the work, in order to catch the salaciously disposed."

9. Manual Enterprises v. Day, supra at 488.

10. Jacobellis v. Ohio, supra at 193-195.

11. Id. at 200-201.

12. See Manual Enterprises v. Day, supra at 485 and Jacobellis v. Ohio, supra at 191.

13. M.P.C. §251.4(4): "In any prosecution under this Section evidence shall be admissible to show...the degree of public acceptance of the material in the United States."

14. City of Newark v. Humphres, 94 N.J. Super. 395, 228 A.2d 550 (1967); Nessinoff v. Harper, 212 So. 2d 666 (Fla. Dist. Ct. App. 1968).

15. In re Giannini, 69 Cal. 2d 563, 446 P.2d 535, 72 Cal. Rptr. 655 (1968), cert. denied, sub nom. California v. Giannini, 395 U.S. 910 (1969); McCanley v. Tropic of Cancer, 20 Wisc. 2d 134, 121 N.W. 2d 545 (1963).

16. Hudson v. State, 234 A.2d 903 (D.C. Mun. Ct. App. 1967); State v. Lewitt, 3 Conn. Cir. Ct. 605, 222 A.2d 579 (1966); State v. Smith, 422 S.W.2d 50 (Mo. 1967), cert. denied, 393 U.S. 895 (1968).

17. Prop. Mich. Rev. Cr. Code, comments at 483.

18. Stanley v. Georgia, 394 U.S. 557 (1969).

19. Smith v. California, 361 U.S. 147 (1959).

20. Cf. H.R.S. §727-10.

" **§712-1215 Promoting pornography for minors.** (1) A person commits the offense of promoting pornography for minors if:

(a) Knowing its character and content, the person disseminates to a minor material which is pornographic for minors; or

(b) Knowing the character and content of a motion picture film or other performance which, in whole or in part, is pornographic for minors, the person:

(i) Exhibits such motion picture film or other performance to a minor;

(ii) Sells to a minor an admission ticket or pass to premises where there is exhibited or to be exhibited such motion picture film or other performance; or

(iii) Admits a minor to premises where there is exhibited or to be exhibited such motion picture film or other performance.

(2) Subsection (1) does not apply to a parent, guardian, or other person in loco parentis to the minor or to a sibling of the minor, or to a person who commits any act specified therein in the person's capacity and within the scope of the person's employment as a member of the staff of any public library.

(3) Promoting pornography for minors is a class C felony. [L 1972, c 9, pt of §1; am L 1974, c 190, §1; am L 1988, c 283, §1; gen ch 1993; am L 2000, c 21, §2]

Revision Note

In subsection (1)(b)(i), "or" deleted pursuant to §23G-15.

Cross References

Internet crimes against children, see chapter 846F.

COMMENTARY ON §712-1215

This section has no direct counterpart in previous Hawaii law. It is derived primarily from New York Revised Penal Law §235.21 and its immediate predecessor, New York Penal Law §484(h)--(i). It is based on the State of Hawaii's role as parens patriae, and

the duties and powers which attach to that role. One of the most dramatic recognitions of the state's role as parens patriae is found in the United States Supreme Court decision in Prince v. Massachussetts.[1]

> The state's authority over children's activities is broader than over like actions of adults.... A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies. It may secure this against impeding restraints and dangers within a broad range of selection.... It is too late now to doubt that legislation appropriately designed to reach such evils is within the state's police power....[2]

Prince v. Massachusetts affirmed the right of the state to overrule a parental prerogative for the welfare of the child. There is abundant authority, not only in the statutory law of Hawaii, but also in case law of sister states and most recently, in a decision by the United States Supreme Court, which supports the right of the state to preserve and augment the parental prerogative.

Under the present Hawaii law alcoholic beverages may not be sold to a person under 18 years of age,[3] cigarettes may not be sold to a person under 15 years of age,[4] and counties are given the option of establishing curfews for minors.[5] These laws attempt to safeguard the prerogative of the parent to decide whether his or her child of a specific age will imbibe, smoke, or stay out past a certain hour.

In regard to the regulation of dissemination of pornographic material to children, the case law is quite clear. In sustaining the state's power to enact such regulations, the New York Court of Appeals stated in Bookcase, Inc. v. Broderick,[6]

> ... Material which is protected for distribution to adults is not necessarily constitutionally protected from restriction upon its dissemination to children.... Because of the State's exigent interest in preventing distribution to children of objectionable material, it can exercise its power to protect the health, safety, welfare and morals of its community by barring the distribution to children of books recognized to be suitable for adults.[7]

An even more cogent recognition of the state's right, and even obligation, to reinforce the parental prerogative is illustrated by Judge Fuld's concurring opinion, People v. Kahan,[8] in which he said:

> While the supervision of children's reading may best be left to their parents, the knowledge that parental control or guidance cannot always be provided and society's transcendant interest in protecting the welfare of children

justify reasonable regulation of the sale of material to them.[9]

If there were any doubt remaining prior to 1968 of the constitutional validity of prohibiting the dissemination of pornography to minors as a specific class, that doubt was laid to rest by the United States Supreme Court decision in Ginsberg v. New York,[10] handed down April 22, 1968. In that decision the Supreme Court upheld the constitutional validity of New York Penal Law 484(h),[11] a law substantially similar with the proposed section.

Two aspects of §712-1215 should be noted at the outset.

First, this provision is not limited to dissemination for monetary gain. The same approach was taken in Michigan.[12] The reason behind this was a strong feeling that the non-commercial distribution of pornographic material to minors often presented a serious problem, that only rarely did it involve parents or guardians, and that a criminal prosecution in these rare cases was unlikely.[13] To insure that §712-1215 is not employed against parents, guardians, others in loco parentis to the minor, or siblings of the minor, subsection (2) has been provided. The United States Supreme Court has clearly implied in Ginsberg v. New York that a prohibition not limited to commercial distribution, which would put parents in jeopardy of criminal sanctions, would be invalidated. The Court pointedly noted that "the prohibition against sales to minors does not bar parents who so desire from purchasing the magazines for their children."[14] In light of this strong implication an adoption of the Michigan approach demands explicit exception of parents, guardians, etc., from the prohibitions of the law.

Secondly, the Code makes 16 years the appropriate age limit for minors. The choice reflects the desire of the state in its role as parens patriae to keep control over the reading matter of minors as long as is realistically feasible. The age limit is not inconsistent with the low age limits under Chapter 707; rather in that chapter, the rationale behind the choice of ages discussed in the commentary to 707-731 to 735 is primarily and necessarily the physical maturity of the female.

Section 712-1215 contains two prohibitions, each with its own specific emphasis. Subsection (1)(a) prohibits the dissemination to a minor of material which is pornographic for minors. The nature of the material falling within this prohibition is described in the definitions of "pornographic for minors" and "material" [§712-1210]. "Material" includes not only printed matter, but also records, tapes, still photographs, motion pictures, drawings, or sculptures. Such material is "pornographic" if it is primarily devoted to explicit and detailed narrative accounts of specified sexual acts between

parties of the same or different sexes or contains a visual representation of naked genitalia or depicting specified sexual acts. The limiting clauses (i) and (ii) in the definition of "pornographic for minors" would exclude sex education texts, scientific texts, and most works of art or literature that are not presented in such a manner as to predominantly appeal to a minor's prurient interest or that have a redeeming social importance for minors. Obviously certain marriage manuals would not fit in this category, nor would some works of art or works of literature. By including these two specific requirements the definition clearly identifies itself with former New York Penal Law §484(h) which was validated by the United States Supreme Court in Ginsberg v. New York. Again, it should be pointed out that there is an added safety valve in §712-1215; nothing prevents a parent from buying material for his or her child, regardless of what that material depicts or narrates.

Subsection (1)(a) would also operate against the merchant who allows a minor to page through pornographic material on display. The word "dissemination" is defined, in §712-1210, to include an "offer to sell" and "exhibit."

Subsection (1)(b) prohibits exhibiting a pornographic motion picture film or other performance to a minor. It also prohibits selling a ticket to a minor for admission to such a movie or other performance or the actual admitting of a minor to such a movie or other performance. Thus the prohibition may reach not only the owner of a movie theater or burlesque house but also the person running the ticket booth as well as the usher who accepts the ticket and admits the minor.

Both subsections (1)(a) and (1)(b) require knowledge of the character and content of the material disseminated or the movie or other performance exhibited. The United States Supreme Court upheld similar knowledge requirements in Smith v. California.[15] Such knowledge requirements were reaffirmed most recently in the Supreme Court's Ginsberg decision.

Subsection (2) makes the promotion of pornographic material for minors a misdemeanor. A fine of $1,000 is available in addition to a one-year term of imprisonment. To the extent that the severity of a penalty has deterrent value, the misdemeanor sanction should suffice.

SUPPLEMENTAL COMMENTARY ON §712-1215

Act 190, Session Laws 1974, amended subsection (2) by adding the words "or to a person who commits any act specified therein in his capacity as a member of the staff of any public library." The change was "to make clear that a person who, in his or her capacity as a member of a staff of a public library,

disseminates to a minor, material which is subsequently held to be 'pornographic for minors' is not guilty of a penal offense." Senate Standing Committee Report No. 1072-74.

Act 283, Session Laws 1988, increased the penalty for promoting pornography to minors from a misdemeanor to a class C felony. The legislature found that it is important to keep pornography out of the hands of children, and increasing the penalty to the felony level should give pornography dealers the incentive to inquire as to the age of their customers and refuse to sell to those who are minors. Senate Standing Committee Report No. 1763, House Standing Committee Report No. 1596-88.

Act 21, Session Laws 2000, amended subsection (2) by narrowing the promoting pornography for minors exemption for public library staff to only acts committed by a staff member within the scope of the staff member's employment. The legislature found that there was no justification in continuing to provide a public library exemption beyond incidents where the staff member was acting within the scope of the staff member's employment. The legislature also found that this amendment struck a balance between providing minors with meaningful access to library materials and protecting them from exposure to pornographic materials while protecting responsible library staff members from threats of litigation. House Standing Committee Report Nos. 926-00 and 1304-00, Senate Standing Committee Report No. 2672.

§712-1215 Commentary:

1. 321 U.S. 158 (1944).

2. Id. at 168-69.

3. H.R.S. §281-4.

4. Id. §445-212.

5. Id. §577-21.

6. 18 N.Y.2d 71, 218 N.E.2d 668 (1966).

7. Id. at 75, 218 N.E.2d at 671.

8. 15 N.Y.2d 311, 206 N.E.2d 333 (1965).

9. Id. at 312, 206 N.E.2d 334.

10. 390 U.S. 629 (1968).

11. Now N.Y.R.P.L. §235.21.

12. Prop. Mich. Rev. Cr. Code §6310.

13. Id.

14. Ginsberg v. New York, supra.

15. 361 U.S. 147 (1959).

" **[§712-1215.5] Promoting minor-produced sexual images in the first degree.** (1) A person, eighteen years of age or older, commits the offense of promoting minor-produced sexual images in the first degree if the person intentionally or knowingly commands, requests, or encourages a minor to use a computer, cell phone, or any other device capable of electronic data transmission or distribution, to transmit to any person a nude photograph or video of a minor.

(2) For purposes of this section, a "minor" means any person under eighteen years of age.

(3) Promoting minor-produced sexual images in the first degree is a misdemeanor. [L 2012, c 213, pt of §1]

" **[§712-1215.6] Promoting minor-produced sexual images in the second degree.** (1) A minor commits the offense of promoting minor-produced sexual images in the second degree if the minor:

(a) Knowingly uses a computer, cell phone, or any other device capable of electronic data transmission or distribution, to transmit or distribute to another person a nude photograph or video of a minor or the minor's self; or

(b) Intentionally or knowingly commands, requests, or encourages another minor to use a computer, cell phone, or any other device capable of electronic data transmission or distribution, to transmit to any person a nude photograph or video of a minor or the minor's self.

(2) A person, of any age, commits the offense of promoting minor-produced sexual images in the second degree if the person knowingly possesses a nude photograph or video of a minor transmitted or distributed in violation of subsection (1). It is an affirmative defense under this subsection that the person took reasonable steps to destroy or eliminate the nude photograph or video of a minor.

(3) For purposes of this section, a "minor" means any person under eighteen years of age.

(4) Promoting minor-produced sexual images in the second degree is a petty misdemeanor. [L 2012, c 213, pt of §1]

COMMENTARY ON §§712-1215.5 AND 712-1215.6

Act 213, Session Laws 2012, added §§712-1215.5 and 712-1215.6 to address the problem of "sexting," which involved minors taking nude pictures and videos of themselves or other minors, and transmitting the nude images to others by use of a cell phone or other form of electronic communication. Specifically, Act 213 prohibited: (1) adults from soliciting minors to electronically transmit nude images of minors by making such conduct a misdemeanor [(§712-1215.5)]; (2) minors from electronically transmitting nude images of themselves or other minors, or soliciting other minors to do so by making such conduct a petty misdemeanor [(§712-1215.6)]; and (3) a person from possessing a nude image transmitted by a minor, but making it an affirmative defense that the recipient made reasonable efforts to destroy the transmitted nude image [(§712-1215.6)]. The legislature found that the electronic transmission of youth-produced sexual pictures and videos was a growing problem, particularly because the images can be shared with many people almost instantaneously. Once transmitted, the original transmitter had very limited ability to control or prevent further dissemination. The legislature further found that the images may be used as a commodity for exchange, and the threatened dissemination of these images may be used as leverage against the subject to force the subject to engage in behaviors that may cause embarrassment, at minimum, and possible mental or emotional harm. Conference Committee Report No. 25-12.

" **§712-1216 Promoting pornography; prima facie evidence.** (1) The fact that a person engaged in the conduct specified by section 712-1215 is prima facie evidence that the person engaged in that conduct with knowledge of the character and content of the material disseminated or the performance produced, presented, directed, participated in, exhibited, or to be exhibited.

(2) In a prosecution under section 712-1215, the fact that the person:

(a) To whom material pornographic for minors was disseminated;

(b) To whom a performance pornographic for minors was exhibited;

(c) To whom an admission ticket or pass was sold to premises where there was or was to have been exhibited such performance; or

(d) Who was admitted to premises where there was or was to have been such performance,

was at that time, a minor, is prima facie evidence that the defendant knew the person to be a minor. [L 1972, c 9, pt of §1; gen ch 1993; am L 2015, c 35, §30]

Revision Note

In subsection (2)(a) and (b), "or" deleted and punctuation changed and in subsection (2)(c), punctuation changed pursuant to §23G-15.

Cross References

Prima facie evidence, see §701-117.

COMMENTARY ON §712-1216

Section 712-1216(1) provides that engagement in the act of promoting pornography, generally or for minors, is prima facie evidence that the actor did so with knowledge of the character and content of the material disseminated or performance produced, presented, directed, participated in, exhibited, or to be exhibited. The subsection addresses itself to a special prosecutorial problem. Since §§712-1214 and 1215 require knowledge on the promoter's part of the character and content of the pornography which the promoter promotes, the prosecution is required to prove, beyond a reasonable doubt, that the defendant knew of the character and content of the pornographic material or performance. However in such cases there is often little evidence of the actor's knowledge of such facts. A recent work in this area has underlined this difficulty quite well:

> How does one prove (beyond a reasonable doubt) what moves in the recesses of another's mind? How does one show that a bookseller knows the items in his stock, that a theater owner is familiar with the movies he exhibits, or that a newsdealer is aware of the general character of the magazines he displays? Aside from those dubious dialogues in which a dealer says how "hot" is his merchandise--conversations most unlikely to take place when the purchaser is a fifteen-year-old--scienter, realistically viewed is rarely susceptible of sure proof. But common sense may assist. No corner hardware merchant would long prosper, lacking general familiarity with the items he had

> for sale... similarly, honest book and magazine dealers have some general knowledge of the character of the wares they order, put on their shelves, sometimes display and ultimately hope to sell. *The draft statute would transmute this common sense into law....*[1]

With this reasoning in mind, subsection (1) allows the prosecution to get its case to the jury on the issue of the actor's knowledge of character and content of the material, film, or performance on proof of the specified conduct only.

Much the same evidentiary problem, difficulty in proving mens rea, is presented when the age of another person is made an element of the offense, as is the case in §712-1215. Section 712-1216(2) provides the same prima facie rule with respect to age that subsection (1) provides with respect to the nature of the material or performance. Again, the evidentiary rule merely permits the prosecution to get the case to the trier of fact on that issue: the burden of proof beyond a reasonable doubt remains on the prosecution. In such situations, the defendant would be free to introduce, but would not be obligated to do so, any evidence tending to negate the inference that the defendant knew the minor's age. In this vein, the minor's appearance, the minor's representations, and apparently official identification records (e.g., a birth certificate, driver's license, or draft card) would all be relevant factors.

§712-1216 Commentary:

1. Kuh, Foolish Figleaves? 264-65 (1967) (emphasis added).

SUPPLEMENTAL COMMENTARY ON §712-1216

Act 35, Session Laws 2015, amended subsection (1) by deleting the reference to §712-1214.

Law Journals and Reviews

The Lum Court and the First Amendment. 14 UH L. Rev. 395 (1992).

Case Notes

Subsection (1) held unconstitutional. 63 H. 596, 634 P.2d 80 (1981).

" **§712-1217 Open lewdness.** (1) A person commits the offense of open lewdness if in a public place the person does

any lewd act which is likely to be observed by others who would be affronted or alarmed.

(2) Open lewdness is a petty misdemeanor. [L 1972, c 9, pt of §1; gen ch 1993]

Cross References

Indecent exposure, see §707-734.

COMMENTARY ON §712-1217

This section penalizes open lewdness which does not amount to a sexual offense under chapter 707 of this Code, but which "amounts to gross flouting of community standards in respect to sexuality or nudity in public."[1] The section does not apply to cult nudism because of the requirement that the act take place when it is known by the actor that the actor's conduct is likely to cause affront or alarm.

Case Notes

Section cited as example of statutory crime without requirement of intention or knowledge. State v. Marley, 54 H. 450, 460, 509 P.2d 1095 (1973).

Intentional exposure of a person's private parts to public view is a lewd act. 61 H. 62, 597 P.2d 10 (1979); 61 H. 68, 597 P.2d 13 (1979); 61 H. 70, 597 P.2d 15 (1979).

Female breasts are not private parts or genitalia, and exposure thereof under existing circumstances was not a lewd act under statute. 61 H. 68, 597 P.2d 13 (1979).

"Public place" construed. 61 H. 187, 600 P.2d 1379 (1979).

No double jeopardy for convictions under this section and §707-734. 8 H. App. 535, 813 P.2d 335 (1991).

Defendant's act occurred in "public place" as it was likely to be seen by any number of casual observers. 81 H. 99 (App.), 912 P.2d 596 (1996).

§712-1217 Commentary:

1. M.P.C., Tentative Draft No. 13, comments at 82 (1961).

" **[§712-1218] Failure to maintain age verification records of sexual performers.** (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.

(2) Failure to maintain age verification records of sexual performers is a class C felony. [L 2002, c 240, pt of §3]

COMMENTARY ON §712-1218

Act 240, Session Laws 2002, added this section to establish criminal penalties against those who participate in or profit from the sexual exploitation of a minor.

" **[§712-1218.5] Failure to maintain age verification records of sexually exploited individuals.** (1) A person commits the offense of failure to maintain age verification records of sexually exploited individuals if, with the intent to profit therefrom, the person knowingly provides sexually exploited individuals to patrons or customers of a public establishment or provides sexually exploited individuals to a private club or event, and the person:

(a) Knowingly fails to create and maintain age verification records for each sexually exploited individual;

(b) Knowingly makes or causes to be made any false entry into the age verification records of sexually exploited individuals required by this section; or

(c) Knowingly fails to produce the age verification records of sexually exploited individuals required by this section upon request by a law enforcement officer for the purpose of verifying the age of a sexually exploited individual.

(2) Failure to maintain age verification records of sexually exploited individuals is a class C felony. [L 2002, c 240, pt of §3]

COMMENTARY ON §712-1218.5

Act 240, Session Laws 2002, added this section to establish criminal penalties against those who participate in or profit from the sexual exploitation of a minor.

" **[§712-1219] Failure to affix information disclosing location of age verification records of sexual performers.** (1) A person commits the offense of failure to affix information disclosing location of age verification records of sexual performers if the person knowingly produces any pornographic 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 fails to affix to each copy a statement describing where any records required by section 712-1218 with respect to all performers depicted in that copy of the matter may be located, including the current address and telephone number of the custodian of those records.

(2) If the person to whom any recordkeeping requirement of section 712-1218 applies is an organization, the affixed information required under subsection (1) shall include the name, title, and business address of the individual employed by the organization who is responsible for maintaining the records required by section 712-1218.

(3) Failure to affix information disclosing the location of age verification records of sexual performers is a class C felony. [L 2002, c 240, pt of §3]

COMMENTARY ON §712-1219

Act 240, Session Laws 2002, added this section to establish criminal penalties against those who participate in or profit from the sexual exploitation of a minor.

" **[§712-1219.5] Disseminating visual depiction of sexual conduct without affixed information disclosing location of age verification records of sexual performers.** (1) A person commits the offense of disseminating visual depiction of sexual conduct without affixed information disclosing location of age verification records of sexual performers if the person knowingly disseminates, sells, or otherwise transfers, or offers for sale or transfer, any book, magazine, periodical, film, videotape, computer image, or other matter that contains one or more visual depictions made after June 30, 2002, of sexual conduct, and that does not have affixed thereto a statement describing where the age verification records required by section 712-1218 may be located; provided that this section shall not be construed to impose a duty upon any persons to

determine the accuracy of the contents of the affixed statement or of the records required to be kept at that location.

(2) Disseminating visual depiction of sexual conduct without affixed information disclosing location of age verification records of sexual performers is a misdemeanor. [L 2002, c 240, pt of §3]

COMMENTARY ON §712-1219.5

Act 240, Session Laws 2002, added this section to establish criminal penalties against those who participate in or profit from the sexual exploitation of a minor.

"PART III. GAMBLING OFFENSES

§712-1220 Definitions of terms in this part. In this part unless a different meaning plainly is required, the following definitions apply[:]

"Advance gambling activity". A person "advances gambling activity" if he engages in conduct that materially aids any form of gambling activity. Conduct of this nature includes but is not limited to conduct directed toward the creation or establishment of the particular game, contest, scheme, device, or activity involved, toward the acquisition or maintenance of premises, paraphernalia, equipment, or apparatus therefor, toward the solicitation or inducement of persons to participate therein, toward the actual conduct of the playing phases thereof, toward the arrangement of any of its financial or recording phases, or toward any other phase of its operation. A person advances gambling activity if, having substantial proprietary control or other authoritative control over premises being used with his knowledge for purposes of gambling activity, he permits that activity to occur or continue or makes no effort to prevent its occurrence or continuation. A person advances gambling activity if he plays or participates in any form of gambling activity.

"Bookmaking" means advancing gambling activity by accepting bets from members of the public upon the outcomes of future contingent events.

"Contest of chance" means any contest, game, gaming scheme, or gaming device in which the outcome depends in a material degree upon an element of chance, notwithstanding that skill of the contestants may also be a factor therein.

"Gambling". A person engages in gambling if he stakes or risks something of value upon the outcome of a contest of chance or a future contingent event not under his control or influence, upon an agreement or understanding that he or someone else will

receive something of value in the event of a certain outcome. Gambling does not include bona fide business transactions valid under the law of contracts, including but not limited to contracts for the purchase or sale at a future date of securities or commodities, and agreements to compensate for loss caused by the happening of chance, including but not limited to contracts of indemnity or guaranty and life, health, or accident insurance.

"Gambling device" means any device, machine, paraphernalia, or equipment that is used or usable in the playing phases of any gambling activity, whether that activity consists of gambling between persons or gambling by a person involving the playing of a machine. However, lottery tickets and other items used in the playing phases of lottery schemes are not gambling devices within this definition.

"Lottery" means a gambling scheme in which:

(a) The players pay or agree to pay something of value for chances, represented and differentiated by numbers or by combinations of numbers or by some other medium, one or more of which chances are to be designated the winning ones; and

(b) The winning chances are to be determined by a drawing or by some other method based on an element of chance; and

(c) The holders of the winning chances are to receive something of value.

"Mutuel" means a form of lottery in which the winning chances or plays are not determined upon the basis of a drawing or other act on the part of persons conducting or connected with the scheme, but upon the basis of the outcome or outcomes of a future contingent event or events otherwise unrelated to the particular scheme.

"Player" means a person who engages in gambling solely as a contestant or bettor.

"Profit from gambling activity". A person "profits from gambling activity" if he accepts or receives money or other property pursuant to an agreement or understanding with any person whereby he participates or is to participate in the proceeds of gambling activity.

"Social gambling" is defined in section 712-1231.

"Something of value" means any money or property, any token, object, or article exchangeable for money or property, or any form of credit or promise directly or indirectly contemplating transfer of money or property or of any interest therein, or involving extension of a service or entertainment. [L 1972, c 9, pt of §1; am L 1973, c 201, pt of §1]

Revision Note

Numeric designation deleted pursuant to §23G-15.

COMMENTARY ON §712-1220

This section provides definitions of terms used repeatedly in this part of chapter 712, a discussion of the definitions is incorporated in the Commentary on the substantive sections employing the defined terms.

SUPPLEMENTAL COMMENTARY ON §712-1220

Act 201, Session Laws 1973, made several changes to the definitions as previously contained in the Proposed Draft of the Code. In Item (1), the phrase "acting other than as a player" was deleted, so that any person, including a player, advances gambling activity if the person engages in conduct that materially aids any form of gambling activity. Also, the last sentence was added, which states: "A person advances gambling activity if he plays or participates in any form of gambling activity." In Item (2) the term "bookmaking" previously was defined as "advancing gambling activity by unlawfully accepting bets from members of the public as a business, rather than in a casual or personal fashion, upon the outcomes of future contingent events." The term "unlawfully" and the phrase "as a business rather than in a casual or personal fashion" were deleted. In Item (6), "lottery" was changed from "an unlawful gambling scheme" to "a gambling scheme."

In Item (8), the Proposed Code, as well as the Code as adopted in 1972, had contained an extensive definition of the word "player" in an attempt to describe a player in a social gambling game. Act 201 deleted that definition and instead defined "player" as a person who "engages in gambling solely as a contestant or bettor." In Item (9), the phrase "other than as a player" was deleted, so that even players may "profit from gambling activity." Item (10) is a new addition stating that "social gambling" is defined in §712-1231. In Item (11) the phrase "or a privilege of playing at a game or scheme without charge" was deleted from the definition of "something of value."

Attorney General Opinions

The activity involved in daily fantasy sports betting is gambling under the plain meaning of Hawaii's gambling statute because: (1) the amount wagered on each daily fantasy sports contest is something of value that is being staked despite being

called an "entry fee"; (2) daily fantasy sports contests are contests of chance and involve future contingent events not under the control of players; and (3) the major daily fantasy sports companies lay out in detail what players will receive on the basis of certain outcomes. Att. Gen. Op. 16-1.

" **§712-1221 Promoting gambling in the first degree.** (1) A person commits the offense of promoting gambling in the first degree if the person knowingly advances or profits from gambling activity by:

(a) Engaging in bookmaking to the extent that the person receives or accepts in any seven-day period more than five bets totaling more than $500;

(b) Receiving in connection with a lottery, or mutuel scheme or enterprise, money or written records from a person other than a player whose chances or plays are represented by such money or records; or

(c) Receiving or having become due and payable in connection with a lottery, mutuel, or other gambling scheme or enterprise, more than $1,000 in any seven-day period played in the scheme or enterprise.

(2) Promoting gambling in the first degree is a class C felony. [L 1972, c 9, pt of §1; am L 1973, c 201, pt of §1; am L 1983, c 161, §1; am L 1987, c 83, §1; gen ch 1992]

Revision Note

In subsection (1)(a), "or" deleted pursuant to §23G-15.

Case Notes

Although it may have been error admitting into evidence, as expert opinion under HRE rule 702, officer's testimony concerning §712-1231(b), the social gambling defense, where defendant was not entitled to this defense in a prosecution for promoting gambling in the first degree under subsection (1)(c), error was harmless. 92 H. 98 (App.), 987 P.2d 996 (1999).

" **§712-1222 Promoting gambling in the second degree.** (1) A person commits the offense of promoting gambling in the second degree if the person knowingly advances or profits from gambling activity.

(2) Promoting gambling in the second degree is a misdemeanor. [L 1972, c 9, pt of §1; am L 1973, c 201, pt of §1; am L 1987, c 83, §2; gen ch 1992]

" **§712-1222.5 Promoting gambling aboard ships.** (1) A person commits the offense of promoting gambling aboard ships if the person knowingly advances or profits from gambling activity by:

(a) Managing, supervising, controlling, operating, or owning, either alone or in association with others, a gambling ship;

(b) Managing, supervising, controlling, operating, or owning, either alone or in association with others, any craft which embarks from any point within the State, and disembarks at the same or another point within the State, during which the person intentionally causes or knowingly permits gambling activity to be conducted, whether within or without the waters of the State; or

(c) Transporting, conveying, or carrying any person to a gambling ship or a craft described in paragraph (b).

(2) In this section:

(a) "Craft" includes every boat, ship, vessel, barge, hulk, or other thing capable of floating.

(b) "Gambling ship" means any craft kept, operated, or maintained for the purpose of gambling, whether within or without the waters of the State and whether it is anchored, moored, lying to, or navigating.

(3) This section shall not apply to gambling activity conducted during travel from foreign nations or another state or territory of the United States to the point of first entry into state waters or during travel to foreign nations or another state or territory of the United States from the point of final exit from state waters; provided that nothing herein shall preclude prosecution for any offense under this part.

(4) Promoting gambling aboard ships is a class C felony. [L 1990, c 196, §1; am L 1992, c 57, §2; gen ch 1992]

Revision Note

In subsection (2), paragraph designations deleted and after the definition of "craft" "and" deleted and punctuation changed pursuant to §23G-15.

" **§712-1223 Gambling.** (1) A person commits the offense of gambling if the person knowingly advances or participates in any gambling activity.

(2) Gambling is a misdemeanor. [L 1972, c 9, pt of §1; am L 1973, c 201, pt of §1; gen ch 1993]

COMMENTARY ON §§712-1221 TO 712-1223

Part III of chapter 712 adopts a comprehensive pattern of gambling legislation proposed in Michigan[1] and enacted in New York.[2] These three sections of the Code initiate a comprehensive revision of Hawaii's gambling laws. For the most part the coverage of the previous law has been preserved, although the emphasis has been changed in several instances. The Code provides penalties for those who exploit gambling activity; however, at the same time, the Code introduces some limited liberalizations in the area which reflect the actual attitude of society toward gambling.

Part III provides inclusive coverage for all forms of gambling exploitation. Section 712-1221 covers exploitations of gambling in the form of "advancing" or "profiting" from gambling activity.[3] It is aimed at large-scale gambling and is the most aggravated offense in this area. Under this section, a class C felony sanction is provided for a person who (a) engages in bookmaking to the extent that the person receives or accepts in any one day more than five bets totaling more than $500, (b) receives in connection with a lottery or mutuel scheme money or written records from a person other than a player whose chances or plays are represented by such money or records, or (c) receives in connection with a lottery, mutuel, or other scheme or enterprise more than $1,000 in any one day of money played in the scheme or enterprise.

"Bookmaking" is defined in §712-1220(2) as taking bets "upon the outcomes of future contingent events." The definition of "lottery" in §712-1220(6) is comprehensive as was that provided by the prior law,[4] without sacrificing clarity. The definition of "mutuel" adds a specific definition not previously contained in Hawaii legislation.[5]

A class C felony is imposed for violation of §712-1221 in recognition of the large-scale exploitive nature of the offense.

Section 712-1222 provides misdemeanor liability for promoting gambling in the second degree if a person knowingly profits from gambling activity. This section covers the small-time promoter who profits from gambling activity when the promoter receives money or other property as a result of participation in the proceeds of any gambling activity.

Act 201, Session Laws 1973, amended §712-1222 by deleting therefrom the advancing of gambling activities and limiting it to profiting from gambling activities. This was done because advancing gambling activity is covered by the new offense of gambling. Senate Standing Committee Report No. 806 (1973).

Section 712-1223 provides misdemeanor liability for gambling if a person knowingly advances or participates in any gambling activity. This is a new section which was added by Act 201,

Session Laws 1973. The Legislature stated that gambling in all its aspects is to be prohibited except in the limited case of "social gambling" as set forth in §712-1231. Thus, in Standing Committee Report No. 806, the Senate Committee on Judiciary noted:

> "While the second degree promoting offense treats the problem of 'profiting' from gambling in isolation, a new offense of 'gambling' has been created to cover all other acts related to gambling for which evidence of profit need not be available nor applicable. The point of this is to obtain a clearer statement that gambling in all its aspects is prohibited except in the limited case of 'social gambling'.
>
> Under the existing law the broad scope of the second degree promoting offense requires that 'social gambling' be considered in a context that includes profiting from gambling. However, 'social gambling' and profiting are mutually exclusive by definition except in the case of the player's winnings. This seems to be a point of confusion. As proposed, the differential exclusion of social gambling is permitted to be considered apart from the profiting problem, and it is thought that thus, a more systematic treatment is achieved."

The former statutory law is all inclusive in condemning as criminal any gambling regardless of how innocuous. Under prior law it was a misdemeanor to set up or assist in any type of lottery scheme,[6] to sell or buy a ticket or chance in a lottery scheme,[7] to conduct or play any game of chance or any game where money is lost or won or to be present where such games occur,[8] to exhibit or expose to view in a barricaded place any gambling paraphernalia,[9] to be present in a barricaded place where gambling paraphernalia is exposed to view,[10] to conduct or assist in any bunco games (such as "three card monte" or the "shell game"),[11] to bet on the outcome of any sporting event,[12] and to allow another person to use any building or vessel for gambling activity.[13] The Code recognizes distinctions in gambling which were not recognized in prior law. It provides increased penalties for exploitive conduct, but exempts social gambling and the casual bet as criminal offenses. The Code's sections strengthen the law by providing a class C felony penalty for the "professional" promoter, instead of a misdemeanor penalty as provided under previous law. By broadly defining the terms "advancing gambling activity" and "promoting gambling activity" it makes unnecessary the explicit listing of various games of chance that was present in previous statutory law.[14] Small-time gamblers are punished

as misdemeanants under the Code, the same penalty available under the former law.

SUPPLEMENTAL COMMENTARY ON §§712-1221 TO 712-1223

Act 161, Session Laws 1983, amended §712-1221(1) so that a person may be prosecuted under this section if that person owed more than $1,000 in any one day as a result of a gambling scheme. The prior law prohibited as evidence, the receipt of wagered money, thereby requiring police to witness the actual transfer of money before making an arrest. The amendment enables police to prosecute bookmakers for gambling based on the contents of seized bookmaking records. Senate Standing Committee Report No. 721, House Standing Committee Report No. 440.

Act 83, Session Laws 1987, amended §712-1221 by changing the one-day period to seven days because there were difficulties with proving promotion of gambling within a one-day period. The extension of the time period would also allow for more effective law enforcement pursuant to this section. Senate Standing Committee Report No. 545.

Act 83, Session Laws 1987, amended §712-1222 by making changes to this section for the purpose of conforming with §712-1221. Conformity was desired with §712-1221 so that if there is insufficient evidence to prove the first degree offense, a person could be found guilty of the second degree offense. Senate Standing Committee Report No. 545.

Act 196, Session Laws 1990, added §712-1222.5 which makes it illegal to promote gambling aboard ships. The legislature found that intrastate gambling junkets would be detrimental to the State's family oriented tourist industry. House Standing Committee Report No. 466-90.

Act 57, Session Laws 1992, amended §712-1222.5 to clarify that gambling activities which are conducted during travel to and from foreign nations and Hawaii are exempt to the same extent as gambling activities which are conducted during travel to and from other states and territories of the United States and Hawaii. Act 57 further amended this section to conform subsection and paragraph designations to the style used in the Code. House Standing Committee Report No. 1198-92, Senate Standing Committee Report No. 1947.

§§712-1221 To 712-1223 Commentary:

1. Prop. Mich. Rev. Cr. Code, Chapter 61.

2. N.Y.R.P.L., Article 225.

3. See §712-1220(1) and (9).

4. H.R.S. §746-1.

5. Cf. id.

6. Id. §746-2.

7. Id. §746-3.

8. Id. §746-4.

9. Id. §746-5.

10. Id. §746-6.

11. Id. §746-7.

12. Id. §746-8.

13. Id. §746-9.

14. E.g., id. §746-4.

" **§712-1224 Possession of gambling records in the first degree.** (1) A person commits the offense of possession of gambling records in the first degree if the person knowingly possesses, produces, or distributes any writing, paper, instrument, or article:

(a) Of a kind commonly used in the operation or promotion of a bookmaking scheme or enterprise, and constituting, reflecting, or representing more than five bets totaling more than $500; or

(b) Of a kind commonly used in the operation, promotion, or playing of a lottery or mutuel scheme or enterprise, and constituting, reflecting, or representing more than one hundred plays or chances therein or one play or chance wherein the winning amount exceeds $5,000.

(2) Possession of gambling records in the first degree is a class C felony. [L 1972, c 9, pt of §1; am L 1973, c 201, pt of §1; am L 1980, c 174, §1; gen ch 1993]

Case Notes

In a prosecution for violation of subsection (1)(a), it is not necessary to prove the occurrence of a sporting event; gambling records were properly admitted although there was no showing of a chain of custody; not unconstitutionally vague. 63 H. 342, 627 P.2d 282 (1981).

" **§712-1225 Possession of gambling records in the second degree.** (1) A person commits the offense of possession of gambling records in the second degree if the person knowingly possesses any writing, paper, instrument, or article:

(a) Of a kind commonly used in the operation or promotion of a bookmaking scheme or enterprise; or

(b) Of a kind commonly used in the operation, promotion, or playing of a lottery or mutuel scheme or enterprise.

(2) Possession of gambling records in the second degree is a misdemeanor. [L 1972, c 9, pt of §1; am L 1973, c 201, pt of §1; gen ch 1993]

" **§712-1226 Possession of a gambling device.** (1) A person commits the offense of possession of a gambling device if the person manufactures, sells, transports, places, possesses, or conducts or negotiates any transaction affecting or designed to affect ownership, custody, or use of any gambling device, knowing it is to be used in the advancement of gambling activity which is not social gambling.

(2) Possession of a gambling device is a misdemeanor. [L 1972, c 9, pt of §1; am L 1973, c 201, pt of §1; gen ch 1993]

COMMENTARY ON §§712-1224 TO 712-1226

These sections enlarge the scope of the previous law by adding inchoate gambling offenses involving the possession of gambling records or devices, thus permitting police intervention at the anticipatory stage of gambling. The sections also complement and bolster the coverage of §§712-1221, 1222, and 1223.

Sections 712-1224 and 1225 concern the possession of gambling records. These records may consist of any writing, paper, instrument, or article of a kind "commonly used" in a bookmaking, lottery, or mutuel scheme. The gradation of penalties into a class C felony and a misdemeanor is made on the same basis as the gradation of penalties for promoting gambling activities (§§712-1221 and 1222).

Section 712-1226 makes it a misdemeanor to manufacture, sell, transport, or possess a gambling device, knowing it is to be used in the advancement of gambling activity which is not social gambling. The term "gambling device" is defined by §712-

1220(5). The definition specifically excludes from its scope lottery tickets to avoid needless overlapping of §§712-1224 and 1225 with §712-1226.

These sections are needed and justifiable for two reasons. First, because of the nature of gambling offenses, the State often cannot prove the actual promotion of gambling activity while at the same time it can easily prove the culpable possession of gambling records or devices. In view of the defense afforded by §712-1227, possession of gambling records and devices provides a legitimate basis for permitting police intervention and imposing penal liability. Secondly, by allowing the State to prosecute for possession of records or devices, society is able to restrict unlawful gambling activity while it is in its preparatory stage. Especially is this so when the definition of the possessory offense relating to gambling devices is drawn so as to cover trafficking in the devices.

The coverage of the previous statutory law is sketchy in regard to the possession of gambling records or devices. A person found in possession of a lottery ticket was guilty of a misdemeanor.[1] There was no express provision penalizing possession of bookmaking records or receipts or gambling devices. The Code fills this gap and provides a basis for earlier police intervention.

The existing case law holds that operating a pinball machine that gives free games upon the scoring of a certain amount of points is a form of gambling.[2] The Proposed Draft of the Code, as well as the Code when adopted in 1972, accepted this position. Originally, "gambling" turned on the possibility of receiving something of value.[3] "Something of value" included "a privilege of playing at a game or scheme without charge." Thus, possession of a pinball machine originally came within the scope of §712-1225. However, by Act 201, Session Laws 1973, the legislature amended the definition of "something of value" by removing the phrase "or a privilege of playing at a game or scheme without charge." (See §712-1220(11), and Commentary thereon.) In commenting on the amendment, the Senate Committee on Judiciary, in Standing Committee Report No. 806 (1973) stated:

> This phrase refers to such activities as pinball and other games involving the winning of a privilege of playing another game without charge. Such winnings were previously allowed under Hawaii law. Your Committee finds that there is no good reason to include 'free game' as something of value from gambling.

These three sections were originally numbered as §§712-1223, 1224 and 1225 in the Code when adopted in 1972. They were

renumbered by Act 201, Session Laws 1973. Act 201 also made the following changes to these sections. In §§712-1224 and 1225, the phrase "other than as a player" was deleted, so that even a person who is a player may be subject to the offense of possession of gambling records. Also, in §712-1224, the clause "and constituting, reflecting, or representing more than 500 plays or chances therein" was inserted to describe the type of records of lottery or mutuel scheme that is necessary for the offense of possession of gambling records in the first degree.

SUPPLEMENTAL COMMENTARY ON §§712-1224 TO 712-1226

Act 174, Session Laws 1980, amended §712-1224 by expanding the offense to include persons who produce or distribute gambling records and by clarifying the definition and monetary amounts of such records. The purpose was to provide for more effective enforcement and to curb the number of pool tickets for extremely high amounts. Senate Standing Committee Report No. 857-80, House Standing Committee Report No. 492-80.

§§712-1224 To 712-1226 Commentary:

1. H.R.S. §746-3.

2. Territory of Hawaii v. Uyehara, 42 Haw. 184 (1957); Territory of Hawaii v. Naumu, 43 Haw. 66 (1958).

3. §712-1220(4).

" **§712-1227 Possession of gambling records; defense.** In any prosecution under sections 712-1224 and [712-1225], it is a defense that the writing, paper, instrument, or article possessed by the defendant was neither used nor intended to be used in the advancement of gambling activity, except for records used in social gambling. [L 1972, c 9, pt of §1; am L 1973, c 201, pt of §1]

COMMENTARY ON §712-1227

This section establishes a defense in a prosecution under §§712-1224 and 1225. It is a defense to such a prosecution that the record possessed is "neither used nor intended to be used in the advancement of gambling activity, except for records used in social gambling." In view of the relaxed standards provided in §§712-1224 and 1225 (i.e., possession of an article "of a kind commonly used..."), a defense has been provided for those

defendants who are able to produce some evidence which raises a reasonable doubt that their possession of the records was preparatory to unlawful gambling.

This section was originally numbered as §712-1226, but was renumbered by Act 201, Session Laws 1973.

" **§712-1228 Gambling offenses; prima facie evidence.** (1) Proof that a person knowingly possessed any gambling record specified in sections 712-1224 and 712-1225 or any gambling device in section 712-1226 is prima facie evidence that the person possessed the record or device with knowledge of its contents and character.

(2) In any prosecution under this part in which it is necessary to prove the occurrence of a sporting event, a published report of its occurrence in any daily newspaper, magazine, or other periodically printed publication of general circulation, shall be admissible in evidence and shall constitute prima facie evidence of the occurrence of the event. [L 1972, c 9, pt of §1; am L 1973, c 201, pt of §1]

Cross References

Prima facie evidence, see §701-112.

COMMENTARY ON §712-1228

Offenses of possession of gambling records and gambling devices pose a special problem regarding proof of the requisite knowledge of the contents and character of the records or the device. In cases which require proof of the occurrence of sporting events, strict adherence to the rules of evidence would force the prosecution in its case in chief to incur great expense on an issue which may not realistically be in controversy. Therefore, this section provides two evidentiary rules designed to let the prosecutor get the case to the jury in situations where direct evidence is difficult or expensive to obtain and the weight of the logical inference in each situation is sufficient to warrant the special rule.

Act 201, Session Laws 1973, renumbered this section from §712-1227 to §712-1228.

" **§712-1229 Lottery offenses; no defense.** It is no defense to a prosecution under any section of this part relating to a lottery that the lottery itself is drawn or conducted outside this State and is not in violation of the laws of the jurisdiction in which it is drawn or conducted. [L 1972, c 9, pt of §1; am L 1973, c 201, pt of §1]

COMMENTARY ON §712-1229

This section provides that it is no defense to a prosecution under any section relating to a lottery that the lottery itself is drawn or conducted outside this State and is not in violation of the laws of the jurisdiction in which it is drawn. This eliminates spurious defenses in cases involving the Irish Sweepstakes or lotteries conducted in other states. Because the person who places the bet or buys the lottery ticket is not criminal under this part, only the seller or promoter is covered and it should make no difference that the seller or promoter is dealing in "chances" based on an out-of-state contingency. The section was renumbered from §712-1228 to §712-1229 by Act 201, Session Laws 1973.

" **§712-1230 Forfeiture of property used in illegal gambling.** Any gambling device, paraphernalia used on fighting animals, or birds, implements, furniture, personal property, vehicles, vessels, aircraft, or gambling record possessed or used in violation of this part, or any money or personal property used as a bet or stake in gambling activity in violation of this part, may be ordered forfeited to the State, subject to the requirements of chapter 712A. [L 1972, c 9, pt of §1; am L 1973, c 201, pt of §1; am L 1979, c 83, §1; am L 1989, c 261, §22; am L 1992, c 57, §3]

Cross References

Surrender or forfeiture of animals, see §711-1110.5.

COMMENTARY ON §712-1230

This section restates in general terms the previous law relating to forfeiture of gambling stakes, records, and devices.[1] The forfeiture is specifically made subject to the requirements of §701-119 which embodies a single procedure for the establishment of all forfeitures declared by the Penal Code. The procedure provides, as did the previous law,[2] for the protection of innocent owners of property which is involved in the commission of an offense. Intentionally omitted are prior provisions permitting a person who loses funds gambling to sue for recovery,[3] permitting a police officer, officer, or other person to sue to recover treble damages based on the amount lost (in which case one-half went to the person so prosecuting and one-half to the state for use for public schools),[4] and voiding instruments of indebtedness used in gambling.[5] These

provisions are unrealistic, seldom, if ever, invoked, and unnecessary in view of the general forfeiture provision. This section was renumbered from §712-1229 to §712-1230, by Act 201, Session Laws 1973.

In State v. Nobuhara, 52 Haw. 319, 474 P.2d 707 (1970), the Hawaii Supreme Court ruled that certain moneys seized under a violation of former HRS §746-8, which proscribed betting on an athletic contest, could not be forfeited. The Court declared that there was no evidence to tie in the moneys with the betting activities and thus could not be forfeited under HRS §746-12.

SUPPLEMENTAL COMMENTARY ON §712-1230

Act 83, Session Laws 1979, amended this section to better define the properties which may be forfeited when used in illegal gambling. Within this context, the legislature specifically intended that "only paraphernalia used in fighting animals and birds be susceptible to ... forfeiture ... as distinguished from the animals or birds themselves." Conference Committee Report No. 60. The Act also established a preponderance of evidence standard for courts to use in determining whether forfeiture should be ordered.

Act 57, Session Laws 1992, amended this section to clarify that forfeitures of property used in illegal gambling are subject to the requirements of chapter 712A. House Standing Committee Report No. 1198-92, Senate Standing Committee Report No. 1947.

Case Notes

The State must prove the existence of a substantial connection between the currency being forfeited and the illegal activity; where $1,300 of the subject currency was substantially connected to appellant's illegal gambling activity and §712A-11(4) provides that the State need not trace the proceeds exactly, $1,300 was properly ordered forfeited to the State. 104 H. 323, 89 P.3d 823 (2004).

Where State failed to prove, by a preponderance of the evidence, that the subject currency of $1,900 seized from appellant's trousers was involved in appellant's gambling transactions, trial court erred in ordering currency forfeited to State; there was no evidence connecting currency to any illegal activity, and absent proof of a substantial connection between the illegal activity and the res, the currency was not subject to forfeiture. 104 H. 323, 89 P.3d 823 (2004).

Insufficient showing that property was integral part of illegal gambling operation. 5 H. App. 547, 705 P.2d 54 (1985).

§712-1230 Commentary:

1. See former H.R.S. §§746-11, 746-12.

2. Id. §746-13.

3. Id. §746-16.

4. Id. §746-18.

5. Id. §746-19.

" **§712-1231 Social gambling; definition and specific conditions, affirmative defense.** (a) Definition. "Social gambling" means gambling in which all of the following conditions are present:

(1) Players compete on equal terms with each other; and

(2) No player receives, or becomes entitled to receive, anything of value or any profit, directly or indirectly, other than the player's personal gambling winnings; and

(3) No other person, corporation, unincorporated association, or entity receives or becomes entitled to receive, anything of value or any profit, directly or indirectly, from any source, including but not limited to permitting the use of premises, supplying refreshments, food, drinks, service, lodging or entertainment; and

(4) It is not conducted or played in or at a hotel, motel, bar, nightclub, cocktail lounge, restaurant, massage parlor, billiard parlor, or any business establishment of any kind, public parks, public buildings, public beaches, school grounds, churches or any other public area; and

(5) None of the players is below the age of majority; and

(6) The gambling activity is not bookmaking.

(b) Affirmative defense:

(1) In any prosecution for an offense described in [section] 712-1223, 712-1224, 712-1225 or 712-1226, a defendant may assert the affirmative defense that the gambling activity in question was a social gambling game as defined in [section] 712-1231(a).

(2) If the defendant asserts the affirmative defense, the defendant shall have the burden of going forward with evidence to prove the facts constituting such defense

unless such facts are supplied by the testimony of the prosecuting witness or circumstance in such testimony, and of proving such facts by a preponderance of evidence.

(c) In any prosecution for an offense described in this part the fact that the gambling activity involved was other than a social gambling game shall not be an element of the offense to be proved by the prosecution in making out its prima facie case. [L 1973, c 201, pt of §1; gen ch 1993]

COMMENTARY ON §712-1231

Section 712-1231 is a completely new and rewritten section set forth by Act 201, Session Laws 1973. This section defines "social gambling" as gambling activity that meets all the prescribed conditions. These conditions are: (1) that all players engage as contestants on "equal terms"; (2) that no profiting be involved--other than the player's winnings; (3) that it should not be conducted at certain enumerated places, such as hotels, school grounds, public parks, any business establishment, etc.; (4) that no minor be involved in the game; and (5) that the gambling activity is not bookmaking. (Senate Standing Committee Report No. 806 (1973).)

With respect to the concept of prohibiting gambling in enumerated places, the Standing Committee Report states:

> Your Committee notes the addition of the concept that gambling in certain enumerated places such as hotels, public parks, etc.-- is prohibited and that gambling conducted in such places is not to come within the protected confines of 'social gambling.' It is felt that this addition to the law clarifies the legislature's intent to prevent the intrusion of hotel and casino type operations into this State, as well as prevent exposure of gambling to children in public parks, school grounds, etc.
>
> In this connection, casual gambling activities in a social context, involving contests of skill, and conducted in places other than those enumerated in the law, such as casual bets between golfers or bowlers would be "social gambling".

Section 712-1231 provides that in any prosecution for an offense described in §712-1223, 1224, 1225, or 1226, the defendant may assert the affirmative defense that the gambling activity was a social gambling game as defined in this section. In respect thereto, the Standing Committee Report No. 806 (1973), Senate Judiciary Committee, states:

> There has been considerable concern whether the affirmative defense provisions of the Hawaii Penal Code are

constitutional. In that regard, your Committee understands that statutorily prescribed affirmative defenses have been held constitutional. See Territory of Hawaii v. Shizuichi Yamamoto, et. al., 39 Haw. 556 (1952); McKelvey v. United States, 260 U.S. 353 (1922); United States v. Sidney B. Rowlette, et. al., 297 F.2d 475 (1968); and U.S. v. Carl Oslin Rumzy, Jr. 446 F.2d 1184 (1971).

A major change affected is the erasure of any mandatory requirement that the defendant utilize this affirmative defense. We note that this is an area of great concern. That is, whether the affirmative defense in the existing law forces the defendant, as a legal requirement, to testify in potential self-incrimination.

Without addressing ourselves to any other application of the affirmative defense in the Hawaii Penal Code, your Committee notes the existing law was to provide in §712-1231(b) that a defendant's resort to the affirmative defense is discretionary. See People v. Felder, 334 N.Y.S. 2d 992 (1972).

There appears to be some confusion as to the prosecutor's burden of proof in relation to the defense of social gambling. It is intended that the prosecution should not have the burden of proving as part of its prima facie case, that the gambling activity in question was other than a social gambling game. Accordingly, an explicit statement to that effect was included in §712-1231(c).

In contrast, it is the intent that the defendant shall be entitled to acquittal on the basis of the affirmative defense only if the trier of the facts finds by a preponderance of the evidence the facts constituting the affirmative defense. In other words, the defendant has both the burden of going forward with the evidence and the burden of persuasion by a preponderance of evidence with respect to the affirmative defense of social gambling.

Case Notes

Defendants did not prove that no person other than players received or became entitled to receive anything of value. 2 H. App. 606, 638 P.2d 338 (1981).

Although it may have been error admitting into evidence, as expert opinion under HRE rule 702, officer's testimony concerning subsection (b), the social gambling defense, where defendant was not entitled to this defense in a prosecution for promoting gambling in the first degree under §712-1221(1)(c), error was harmless. 92 H. 98 (App.), 987 P.2d 996 (1999).

"PART IV. OFFENSES RELATED TO DRUGS AND INTOXICATING COMPOUNDS

Note

Industrial hemp remediation and biofuel crop research program (repealed July 1, 2016). L 2014, c 56.

Cross References

Drug demand reduction assessments; special fund, see §706-650.

Intermediate sanctions for selected offenders and defendants, see §§353-10.5, 353-63.5, and 706-605.1.

Money laundering, see chapter 708A.

Cross References

Overdose prevention; limited immunity, see §329-43.6.

Law Journals and Reviews

Marijuana Prohibition in Hawaii. 13 HBJ, no. 3, at 9 (1977).

Case Notes

When a statute proscribes a substance as harmful, presumption of constitutionality applies although scientific views on harm are conflicting. This rule applies to marijuana cases. 56 H. 271, 535 P.2d 1394 (1975).

Defendants with prior felony convictions of drug offenses are disqualified from sentencing pursuant to §706-622.5, even if the convictions occurred in other jurisdictions and therefore not "under part IV of chapter 712", so long as the offenses would implicate this part if committed in Hawaii. 104 H. 71, 85 P.3d 178 (2004).

§712-1240 Definitions of terms in this part. In this part, unless a different meaning plainly is required:

"Dangerous drugs" means any substance or immediate precursor defined or specified as a "Schedule I substance" or a "Schedule II substance" by chapter 329, or a substance specified in section 329-18(c)(14), except marijuana or marijuana concentrate.

"Detrimental drug" means any substance or immediate precursor defined or specified as a "Schedule V substance" by chapter 329, or any marijuana.

"Dosage unit" for purposes of section 712-1241 and section 712-1242 means an entity designed and intended for singular consumption or administration.

"Harmful drug" means any substance or immediate precursor defined or specified as a "Schedule III substance" or a "Schedule IV substance" by chapter 329, or any marijuana concentrate except marijuana and a substance specified in section 329-18(c)(14).

"Immediate precursor" means a substance which the department of health, State of Hawaii, has found to be and by rule designates as being the principal compound commonly used or produced primarily for use, and which is an immediate chemical intermediary used or likely to be used in the manufacture of a controlled substance, the control of which is necessary to prevent, curtail, or limit manufacture.

"Intoxicating compounds" means any compound, liquid or chemical containing toluol, hexane, trichloroethylene, acetone, toluene, ethyl acetate, methyl ethyl ketone, trichloroethane, isopropanol, methyl isobutyl ketone, methyl cellosolve acetate, cyclohexanone, or any other substance for the purpose of inducing a condition of intoxication, stupefaction, depression, giddiness, paralysis or irrational behavior, or in any manner changing, distorting or disturbing the auditory, visual or mental processes. For the purposes of this section, any such condition so induced shall be deemed to be an intoxicated condition.

"Intoxicating liquor" means any substance defined as "liquor" or "intoxicating liquor" by section 281-1.

"Manufacture" means to produce, prepare, compound, convert, or process a dangerous drug, either directly or indirectly by extraction from substances of natural origin, or independently by means of chemical conversion or synthesis.

"Marijuana" means any part of the plant (genus) cannabis, whether growing or not, including the seeds and the resin, and every alkaloid, salt, derivative, preparation, compound, or mixture of the plant, its seeds or resin, except that, as used herein, "marijuana" does not include hashish, tetrahydrocannabinol, and any alkaloid, salt, derivative, preparation, compound, or mixture, whether natural or synthesized, of tetrahydrocannabinol.

"Marijuana concentrate" means hashish, tetrahydrocannabinol, or any alkaloid, salt, derivative, preparation, compound, or mixture, whether natural or synthesized, of tetrahydrocannabinol.

"Minor" means a person who has not reached the age of majority.

"Ounce" means an avoirdupois ounce as applied to solids and semi-solids, and a fluid ounce as applied to liquids.

"Practitioner" means[:]

(1) A physician, dentist, veterinarian, scientific investigator, or other person licensed, registered, or otherwise permitted to distribute, dispense, prescribe, conduct research with respect to or to administer a controlled substance in the course of professional practice or research in this State.

(2) A pharmacy, hospital, or other institution licensed, registered, or otherwise permitted to distribute, dispense, prescribe, conduct research with respect to or to administer a controlled substance in the course of professional practice or research in this State.

"To distribute" means to sell, transfer, prescribe, give, or deliver to another, or to leave, barter, or exchange with another, or to offer or agree to do the same.

"To sell" means to transfer to another for consideration. [L 1972, c 9, pt of §1; am L 1975, c 163, §6(a), (b); am L 1979, c 112, §2; am L 1984, c 122, §2; am L 1987, c 176, §6 and c 356, §1; am L 1997, c 319, §1; am L 2004, c 193, §4; am L 2012, c 34, §15]

COMMENTARY ON §712-1240

This section provides definitions of terms used throughout this part. The definitions are discussed, when an explanation is needed, in the commentary on the following sections.

The Code made several changes to the recommendations of the proposed draft for this section. It redefined "dangerous drug", and added definitions of such new terms as "harmful drug", "detrimental drug", "immediate precursor", "intoxicating compounds", "practitioner", and "to distribute". Concurrently, the Code eliminated the proposed draft's definitions of the terms "narcotic drug" and "to dispense". The Code also changed the draft's definition of the word "unlawfully". Instead of "narcotic drug and dangerous drug", the term concerned is "a Schedule I, II, III, IV, or V substance", as well as marijuana, marijuana concentrates, and intoxicating compounds.

Act 163, Session Laws 1975, amended this section in two respects. The word "unlawfully" was deleted from the list of definitions and from every other section in this part where it was made an element of an offense. The legislature found that the inclusion of this element required the prosecution to prove a negative without being able to compel the accused to testify. It was found that this was a practical impossibility and accordingly it has been eliminated as an element of every offense in this part. Senate Standing Committee Report No. 590.

The legislature also amended the definition of marijuana so as to indicate that the entire genus cannabis was to be included in the term and not merely cannabis sativa.

SUPPLEMENTAL COMMENTARY ON §712-1240

Act 112, Session Laws 1979, amended this section by adding the broadly defined term "dosage unit." The legislature found that drugs, while commonly sold in tablets, capsules, or other forms covered by existing drugs laws, are also distributed and sold in forms which are not covered. The legislature believed that these amendments would lessen the promotion of dangerous drugs within the State. Conference Committee Report No. 41.

Act 122, Session Laws 1984, added the definition of intoxicating liquor because of the inclusion of a new section prohibiting adults from promoting intoxicating liquor to a minor.

Act 356, Session Laws 1987, added "and section 712-1242" to the definition of "dosage unit," for the purpose of conformity between sections 712-1241 and 712-1242. House Standing Committee Report No. 480.

Act 319, Session Laws 1997, amended this section by defining "manufacture." The legislature found that the growing problem of manufacturing dangerous drugs in Hawaii posed a significant problem to law enforcement officials given the lack of powerful sanctions under current law. The legislature believed it was imperative to establish an aggressive policy for penalizing the manufacture, sale, and distribution of dangerous drugs. Senate Standing Committee Report No. 770, House Standing Committee Report No. 1651.

Act 193, Session Laws 2004, made medical gamma hydroxybutyric acid a schedule III depressant and made conforming amendments to the definitions of "dangerous drugs" and "harmful drug" in this section to make the nonmedical use of gamma hydroxybutyric acid an appropriately severe crime. House Standing Committee Report No. 701-04.

Act 34, Session Laws 2012, amended the definitions of "dangerous drugs" and "harmful drug" by changing the reference to "section 329-18(c)(13)" to "section 329-18(c)(14)" to correctly reference gamma hydroxybutyric acid.

Case Notes

One who acts as buyer's agent to purchase drug with buyer's funds does not commit offense of "selling" the drug. 60 H. 8, 586 P.2d 1022 (1978).

"To distribute" does not include "to buy" or "to offer to buy". 78 H. 317, 893 P.2d 168 (1995).

Although there was substantial evidence to conclude that defendant was a drug distributor in violation of §712-1242, defendant was entitled to a procuring agent defense instruction as (1) a jury instruction must be given on every defense if there is any support in the evidence "no matter how weak, inconclusive or unsatisfactory the evidence may be", (2) defendant's participation in drug transaction negotiation or touching the drugs or money involved did not foreclose a procuring agent defense, (3) determining whether defendant was an agent of buyer was for the fact finder, and (4) there was support in evidence for a procuring agent defense. 113 H. 385, 153 P.3d 456 (2007).

Charge of possession of "marijuana concentrate hashish" established by presence of THC and absence of marijuana plant; fact that commonly accepted connotation of "concentrate" is that of more powerful substance is irrelevant for purposes of section; section not unconstitutionally vague. 4 H. App. 79, 661 P.2d 1206 (1983).

" **§712-1240.1 Defense to promoting.** (1) It is a defense to prosecution for any offense defined in this part that the person who possessed or distributed the dangerous, harmful, or detrimental drug did so under authority of law as a practitioner, as an ultimate user of the drug pursuant to a lawful prescription, or as a person otherwise authorized by law.

(2) It is an affirmative defense to prosecution for any marijuana-related offense defined in this part that the person who possessed or distributed the marijuana was authorized to possess or distribute the marijuana for medical purposes pursuant to part IX of chapter 329. [L 1977, c 137, §1; am L 2000, c 228, §4]

COMMENTARY ON §712-1240.1

Act 137, Session Laws 1977, added this section to provide a defense for the lawful possession or distribution of drugs by authorized persons. In enacting the section, the legislature found that the law as then worded made any possession or distribution of drugs criminal. Senate Standing Committee Report No. 1127, House Standing Committee Report No. 683.

Act 228, Session Laws 2000, in permitting the medical use of marijuana by persons with certain medical conditions, amended this section to include an affirmative defense for the medical use of marijuana. Senate Standing Committee Report No. 2760.

Case Notes

Legislature intended section as a defense rather than element of an offense. 64 H. 568, 645 P.2d 308 (1982).

As California statute did not authorize defendant to possess or cultivate fifty or more marijuana plants in violation of §712-1249.5, trial court did not err in concluding that this section was inapplicable to the case and the documents submitted in support of defendant's motion to dismiss were not clearly exculpatory; thus, trial court did not err in denying defendant's motion to dismiss. 108 H. 169, 118 P.3d 652 (2005).

District court erred in re-determining the fact of medical use in contrast to the parties' stipulation that petitioner possessed and transported medical marijuana under a valid Medical Marijuana Registry Patient Identification Certificate, thus preempting consideration of petitioner's affirmative defense; given that the State presented no evidence showing that the marijuana was for any other use other than a medical use, petitioner proved that petitioner was authorized to possess marijuana for medical purposes pursuant to part IX of chapter 329 for purposes of an affirmative defense under subsection (2). 129 H. 397, 301 P.3d 607 (2013).

" **[§712-1240.5] Manufacturing a controlled substance with a child present.** (1) Except as provided in subsection (2), any person convicted of manufacturing a controlled substance in violation of this chapter, who commits the offense knowing that a child under the age of sixteen is present in the structure where the offense occurs, shall be sentenced to a term of two years imprisonment to run consecutively to the maximum indeterminate term of imprisonment for the conviction of any offense involving the manufacturing of a controlled substance.

(2) Any person convicted of manufacturing a controlled substance in violation of this chapter, who commits the offense knowing that a child under the age of eighteen is present in the structure where the offense occurs and causes the child to suffer serious or substantial bodily injury as defined in section 707-700, shall be sentenced to a term of five years imprisonment to run consecutively to the maximum indeterminate term of imprisonment for the conviction of any offense involving the manufacturing of a controlled substance.

(3) As used in this section, "structure" means any house, apartment building, shop, warehouse, building, vessel, cargo container, motor vehicle, tent, recreational vehicle, trailer, or other enclosed space capable of holding a child and equipment for the manufacture of a controlled substance. [L 2004, c 44, pt of §3]

COMMENTARY ON §712-1240.5

Act 44, Session Laws 2004, added this section, enhancing prison sentences for persons who manufacture drugs in the presence of a child and cause injury to a child, to protect children from the dangers of clandestine methamphetamine laboratories and homes where illegal substances may harm the children. House Standing Committee Report No. 495-04, Senate Standing Committee Report No. 3091.

" **§712-1240.6 REPEALED.** L 2006, c 230, §50.

" **§712-1240.7 Methamphetamine trafficking.** (1) A person commits the offense of methamphetamine trafficking if the person knowingly:

(a) Distributes methamphetamine in any amount to a minor; or

(b) Manufactures methamphetamine in any amount.

(2) Methamphetamine trafficking is a class A felony for which the defendant shall be sentenced as provided in subsection (3).

(3) Notwithstanding sections 706-620(2), 706-640, 706-641, 706-659, 706-669, and any other law to the contrary, a person convicted of methamphetamine trafficking shall be sentenced to an indeterminate term of imprisonment of twenty years with a mandatory minimum term of imprisonment of not less than two years and not greater than eight years and a fine not to exceed $20,000,000; provided that:

(a) If the person has one prior conviction for methamphetamine trafficking pursuant to this section, promoting a dangerous drug in the first degree pursuant to section 712-1241 and methamphetamine was the drug upon which the conviction was predicated, or section 712-1240.8 as that section was in effect prior to July 1, 2016, the mandatory minimum term of imprisonment shall be not less than six years, eight months and not greater than thirteen years, four months;

(b) If the person has two prior convictions for methamphetamine trafficking pursuant to this section, promoting a dangerous drug in the first degree pursuant to section 712-1241 and methamphetamine was the drug upon which the conviction was predicated, or section 712-1240.8, as that section was in effect prior to July 1, 2016, the mandatory minimum term of

imprisonment shall be not less than thirteen years, four months and not greater than twenty years; or

(c) If the person has three or more prior convictions for methamphetamine trafficking pursuant to this section, promoting a dangerous drug in the first degree pursuant to section 712-1241 and methamphetamine was the drug upon which the conviction was predicated, or section 712-1240.8 as that section was in effect prior to July 1, 2016, the mandatory minimum term of imprisonment shall be twenty years. [L 2006, c 230, pt of §4; am L 2016, c 231, §52]

" **§712-1240.8 REPEALED.** L 2016, c 231, §56.

Note

Applicability of L 2016, c 231, §56 repeal, see Note at §712-1241.

" **§712-1240.9 Methamphetamine trafficking; restitution and reimbursement.** When sentencing a defendant convicted of methamphetamine trafficking pursuant to section 712-1240.7 or 712-1240.8 as that section was in effect prior to July 1, 2016, the court may order restitution or reimbursement to the State or appropriate county government for the cost incurred for any cleanup associated with the manufacture or distribution of methamphetamine and to any other person injured as a result of the manufacture or distribution of methamphetamine. [L 2006, c 230, pt of §4; am L 2016, c 231, §53]

COMMENTARY ON §§712-1240.7 TO 712-1240.9

Act 230, Session Laws 2006, added §§712-1240.7 and 712-1240.8, methamphetamine trafficking in the first and second degrees. House Standing Committee Report No. 665-06.

Act 230, Session Laws 2006, also added §712-1240.9, authorizing a court to order restitution or reimbursement when sentencing a defendant convicted under §712-1240.7 or §712-1240.8.

Act 231, Session Laws 2016, amended §712-1240.7 by, among other things, removing possession and distribution of methamphetamine from the statute. Act 231 placed possession and distribution of methamphetamine in the statutes relating to promoting a dangerous drug [§§712-1241 and 712-1242], which gives the court the discretion to impose probation and drug treatment when appropriate. The offenses remaining in §712-1240.7 are distribution of methamphetamine to a minor and

manufacturing of methamphetamine, which remain class A felonies. The amendments implemented recommendations made by the Penal Code Review Committee convened pursuant to House Concurrent Resolution No. 155, S.D. 1 (2015). The Penal Code Review Committee commented, on page 59 of its report, that "[w]hile the Committee recognizes these dangers and challenges, it is of the opinion that the current Methamphetamine Trafficking statutes are not properly addressing those challenges and should be changed based on the experience of the Committee regarding the application of these provisions in the criminal justice system in Hawaii." House Standing Committee Report No. 660-16.

Act 231, Session Laws 2016, repealed §712-1240.8 and amended §712-1240.9 by making a conforming amendment. Act 231 implemented recommendations made by the Penal Code Review Committee convened pursuant to House Concurrent Resolution No. 155, S.D. 1 (2015).

" **§712-1241 Promoting a dangerous drug in the first degree.** (1) A person commits the offense of promoting a dangerous drug in the first degree if the person knowingly:

(a) Possesses one or more preparations, compounds, mixtures, or substances of an aggregate weight of:
  (i) One ounce or more, containing methamphetamine, heroin, morphine, or cocaine or any of their respective salts, isomers, and salts of isomers; or
  (ii) One and one-half ounce or more, containing one or more of any of the other dangerous drugs;

(b) Distributes:
  (i) Twenty-five or more capsules, tablets, ampules, dosage units, or syrettes containing one or more dangerous drugs; or
  (ii) One or more preparations, compounds, mixtures, or substances of an aggregate weight of:
    (A) One-eighth ounce or more, containing methamphetamine, heroin, morphine, or cocaine or any of their respective salts, isomers, and salts of isomers; or
    (B) Three-eighths ounce or more, containing any other dangerous drug;

(c) Distributes any dangerous drug in any amount to a minor except for methamphetamine; or

(d) Manufactures a dangerous drug in any amount, except for methamphetamine; provided that this subsection shall not apply to any person registered under section 329-32.

(2) Promoting a dangerous drug in the first degree is a class A felony. [L 1972, c 9, pt of §1; am L 1975, c 163, §6(c); am L 1979, c 112, §1; am L 1981, c 31, §1; am L 1982, c 9, §1; am L 1988, c 146, §1; am L 1989, c 163, §1; gen ch 1992; am L 1996, c 308, §2; am L 1997, c 319, §2; am L 2002, c 161, §6; am L 2004, c 44, §5; am L 2006, c 230, §49; am L 2016, c 231, §54]

Note

L 2016, c 231, §70 provides:

"SECTION 70. This Act does not affect rights and duties that matured, penalties that were incurred, and proceedings that were begun before its effective date [July 1, 2016]; provided that sections 54 [amending §712-1421(1)], 55 [amending §712-1242(1)], and 56 [repealing §712-1240.8] shall apply to offenses committed before the effective date of this Act [July 1, 2016]:

(1) But not yet charged as of its effective date [July 1, 2016];

(2) Originally charged as a violation of section 712-1240.7 or 712-1240.8, Hawaii Revised Statutes, where the defendant:

(a) Has not yet been placed in jeopardy or convicted on a plea or verdict; and

(b) Waives any claim of denial of speedy trial rights for the period elapsing between the date of filing of the original charge and the date of filing of the new charge under this Act;

(3) Originally charged as a violation of section 712-1240.7 or 712-1240.8, Hawaii Revised Statutes, for which the defendant has been convicted on a plea or verdict, but not yet sentenced, in which case the defendant shall be sentenced pursuant to this Act; and

(4) Originally charged as a violation of section 712-1240.7 or 712-1240.8, Hawaii Revised Statutes, for which the defendant has been convicted on a plea or verdict and sentenced but for which no final judgment on appeal has been entered, in which case the appellate court shall either:

(a) Remand the case for sentencing pursuant to this Act if the judgment is affirmed on appeal or if the sentence is vacated; or

(b) Remand the case for further proceedings pursuant to this Act if the judgment is reversed and remanded for further proceedings."

Revision Note

In subsection (1)(a)(ii), "or" deleted pursuant to §23G-15.

Cross References

Sale of sterile syringes for prevention of diseases, see §325-21.

Case Notes

Proscription of distribution of lysergic acid diethylamine cannot be extended by analogy to distribution of lysergic acid diethylamide. 61 H. 74, 595 P.2d 288 (1979).

Crime of promoting dangerous drug by distributing same is complete upon offer to sell the contraband; actual delivery or chemical analysis not required. 63 H. 77, 621 P.2d 364 (1980).

Nothing in subsection (1)(b)(ii)(A) required that defendant "[possess] at any one time" one-eighth ounce or more of a cocaine-containing substance or that the substance be delivered all at once in a "single container"; undercover police officer's testimony constituted substantial evidence supporting jury's verdict finding defendant guilty. 77 H. 72, 881 P.2d 1218 (1994).

Conviction vacated where proof that defendant possessed an aggregate weight of one ounce or more of cocaine not supported by substantial and admissible evidence. 80 H. 382, 910 P.2d 695 (1996).

Notwithstanding the use of the terms "mixture" and "weight" in subsection (1)(b)(ii)(B), dangerous drugs distributed in liquid form must be measured in fluid ounces. 90 H. 255, 978 P.2d 693 (1999).

Disregarding the erroneously admitted testimony of the police criminalist as to the weight of the substances, the record was devoid of any evidence of the requisite weight of the methamphetamine, a material element of the offenses charged; because those material elements of the offenses were not supported by substantial and admissible evidence, prosecution failed to adduce sufficient evidence to prove every element of the offenses beyond a reasonable doubt. 115 H. 343, 167 P.3d 336 (2007).

Defendants did not prove entrapment under §702-237(1)(b) by preponderance of evidence as required by §701-115(2)(b); officer's conduct merely provided defendants with opportunity to commit offense of promoting a dangerous drug in the first degree. 82 H. 499 (App.), 923 P.2d 916 (1996).

There was insufficient evidence that defendant took a substantial step toward the distribution of at least one-eighth

ounce of methamphetamine in defendant's possession where there was no evidence that defendant had engaged in negotiations, offered, or agreed to distribute any of the methamphetamine found in defendant's possession. 107 H. 144 (App.), 111 P.3d 39 (2005).

The legislature did not intend to authorize the imposition of multiple punishments for both possession and attempted distribution under this section, where the convictions are based on a defendant's possession of the same drugs at the same moment in time. 115 H. 364 (App.), 167 P.3d 739 (2007).

Cited: 700 F. Supp. 2d 1252 (2010).

Mentioned: 74 H. 161, 840 P.2d 358 (1992).

" **§712-1242 Promoting a dangerous drug in the second degree.** (1) A person commits the offense of promoting a dangerous drug in the second degree if the person knowingly:

(a) Possesses twenty-five or more capsules, tablets, ampules, dosage units, or syrettes, containing one or more dangerous drugs;

(b) Possesses one or more preparations, compounds, mixtures, or substances of an aggregate weight of:

(i) One-eighth ounce or more, containing methamphetamine, heroin, morphine, or cocaine or any of their respective salts, isomers, and salts of isomers; or

(ii) One-fourth ounce or more, containing any dangerous drug; or

(c) Distributes any dangerous drug in any amount.

(2) Promoting a dangerous drug in the second degree is a class B felony. [L 1972, c 9, pt of §1; am L 1975, c 163, §6(d); am L 1982, c 9, §2; am L 1987, c 176, §7 and c 356, §2; am L 1988, c 291, §1; am L 1989, c 163, §2; gen ch 1992; am L 1996, c 308, §3; am L 2002, c 161, §7; am L 2004, c 44, §6; am L 2007, c 27, §1; am L 2016, c 231, §55]

Note

Applicability of L 2016, c 231, §55 amendment, see Note at §712-1241.

Revision Note

In subsection (1)(a), "or" deleted pursuant to §23G-15.

Case Notes

Procuring agency defense is not applicable to charge under subsection (1)(c). 58 H. 234, 566 P.2d 1370 (1977).

Instruction was erroneous which required the jury to find that defendant knew the substance was heroin upon the State's showing by chemical analysis that it was heroin. 61 H. 308, 603 P.2d 141 (1979).

Because undisputed evidence at trial was that defendant did nothing more than offer to buy cocaine from police sergeant, defendant did not, as a matter of law, violate subsection (1)(c). 78 H. 317, 893 P.2d 168 (1995).

In the absence of a bill of particulars, where the evidence adduced at trial proves only a sale and a reasonable juror could find that the defendant did not act on the seller's behalf, the defendant is entitled to a jury instruction on the procuring agent defense. 93 H. 279, 1 P.3d 281 (2000).

Although there was substantial evidence to conclude that defendant was drug distributor in violation of this section, defendant was entitled to a procuring agent defense instruction as (1) a jury instruction must be given on every defense if there is any support in the evidence "no matter how weak, inconclusive or unsatisfactory the evidence may be", (2) defendant's participation in drug transaction negotiation or touching the drugs or money involved did not foreclose a procuring agent defense, (3) determining whether defendant was an agent of buyer was for the fact finder, and (4) there was support in evidence for a procuring agent defense. 113 H. 385, 153 P.3d 456 (2007).

Disregarding the erroneously admitted testimony of the police criminalist as to the weight of the substances, the record was devoid of any evidence of the requisite weight of the methamphetamine, a material element of the offenses charged; because those material elements of the offenses were not supported by substantial and admissible evidence, prosecution failed to adduce sufficient evidence to prove every element of the offenses beyond a reasonable doubt. 115 H. 343, 167 P.3d 336 (2007).

Where promoting a dangerous drug in the second degree was a lesser included offense of the charged offense of promoting a dangerous drug in the first degree, and evidence established that defendant knowingly distributed methamphetamine, case remanded to convict defendant of promoting a dangerous drug in the second degree. 115 H. 343, 167 P.3d 336 (2007).

Method used to prove that capsules of methaqualone hydrochloride contained methaqualone accepted as evidence. 1 H. App. 31, 613 P.2d 919 (1980).

Instruction charging the jury that proof that the defendant distributed the substance proven to be cocaine was sufficient to

show defendant had knowledge of the nature of the substance was erroneous. 1 H. App. 544, 622 P.2d 619 (1981).

Chain of custody requirements. 1 H. App. 546, 622 P.2d 620 (1981).

Evidence was sufficient to prove distribution; it was not necessary to introduce cocaine itself into evidence. 10 H. App. 1, 860 P.2d 610 (1993).

Cited: 700 F. Supp. 2d 1252 (2010).

" **§712-1243 Promoting a dangerous drug in the third degree.** (1) A person commits the offense of promoting a dangerous drug in the third degree if the person knowingly possesses any dangerous drug in any amount.

(2) Promoting a dangerous drug in the third degree is a class C felony. [L 1972, c 9, pt of §1; am L 1975, c 163, §6(e); gen ch 1993; am L 1996, c 308, §4; am L 2002, c 161, §8; am L 2004, c 44, §7]

Case Notes

Possession of "any" amount is sufficient; usable quantity standard not applicable, but de minimis doctrine may apply. 61 H. 291, 602 P.2d 933 (1979).

Though evidence insufficient to convict defendant of promoting a dangerous drug in the first degree, purged trial record contained substantial and admissible evidence that defendant knowingly possessed cocaine "in any amount". 80 H. 382, 910 P.2d 695 (1996).

Where defendant's possession of .001 grams of methamphetamine did not threaten the harm sought to be prevented by this section, trial court did not abuse discretion by determining that amount of methamphetamine was de minimis under §702-236. 92 H. 130, 988 P.2d 195 (1999).

Where prosecution adduced substantial evidence that the cocaine residue in the pipe was visible to the naked eye and could be scraped out and smoked again, trial court did not abuse its discretion in ruling that defendant's infraction of this section was not de minimis within the meaning of §702-236. 93 H. 279, 1 P.3d 281 (2000).

Where the defense failed to adduce any evidence or present any argument with respect to the attendant circumstances, it failed to meet its burden of providing evidence to support a finding that the conduct alleged "did not actually cause or threaten the harm or evil sought to be prevented by this section or did so only to an extent too trivial to warrant the condemnation of conviction"; thus trial court did not err in finding that

defendant's alleged conduct did not constitute a de minimis infraction. 99 H. 75, 53 P.3d 214 (2002).

In light of defendant's burden to prove that defendant's conduct constituted a de minimis infraction and trial court's finding that pipe residue contained a sufficient amount of methamphetamine to produce a pharmacological effect, which was supported by officer's testimony that amount recovered from defendant's pipe may have been an amount sufficient to be "used" by someone, trial court did not abuse discretion in refusing to dismiss charge of promoting a dangerous drug in the third degree. 100 H. 498, 60 P.3d 899 (2002).

Trial court properly sentenced defendant as a repeat offender based on defendant's conviction of promoting a dangerous drug in the third degree, an enumerated class C felony under §706-606.5. 106 H. 146, 102 P.3d 1044 (2004).

As §706-622.5 is ameliorative in its intent and effect and its application would neither be detrimental nor materially disadvantageous to the defendant, retrospective application of §706-622.5 as established by Act 161, L 2002, was not prohibited; where defendant did not qualify as a first-time drug offender, the trial court did not err in sentencing defendant pursuant to subsection (3) (2002). 107 H. 215, 112 P.3d 69 (2005).

Notwithstanding that trial court had authority to sentence defendant pursuant to subsection (3) (2002), it did not have the discretion to consider the alleged conduct of which defendant was acquitted in sentencing defendant; trial court thus erred in factoring its belief that defendant was dealing drugs into its imposition of the two maximum statutorily prescribed mandatory minimum terms of imprisonment. 107 H. 215, 112 P.3d 69 (2005).

Where promoting a dangerous drug in the third degree was a lesser included offense of the charged offense of promoting a dangerous drug in the second degree, and evidence established that defendant knowingly possessed methamphetamine, case remanded to convict defendant of promoting a dangerous drug in the third degree. 115 H. 343, 167 P.3d 336 (2007).

Legislature intended to impose penal sanctions for constructive and actual possession of contraband items. 8 H. App. 610, 822 P.2d 23 (1991).

In subsection (3), the word "convicted" means "found guilty" and not "found guilty and sentenced". 93 H. 389 (App.), 4 P.3d 523 (2000).

Looking at defendant's conduct and attendant circumstances regarding commission of the offense, including possession of smoking device, smoked residue, and depleted drug contraband of 0.004 grams of methamphetamine by one engaged in shoplifting, court could not conclude that under §702-236, defendant's

conduct "did not actually cause or threaten the harm or evil sought to be prevented by this section, or did so only to an extent too trivial to warrant condemnation of conviction". 97 H. 247 (App.), 35 P.3d 764 (2001).

" **§712-1244 Promoting a harmful drug in the first degree.** (1) A person commits the offense of promoting a harmful drug in the first degree if the person knowingly:

(a) Possesses one hundred or more capsules or tablets or dosage units containing one or more of the harmful drugs or one or more of the marijuana concentrates, or any combination thereof;

(b) Possesses one or more preparations, compounds, mixtures, or substances, of an aggregate weight of one ounce or more containing one or more of the harmful drugs or one or more of the marijuana concentrates, or any combination thereof;

(c) Distributes twenty-five or more capsules or tablets or dosage units containing one or more of the harmful drugs or one or more of the marijuana concentrates, or any combination thereof;

(d) Distributes one or more preparations, compounds, mixtures, or substances, of an aggregate weight of one- eighth ounce or more, containing one or more of the harmful drugs or one or more of the marijuana concentrates, or any combination thereof; or

(e) Distributes any harmful drug or any marijuana concentrate in any amount to a minor.

(2) Promoting a harmful drug in the first degree is a class A felony. [L 1972, c 9, pt of §1; am L 1975, c 119, §1 and c 163, §6(f); am L 1979, c 105, §66; am L 1981, c 31, §2; am L 1989, c 163, §3; gen ch 1992]

Revision Note

In subsection (1)(a), (b), and (c), "or" deleted pursuant to §23G-15.

Case Notes

Subsection (1)(d) not void for vagueness with respect to hashish; statutory classification of hashish as a harmful drug did not violate equal protection. 65 H. 174, 649 P.2d 381 (1982).

Chain of custody requirements. 1 H. App. 546, 622 P.2d 620 (1981).

" **§712-1245 Promoting a harmful drug in the second degree.** (1) A person commits the offense of promoting a harmful drug in the second degree if the person knowingly:

(a) Possesses fifty or more capsules or tablets or dosage units containing one or more of the harmful drugs or one or more of the marijuana concentrates, or any combination thereof;

(b) Possesses one or more preparations, compounds, mixtures, or substances, of an aggregate weight of one- eighth ounce or more, containing one or more of the harmful drugs or one or more of the marijuana concentrates, or any combination thereof; or

(c) Distributes any harmful drug or any marijuana concentrate in any amount.

(2) Promoting a harmful drug in the second degree is a class B felony. [L 1972, c 9, pt of §1; am L 1975, c 119, §2 and c 163, §6(g); am L 1989, c 163, §4; gen ch 1992]

Revision Note

In subsection (1)(a), "or" deleted pursuant to §23G-15.

" **§712-1246 Promoting a harmful drug in the third degree.** (1) A person commits the offense of promoting a harmful drug in the third degree if the person knowingly possesses twenty-five or more capsules or tablets or dosage units containing one or more of the harmful drugs or one or more of the marijuana concentrates, or any combination thereof.

(2) Promoting a harmful drug in the third degree is a class C felony. [L 1972, c 9, pt of §1; am L 1975, c 163, §6(h); am L 1989, c 163, §5; gen ch 1992]

" **[§712-1246.5] Promoting a harmful drug in the fourth degree.** (1) A person commits the offense of promoting a harmful drug in the fourth degree if the person knowingly possesses any harmful drug in any amount.

(2) Promoting a harmful drug in the fourth degree is a misdemeanor. [L 1989, c 163, §6]

" **§712-1247 Promoting a detrimental drug in the first degree.** (1) A person commits the offense of promoting a detrimental drug in the first degree if the person knowingly:

(a) Possesses four hundred or more capsules or tablets containing one or more of the Schedule V substances;

(b) Possesses one or more preparations, compounds, mixtures, or substances of an aggregate weight of one

ounce or more, containing one or more of the Schedule V substances;

(c) Distributes fifty or more capsules or tablets containing one or more of the Schedule V substances;

(d) Distributes one or more preparations, compounds, mixtures, or substances of an aggregate weight of one-eighth ounce or more, containing one or more of the Schedule V substances;

(e) Possesses one or more preparations, compounds, mixtures, or substances of an aggregate weight of one pound or more, containing any marijuana;

(f) Distributes one or more preparations, compounds, mixtures, or substances of an aggregate weight of one ounce or more, containing any marijuana;

(g) Possesses, cultivates, or has under the person's control twenty-five or more marijuana plants; or

(h) Sells or barters any marijuana or any Schedule V substance in any amount.

(2) Promoting a detrimental drug in the first degree is a class C felony.

(3) Any marijuana seized as evidence of a violation of this section in excess of one pound may be destroyed after it has been photographed and the weight thereof recorded. The remainder of the marijuana shall remain in the custody of the police department until the termination of any criminal action brought as a result of the seizure of the marijuana. Photographs duly identified as accurately representing the marijuana shall be deemed competent evidence of the marijuana involved and shall be admissible in any proceeding, hearing, or trial to the same extent as the marijuana itself; provided that nothing in this subsection shall be construed to limit or to restrict the application of rule 901 of the Hawaii rules of evidence. [L 1972, c 9, pt of §1; am L 1975, c 163, §6(i); am L 1981, c 31, §3 and c 123, §1; am L 1986, c 314, §75; am L 1989, c 384, §2]

Revision Note

In subsection (1)(a) to (f), "or" deleted pursuant to §23G-15.

Case Notes

Criminalization of marijuana is constitutional. 56 H. 501, 542 P.2d 366 (1975).

Where a bill of particulars, under a charge of distributing marijuana, states that defendant "offered or agreed to sell" marijuana, State is limited to proving the particulars specified

in the bill, notwithstanding the definition of "distribute" contained in §712-1240(1). 60 H. 8, 586 P.2d 1022 (1978).

Where violation of misdemeanor offense under §712-1247(1)(d) also constituted violation of felony offense under subsection (1)(h), conviction of felony offense would have constituted violation of defendant's due process and equal protection rights. 86 H. 48, 947 P.2d 360 (1997).

Procuring agent for the buyer defense was available against a charge of bartering a drug and was available to a defendant who was buyer's accomplice. 78 H. 488 (App.), 896 P.2d 944 (1995).

Since to sell and to barter do not include to prescribe, §712-1248(1)(d) is not a lesser included offense of §712-1247(1)(h). 78 H. 488 (App.), 896 P.2d 944 (1995).

Where a Hawaii county ordinance made the enforcement of marijuana laws the lowest enforcement priority in the county, the ordinance was preempted by state laws governing the investigation and prosecution of alleged violations of the Hawaii Penal Code concerning the adult personal use of cannabis. 132 H. 511 (App.), 323 P.3d 155 (2014).

" **§712-1248 Promoting a detrimental drug in the second degree.** (1) A person commits the offense of promoting a detrimental drug in the second degree if the person knowingly:

(a) Possesses fifty or more capsules or tablets containing one or more of the Schedule V substances;

(b) Possesses one or more preparations, compounds, mixtures, or substances, of an aggregate weight of one- eighth ounce or more, containing one or more of the Schedule V substances;

(c) Possesses one or more preparations, compounds, mixtures, or substances, of an aggregate weight of one ounce or more, containing any marijuana; or

(d) Distributes any marijuana or any Schedule V substance in any amount.

(2) Promoting a detrimental drug in the second degree is a misdemeanor. [L 1972, c 9, pt of §1; am L 1975, c 163, §6(j); am L 1989, c 384, §3]

Revision Note

In subsection (1)(a) and (b), "or" deleted pursuant to §23G-15.

Case Notes

Where violation of misdemeanor offense under subsection (1)(d) also constituted violation of felony offense under §712-

1247(1)(h), conviction of felony offense would have constituted violation of defendant's due process and equal protection rights. 86 H. 48, 947 P.2d 360 (1997).

Since to sell and to barter do not include to prescribe, §712-1248(1)(d) is not a lesser included offense of §712-1247(1)(h). 78 H. 488 (App.), 896 P.2d 944 (1995).

Where a Hawaii county ordinance made the enforcement of marijuana laws the lowest enforcement priority in the county, the ordinance was preempted by state laws governing the investigation and prosecution of alleged violations of the Hawaii Penal Code concerning the adult personal use of cannabis. 132 H. 511 (App.), 323 P.3d 155 (2014).

" **§712-1249 Promoting a detrimental drug in the third degree.** (1) A person commits the offense of promoting a detrimental drug in the third degree if the person knowingly possesses any marijuana or any Schedule V substance in any amount.

(2) Promoting a detrimental drug in the third degree is a petty misdemeanor. [L 1972, c 9, pt of §1; am L 1975, c 163, §6(k); gen ch 1993]

SUPPLEMENTAL COMMENTARY ON §§712-1241 TO 712-1250

Act 231, Session Laws 2016, amended §§712-1241(1) and 712-1242(1) by placing possession and distribution of methamphetamine in the sections, giving the court the discretion to impose probation and drug treatment when appropriate. Act 231 removed possession and distribution of methamphetamine from the methamphetamine trafficking statutes [by amending §§712-1240.7 and 712-1240.9 and repealing §712-1240.8]. The amendments implemented recommendations made by the Penal Code Review Committee convened pursuant to House Concurrent Resolution No. 155, S.D. 1 (2015). The Penal Code Review Committee commented, on page 59 of its report, that "[w]hile the Committee recognizes these dangers and challenges, it is of the opinion that the current Methamphetamine Trafficking statutes are not properly addressing those challenges and should be changed based on the experience of the Committee regarding the application of these provisions in the criminal justice system in Hawaii." House Standing Committee Report No. 660-16.

Law Journals and Reviews

The Protection of Individual Rights Under Hawai‘i's Constitution. 14 UH L. Rev. 311 (1992).

Privacy Outside of the Penumbra: A Discussion of Hawai‘i's Right to Privacy After State v. Mallan. 21 UH L. Rev. 273 (1999).

Case Notes

Not unconstitutional. 56 H. 271, 535 P.2d 1394 (1975); 61 H. 71, 595 P.2d 287 (1979).

Defense of medical necessity. 61 H. 71, 595 P.2d 287 (1979).

Identification of seeds as marijuana seeds required expert testimony. 61 H. 505, 606 P.2d 913 (1980).

Purported right to possess and use marijuana not a fundamental right; where defendant failed to prove section lacked any rational basis, section constitutional. 86 H. 440, 950 P.2d 178 (1998).

Under the circumstances of the case, the free exercise clause of the First Amendment was not a viable defense to prosecution under this section; this section is a neutral law of general applicability to the extent it purports to prohibit, without exception, the possession of marijuana and any other substance defined as a "Schedule V substance" by chapter 329, it does not interfere with other constitutional rights, and it does not create a mechanism for governmental assessment of individual applicants for exemptions. 115 H. 396, 168 P.3d 526. (2007)

Section did not burden defendant's free exercise of religion. 5 H. App. 411, 695 P.2d 336 (1985).

Where insufficient evidence in record that defendant had the necessary intent to exercise control and dominion over the marijuana, no violation of section by "constructive possession". 92 H. 472 (App.), 992 P.2d 741 (1999).

Where a Hawaii county ordinance made the enforcement of marijuana laws the lowest enforcement priority in the county, the ordinance was preempted by state laws governing the investigation and prosecution of alleged violations of the Hawaii Penal Code concerning the adult personal use of cannabis. 132 H. 511 (App.), 323 P.3d 155 (2014).

" **[§712-1249.4] Commercial promotion of marijuana in the first degree.** (1) A person commits the offense of commercial promotion of marijuana in the first degree if the person knowingly:

(a) Possesses marijuana having an aggregate weight of twenty-five pounds or more;

(b) Distributes marijuana having an aggregate weight of five pounds or more;

(c) Possesses, cultivates, or has under the person's control one hundred or more marijuana plants;

(d) Cultivates on land owned by another person, including land owned by the government or other legal entity, twenty-five or more marijuana plants, unless the person has the express permission from the owner of the land to cultivate the marijuana or the person has a legal or an equitable ownership interest in the land or the person has a legal right to occupy the land; or

(e) Uses, or causes to be used, any firearm or other weapon, device, instrument, material, or substance, whether animate or inanimate, which in the manner used is capable of causing death, serious bodily injury, substantial bodily injury, or other bodily injury, as defined in chapter 707 in order to prevent the theft, removal, search and seizure, or destruction of marijuana.

(2) Commercial promotion of marijuana in the first degree is a class A felony.

(3) Any marijuana seized as evidence in violation of this section in excess of an aggregate weight of twenty-five pounds as stated in subsection (1)(a), or in excess of an aggregate weight of five pounds as stated in subsection (1)(b), or in excess of one hundred marijuana plants as stated in subsection (1)(c), or in excess of twenty-five marijuana plants as stated in subsection (1)(d) may be destroyed after the excess amount has been photographed and the number of plants and the weight thereof has been recorded. The required minimum amount of the marijuana needed to constitute the elements of this offense shall remain in the custody of the police until the termination of any criminal action brought as a result of the seizure of the marijuana. Photographs duly identified as accurately representing the marijuana shall be deemed competent evidence of the marijuana involved and shall be admissible in any proceeding, hearing, or trial to the same extent as the marijuana itself; provided that nothing in this subsection shall be construed to limit or restrict the application of rule 901 of the Hawaii rules of evidence. [L 1989, c 384, §1]

Revision Note

In subsection (1)(a), (b), (c), "or" deleted pursuant to §23G-15.

" **§712-1249.5 Commercial promotion of marijuana in the second degree.** (1) A person commits the offense of commercial promotion of marijuana in the second degree if the person knowingly:

(a) Possesses marijuana having an aggregate weight of two pounds or more;
(b) Distributes marijuana having an aggregate weight of one pound or more;
(c) Possesses, cultivates, or has under the person's control fifty or more marijuana plants;
(d) Cultivates on land owned by another person, including land owned by the government or other legal entity, any marijuana plant, unless the person has the express permission from the owner of the land to cultivate the marijuana or the person has a legal or an equitable ownership interest in the land or the person has a legal right to occupy the land; or
(e) Sells or barters any marijuana or any Schedule V substance in any amount to a minor.

(2) Commercial promotion of marijuana in the second degree is a class B felony.

(3) Any marijuana seized as evidence in violation of this section in excess of an aggregate weight of two pounds as stated in subsection (1)(a), or in excess of an aggregate weight of one pound as stated in subsection (1)(b), or in excess of twenty-five marijuana plants as stated in subsection (1)(c) may be destroyed after the excess amount has been photographed and the number of plants and the weight thereof has been recorded. The required minimum amount of the marijuana needed to constitute the elements of this offense shall remain in the custody of the police until the termination of any criminal action brought as a result of the seizure of the marijuana. Photographs duly identified as accurately representing the marijuana shall be deemed competent evidence of the marijuana involved and shall be admissible in any proceeding, hearing, or trial to the same extent as the marijuana itself; provided that nothing in this subsection shall be construed to limit or to restrict the application of rule 901 of the Hawaii rules of evidence. [L 1986, c 314, §76; am L 1987, c 176, §8; am L 1989, c 384, §4]

Revision Note

In subsection (1)(a), (b), and (c), "or" deleted pursuant to §23G-15.

Case Notes

As California statute did not authorize defendant to possess or cultivate fifty or more marijuana plants in violation of this section, trial court did not err in concluding that §712-1240.1 was inapplicable to the case and the documents submitted in

support of defendant's motion to dismiss were not clearly exculpatory; thus, trial court did not err in denying defendant's motion to dismiss. 108 H. 169, 118 P.3d 652 (2005).

Trial court did not err in concluding that defendant failed to prove that this section unconstitutionally burdened the free exercise of defendant's religion where defendant failed to establish that the trial court clearly erred in finding that defendant did not demonstrate that defendant's religion required possession or cultivation of fifty or more marijuana plants. 108 H. 169, 118 P.3d 652 (2005).

" §712-1249.6 **Promoting a controlled substance in, on, or near schools, school vehicles, public parks, or public housing projects or complexes.** (1) A person commits the offense of promoting a controlled substance in, on, or near schools, school vehicles, public parks, or public housing projects or complexes if the person knowingly:

(a) Distributes or possesses with intent to distribute a controlled substance in any amount in or on the real property comprising a school, public park, or public housing project or complex;

(b) Distributes or possesses with intent to distribute a controlled substance in any amount within seven hundred and fifty feet of the real property comprising a school, public park, or public housing project or complex;

(c) Distributes or possesses with intent to distribute a controlled substance in any amount while on any school vehicle, or within ten feet of a parked school vehicle during the time that the vehicle is in service for or waiting to transport school children; or

(d) Manufactures methamphetamine or any of its salts, isomers, and salts of isomers, within seven hundred and fifty feet of the real property comprising a school, public park, or public housing project or complex.

(2) A person who violates subsection (1)(a), (b), or (c) is guilty of a class C felony. A person who violates subsection (1)(d) is guilty of a class A felony.

(3) Any person with prior conviction or convictions under subsection (1)(a), (b), or (c) is punishable by a term of imprisonment of not less than two years and not more than ten years.

(4) Any individual convicted under subsection (3) of this section shall not be eligible for parole until the individual has served the minimum sentence required by such subsection.

(5) For the purposes of this section, "school vehicle" means every school vehicle as defined in section 286-181 and any regulations adopted pursuant to that section.

(6) For purposes of this section, "school" means any public or private preschool, kindergarten, elementary, intermediate, middle secondary, or high school.

(7) For purposes of this section, "public housing project or complex" means a housing project directly controlled, owned, developed, or managed by the Hawaii public housing authority pursuant to the federal or state low-rent public housing program. [L 1988, c 284, §1; am L 1991, c 11, §1; am L 2003, c 70, §1; am L 2004, c 44, §8; am L 2012, c 23, §1]

" **[§712-1249.7] Promoting a controlled substance through a minor.** (1) A person age eighteen or over commits the offense of promoting a controlled substance through a minor if the person knowingly employs, hires, uses, persuades, induces, entices, or coerces a minor to facilitate the illegal distribution of a controlled substance.

(2) The offense of promoting a controlled substance through a minor is a class B felony unless the offense occurs in, on, or near the real property comprising a school, school vehicles, or public parks as prohibited under section 712-1249.6, in which case it is a class A felony. [L 2004, c 44, pt of §3]

" **§712-1250 Promoting intoxicating compounds.** (1) A person commits the offense of promoting intoxicating compounds if the person knowingly:

(a) Breathes, inhales, or drinks any compound, liquid, or chemical containing toluol, hexane, trichloroethylene, acetone, toluene, ethyl acetate, methyl ethyl ketone, trichloroethane, isopropanol, methyl isobutyl ketone, methyl cellosolve acetate, cyclohexanone, or any other substance for the purpose of inducing a condition of intoxication, stupefaction, depression, giddiness, paralysis or irrational behavior, or in any manner changing, distorting or disturbing the auditory, visual or mental processes.

(b) Sells or offers for sale, delivers or gives to any person under eighteen years of age, unless upon written order of such person's parent or guardian, any compound liquid or chemical containing toluol, hexane, trichloroethylene, acetone, toluene, ethyl acetate, methyl ethyl ketone, trichloroethane, isopropanol, methyl isobutyl ketone, methyl cellosolve acetate, cyclohexanone, or any other substance which will

induce an intoxicated condition, as defined herein, when the seller, offeror or deliveror knows or has reason to know that such compound is intended for use to induce such condition.

(2) Promoting intoxicating compounds is a misdemeanor.

(3) This section shall not apply to any person who commits any act described herein pursuant to the direction or prescription of a practitioner, as defined in the "Hawaii Food, Drug and Cosmetic Act" (section 328-16). [L 1972, c 9, pt of §1; am L 1975, c 163, §6(1); gen ch 1993]

Case Notes

"Any other substance" in subsection (1)(a) construed; rule of ejusdem generis applied. 56 H. 481, 541 P.2d 1020 (1975).

Subsection (1)(a) is not unconstitutional; consumption of compounds to become intoxicated is not a fundamental freedom. 56 H. 481, 541 P.2d 1020 (1975).

COMMENTARY ON §§712-1241 TO 712-1250

These sections set forth four different offenses relating to drugs and intoxicating compounds. The offenses are: 1) promoting a dangerous drug; 2) promoting a harmful drug; 3) promoting a detrimental drug; and 4) promoting intoxicating compounds. All of the drug offenses are divided into three degrees. The intoxicating compound offense is in one degree, a misdemeanor.

Dangerous Drugs. These drugs are defined in §712-1240 as any substance or immediate precursor defined as a Schedule I or II substance by chapter 329, Hawaii Revised Statutes, except marijuana or marijuana concentrate. Chapter 329 is the Uniform Controlled Substances Act, which was enacted by the 1972 legislature. Schedule I substances have the "highest degree of danger or probable danger"[1] and includes such drugs as morphine[2] and heroin,[3] among others. Schedule II substances have a "high degree of danger or probable danger",[4] and includes, among others, such drugs as opium[5] and cocaine.[6]

These drugs are the most fearsome in their potential for destruction of physical and mental well being. The drugs of this category are characterized by a high tolerance level which requires the user to use greater and greater amounts each time to achieve the same "high".[7] More importantly, all the drugs, with the exception of cocaine to some extent, are highly addictive;[8] that is, if use of the drug is discontinued, severe withdrawal symptoms occur which can be relieved only by more of the drug.[9] The combination of a high tolerance level

and addictive liability creates a physical dependence in the user which may lead, and in many cases has led, the user to commit crimes to obtain money needed to buy more narcotics.

Under §712-1243, a person commits the offense of promoting a dangerous drug in the third degree if the person "knowingly" possesses any dangerous drug in any amount. The offense is a class C felony.

The offense is in the second degree, a class B felony, if the defendant possesses a specified quantity of a dangerous drug. Thus, it would be a second degree offense if the defendant possesses 1/8 ounce of heroin, morphine, or cocaine, or 50 or more capsules, tablets, ampules, syrettes containing one or more dangerous drugs or 1/2 ounce of any other dangerous drug. It would also be promoting a dangerous drug in the second degree if the defendant "distributes" any dangerous drug in any amount. The word "distribute", as defined in §712-1240, means to "sell, transfer, give, or deliver to another or to leave, barter, exchange with another, or to offer or agree to do the same".

Section 712-1241 deals with promoting a dangerous drug in the first degree, which is a class A felony. A person commits this offense if the person "knowingly" possesses one ounce or more of morphine, heroin, or cocaine, or two ounces or more of any other dangerous drug. It would also cover a person who "knowingly" distributes 50 capsules, etc., of a dangerous drug, or 1/8 ounce of heroin, morphine, or cocaine, or 1/2 ounce of any other dangerous drug. Finally, the offense is committed if any dangerous drug is distributed to any minor who is at least three years younger than the distributor.

Harmful Drugs. These drugs, according to §712-1240, mean any substance or immediate precursor listed as a Schedule III or IV substance by chapter 329, and include marijuana concentrates, but not marijuana. Schedule III substances, which have a degree of danger or probable danger less than substances in Schedules I and II, include drugs which have a stimulant or depressant effect on the central nervous system.[10] Schedule IV substances generally have a depressant effect on the central nervous system.[11]

"Marijuana concentrates" are defined to include hashish and tetrahydrocannabinol. Formerly, hashish was defined under "narcotics",[12] which it is not. Tetrahydrocannabinol is the recently synthesized active principal of marijuana. It is believed that hashish and tetrahydrocannabinol, and its alkaloids, salts, derivatives, preparations, compounds, and mixtures, will be subject to more abuse in the future due to the rise in popularity of marijuana,[13] of which hashish is a concentrated resin extract. It is vital that persons tempted to deal in or use these substances be warned that their effects are

more dangerous than those of marijuana,[14] and that thus its possession and distribution are subject to severer sanctions.

Under §712-1246, a person commits the offense of promoting a "harmful" drug in the third degree if the person knowingly possesses any harmful drug in any amount. The offense is a misdemeanor. However, if the person distributes a harmful drug or marijuana concentrate, then under §712-1245, it is an offense in the second degree, which is a class B felony. It is also in the second degree if the person possesses 50 or more capsules, etc., of a harmful drug or marijuana concentrate, or 1/8 ounce of a harmful drug or marijuana concentrate.

Section 712-1244 makes the offense in the first degree, a class A felony, if the possession totalled 400 or more capsules or tablets of harmful drugs or marijuana concentrates, or one ounce of such harmful drug or marijuana concentrate. It is also in the first degree if the defendant distributes 50 or more capsules or tablets of the same, or 1/8 ounce or more of the same. Finally, it is promoting harmful drug in the first degree if defendant knowingly distributes a harmful drug or marijuana concentrate to a minor who is three years the defendant's junior.

Detrimental Drugs. These drugs are defined in §712-1240 as marijuana or any Schedule V substance listed in chapter 329. Schedule V substances, which are less dangerous than Schedule IV substances, include limited quantities of certain types of narcotic drugs combined with nonnarcotic ingredients.

It should be noted again that marijuana concentrates are not included under the term "marijuana". It now appears that marijuana is not addictive; that is, there are no withdrawal symptoms at the discontinuance of the use of the substance so the user is not forced to continue taking it because of physical need;[15] the substance has no tolerance level so there is no necessity to take more each time to achieve the same "high";[16] and finally, hallucinations and other elements of model psychosis are rare and appear to occur only under very large doses.[17] Such large doses are usually risked only by the users of hashish.[18]

Under §712-1249, a person commits the offense of promoting a detrimental drug in the third degree, which is a petty misdemeanor, if the person knowingly possesses marijuana or any Schedule V substance in any amount. The offense is in the second degree if the possession is of 50 or more capsules or tablets of a Schedule V substance, or 1/8 ounce or more of such substance, or one ounce or more of marijuana. Also, it is a second degree offense if the defendant "sells" marijuana or distributes a Schedule V substance in any amount. Under §712-1248, the second degree offense is classified as a misdemeanor.

Under §712-1247, promoting a detrimental drug in the first degree is a class C felony. Here again, the offense is concerned with the knowing possession or distribution of specified amount of Schedule V substances or marijuana. The offense is also committed if there is distribution to a minor who is three years younger than the defendant.

Illegal traffic in dangerous drugs, harmful drugs, and detrimental drugs. It is the purpose of the Code to hit hardest at the illegal trafficker in dangerous drugs, harmful drugs, and detrimental drugs. The scheme devised for so doing is to arrange the sanctions relating to each substance, either for possession or distributing, on the basis of the amounts involved. Such amounts are meant to reflect, i.e., provide an indicia of the position of the defendant in the illegal drug traffic. Large amounts indicate the defendant is a main source of supply, sometimes called an "importer", "dealer", or "wholesaler". Middle amounts indicate that the defendant is an intermediary between the main source and the consumer; sometimes the intermediary is called a "pusher", "carrier", or "retailer". Finally, the smallest amounts indicate the defendant's main involvement in the traffic is that of a user or consumer of drugs or substances. In keeping with the purpose of the Code, the greater the amounts involved the more severe the sanctions. Also, it will be noted that the offenses of distributing a given substance are classed or graded one degree above the possession of the same amount. Thus, for example, in §§712-1241 and 1242, the possession of "wholesale" amounts of a dangerous drug is a class A felony; however, the defendant who distributes "retail" amounts of a dangerous drug will receive the same sanction, whereas possession of that amount is a class B felony. In equating, for purposes of classification and sanction, possession of a given amount of a substance with distributing a somewhat smaller amount, the Code attempts to provide the same sanction for persons at the same level of involvement in the trafficking of a particular substance. For example, a "pusher" is likely to possess a larger supply of one or more of the specified substances which the pusher would distribute on a given occasion; the pusher will break down the pusher's supply into smaller, marketable amounts before distributing.

Distributing to Minors. The Code attaches severe penalties to distributing to the young. This position reflects society's special interest in protecting the young from those who encourage or induce young people to experiment in any drug, or pander to their wishes to do so. In each category of substances, the offense of distributing to a minor receives the most serious sanction involving the individual substance.

It should be noted that the Code severely punishes the distribution of any drug to a minor who is at least three years younger than the defendant. Thus if a dangerous drug is involved, §712-1241(1)(c) makes it a first degree offense. Similarly, §712-1244(1)(e) makes it promoting a harmful drug in the first degree if there is distribution of a harmful drug or marijuana concentrate to a minor who is three years younger than the defendant. Under §712-1247(1)(g) the same type of treatment is made when a detrimental drug is involved.

Intoxicating Compounds. The Code, under §712-1250, makes it a misdemeanor for a person to knowingly "breathe, inhale, or drink" certain intoxicating compounds, and prohibits the sale or offer for sale of such compounds to persons under 18 years of age.

The Code differs from the proposed draft in several respects. Basically, it changes the draft by incorporating the schedules set forth in the companion statute, Uniform Controlled Substances Act, which was enacted by the 1972 legislature. This is based on the "Comprehensive Drug Abuse Prevention and Control Act of 1970" (Public Law 91-513). Thus the Hawaii law generally is in accord with the federal law relating to the drug abuse problem.

In another revision, the Code has included the offense of promoting intoxicating compounds, which are found in chapter 328 of the Hawaii Revised Statutes. Another change is that the Code handles the problem of avoiding severe sanctions on youthful offenders by requiring a three-year difference in age between the offender and the minor involved.

Prior Law. The Code differs basically in spirit from previous Hawaii law on drugs, and intoxicants. First and foremost, under prior law, all prohibited drugs were treated the same, with marijuana considered a narcotic along with heroin, morphine, and cocaine.[19] Thus the sale of a narcotic or a dangerous drug or marijuana carried a possible penalty of 10 years in prison and a $1,000 fine for a first conviction.[20] Also, prior law provided no distinction between possessing and transferring a dangerous drug; the same penalty stated for selling existed for possession of any such drug.[21] However, a distinction was made under the previous law, in the case of narcotics, between selling or possessing with intent to sell, on the one hand, and simple possession on the other. The former case was a 10-year felony upon first conviction, and the latter case was a 5-year felony upon first conviction.[22] Possession of marijuana could be treated either as a felony or misdemeanor upon first conviction.[23] Because of difficulties of proof, the offense based on intent to sell was rarely invoked. There were no differentiations based on the amounts involved except as related

to a presumption of intent to sell.[24] The Code's approach, which attempts to provide some indicia of the defendant's role in the drug, marijuana concentrate, or marijuana traffic, and the dangerousness of the substance involved, rationalizes previous law. The Code is essentially in agreement with the policy of special sanctions, in previous Hawaii law,[25] for those who unlawfully dispense or sell narcotics, dangerous drugs, or marijuana to minors. Although the differentiation based on amounts must be considered, the Code (1) generally increases the available penalties for dangerous drug offenses, (2) is in accord with previous penalties relating to harmful drug offenses, and (3) provides a slight reduction relating to detrimental drug offenses.

SUPPLEMENTAL COMMENTARY ON §§712-1241 TO 712-1250

Act 119, Session Laws 1975, amended §§712-1244 and 712-1245 by increasing the penalty one step to create a greater deterrent to persons considering engaging in the proscribed activities. Senate Standing Committee Report No. 775, House Standing Committee Report No. 480.

Act 163, Session Laws 1975, deleted the term "unlawfully" from the description of any offense set forth in this part for the reasons stated in the Commentary on §712-1240.

Act 112, Session Laws 1979, amended §712-1241 by adding the broadly defined term "dosage unit." The legislature found that drugs, while commonly sold in tablets, capsules, or other forms covered by existing drug laws, are also distributed and sold in forms which are not covered. The legislature believed that these amendments would lessen the promotion of dangerous drugs within the State. Conference Committee Report No. 41.

Act 31, Session Laws 1981, deleted "who is at least three years his junior" after "minor" in §§712-1241, 712-1244, and 712-1247 to remove an incentive to recruit young persons as "pushers." Senate Standing Committee Report No. 403, House Standing Committee Report No. 944.

Act 123, Session Laws 1981, amended §712-1247 by adding subsection (3) to deal with the storage and transportation problem, which was increasing with the rise in marijuana cases. Senate Conference Committee Report No. 13, House Conference Committee Report No. 14.

Act 9, Session Laws 1982, amended §§712-1241 and 712-1242 by deleting the references to alkaloids of heroin, morphine, and cocaine, there being no such alkaloids.

Act 314, Session Laws 1986, added §712-1249.5 to make commercial growing of marijuana a crime and a class B felony. House Standing Committee Report No. 487.

Act 356, Session Laws 1987, added the term "dosage units" to §712-1242 for the purpose of conforming this section with §712-1241. House Standing Committee Report No. 480.

Act 146, Session Laws 1988, added methamphetamine to the list of drugs under §712-1241. The changes to this section are intended to control the sale, use or possession of the street drug, known by various names such as: "crystal," "crystal meth," "crack" and "ice." It is intended that the illegal distribution of prescription methamphetamine in its capsule or tablet form remains within the scope of subsection (1)(b)(i). House Standing Committee Report No. 1093-88, Senate Conference Committee Report No. 271.

Act 284, Session Laws 1988, added §712-1249.6 which makes the promotion of a controlled substance in or around a school a class C felony. This section will give law enforcement officials the power to conduct investigations of drug dealers who operate in the vicinity of the schools. Senate Conference Committee Report No. 268, House Conference Committee Report No. 118-88.

Act 291, Session Laws 1988, added methamphetamine to the list of drugs covered by §712-1242. The changes are intended to control the sale, use or possession of the street drug, known by various names such as: "crystal," "crystal meth," "crack" and "ice." It is intended that the illegal distribution of prescription methamphetamine in its capsule or tablet form will remain within the scope of subsection (1)(a). House Standing Committee Report No. 1085-88, Senate Conference Committee Report No. 277.

Act 163, Session Laws 1989, added §712-1246.5 and amended various sections in this part to reduce the quantity of dangerous and harmful drugs required for conviction of the crime of promoting such drugs to provide law enforcement officers a much needed tool in the war on drugs. Senate Conference Committee Report No. 168, House Conference Committee Report No. 163.

Act 384, Session Laws 1989, added §712-1249.4 and amended various sections in this part to provide stiffer penalties for the promotion of marijuana and similar substances in furtherance of the war against drugs. Senate Conference Committee Report No. 164, House Conference Committee Report No. 146.

Act 11, Session Laws 1991, amended §712-1249.6 by prohibiting distribution or possession of drugs on or near school vehicles. The legislature felt this measure would ensure that the drug free school zone law would not be easily circumvented and drug dealing on buses or at bus stops would be discouraged. House Standing Committee Report No. 545.

Act 308, Session Laws 1996, amended §§712-1241, 712-1242, and 712-1243 by providing for mandatory minimum terms of imprisonment for offenses involving methamphetamines. The stiffer penalties were intended to counter increased property and violent crimes associated with the use of methamphetamines. Conference Committee Report No. 29, House Standing Committee Report No. 734-96.

Act 319, Session Laws 1997, amended §712-1241 by including the manufacture of dangerous drugs in any amount in the offense of promoting a dangerous drug in the first degree, and by providing a ten-year mandatory minimum term of imprisonment applicable to the offense of manufacturing methamphetamine. The legislature found that the growing problem of manufacturing dangerous drugs in Hawaii posed a significant problem to law enforcement officials given the lack of powerful sanctions under current law. Further, the illegal manufacture and abuse of "ice," a form of methamphetamine, presented an imminent public health threat as a highly addictive drug linked to violent behavior. The legislature believed it was imperative to establish an aggressive policy for penalizing the manufacture, sale, and distribution of dangerous drugs. Senate Standing Committee Report No. 770, House Standing Committee Report No. 1651.

Act 161, Session Laws 2002, amended §§712-1241, 712-1242, and 712-1243 to require that first-time nonviolent drug offenders be sentenced to undergo and complete drug treatment instead of incarceration. The legislature found that the link between substance abuse and crime is well-established. The legislature did not wish to diminish the seriousness of crime, but looked to approaching crime as being the result of addiction that is treatable. The treatment route was expected to produce a reduction in crime and recidivism. The legislature intended to promote treatment of nonviolent substance abuse offenders, rather than incarceration, as being in the best interests of the individual and the community at large. Conference Committee Report No. 96-02.

Act 70, Session Laws 2003, amended §712-1249.6 to extend the offense of promoting a controlled substance near schools or school vehicles to include public parks. The legislature found that public parks serve functions similar to those served by school playgrounds where people congregate for recreation and student activities. These areas should be free from the bad influence that drug activity can inflict upon Hawaii's youth. House Standing Committee Report No. 311, Conference Committee Report No. 8.

Act 44, Session Laws 2004, amended §§712-1241, 712-1242, and 712-1243, by eliminating the manufacturing and distribution of methamphetamine elements which are incorporated in a new offense

of methamphetamine trafficking [§712-1259]. The mandatory minimum sentences for methamphetamine were deleted because of the creation of the new offense. House Standing Committee Report No. 495-04.

Act 44, Session Laws 2004, amended §712-1249.6 to make the manufacture of methamphetamine within seven hundred fifty feet of a school or public park a class A felony and expanded the definition of schools to include preschools, kindergarten, and middle schools. House Standing Committee Report No. 495-04.

Act 44, Session Laws 2004, added §712-1249.7, creating a new offense of promoting a controlled substance through the use of a minor, as part of the Act's comprehensive legislation to address the devastating effects of crystal methamphetamine (commonly known as "ice") abuse in Hawaii. House Standing Committee Report No. 495-04.

Act 230, Session Laws 2006, amended §712-1241(1) by, among other things, deleting references to §712-1240.6, which was repealed by the Act.

Act 27, Session Laws 2007, amended §712-1242(1) by deleting an obsolete reference [to §712-1240.6]. The legislature repealed §712-1240.6 with Act 230, Session Laws 2006. However, the reference to that section was not deleted from §712-1242. Act 27 rectified the oversight. Senate Standing Committee Report No. 1368.

Act 23, Session Laws 2012, amended §712-1249.6 to extend the offense of promoting a controlled substance in, on, or near schools, school vehicles, or public parks to include public housing projects and complexes. The legislature found that there was a cycle of substance abuse and drug trafficking common in public housing projects or complexes. Act 23 established the crime of promoting a controlled substance in, on, or near a public housing project or complex as a class C felony, or, in the case of manufacturing methamphetamine within a certain distance from a public housing project or complex, as a class A felony. These deterrents should significantly improve the ability of the Hawaii housing public authority to ensure a secure, livable community for public housing residents. Senate Standing Committee Report No. 2225, House Standing Committee Report No. 1292-12.

§§712-1241 To 712-1250 Commentary:

1. H.R.S. §329-13.

2. Id. §329-14.

3. Id.

4. Id. §329-15.

5. Id. §329-16.

6. Id.

7. Goth, Medical Pharmacology, 275-292 (1966).

8. Id.

9. Id.

10. H.R.S. §329-18.

11. Id. §329-20.

12. Id. §329-1.

13. Kaplan, Proposed Tentative Draft and Commentary, California Legislature, Joint Committee for the Revision of the Penal Code 89-124 (1968).

14. Id.

15. Grollman, Pharmacology and Therapeutics, 251 (1965).

16. Id.

17. Kaplan, op cit.

18. Id.

19. H.R.S. §329-1.

20. Id. §§328-84, 329-3.

21. Id. §328-84.

22. Id. §§329-3, 329-5.

23. Id. §329-5.

24. Id. §329-3.

25. Id. §§328-84, 329-4.

" §712-1250.5 **Promoting intoxicating liquor to a person under the age of twenty-one.** (1) A person, including any licensee as defined in section 281-1, commits the offense of promoting intoxicating liquor to a person under the age of twenty-one if the person recklessly:

(a) Sells or offers for sale, influences the sale, serves, delivers, or gives to a person intoxicating liquor, and the person receiving the intoxicating liquor is a person under the age of twenty-one; or

(b) Permits a person to possess intoxicating liquor while on property under his control, and the person possessing the intoxicating liquor is a person under the age of twenty-one.

(2) It is a defense to a prosecution for promoting intoxicating liquor to a person under the age of twenty-one that:

(a) The intoxicating liquor provided to the person under the age of twenty-one was an ingredient in a medicine prescribed by a licensed physician for medical treatment of the person under the age of twenty-one;

(b) The intoxicating liquor was provided to the person under the age of twenty-one as part of a ceremony of a recognized religion;

(c) The defendant provided the intoxicating liquor to the person under the age of twenty-one with the belief, which was reasonable under the circumstances, that the person under the age of twenty-one had attained the age of twenty-one;

(d) The defendant provided the intoxicating liquor to the person under the age of twenty-one with the express consent of the parent or legal guardian and with the belief, which was reasonable under the circumstances, that the person under the age of twenty-one would not consume any portion of the substance;

(e) The defendant provided the intoxicating liquor to the person under the age of twenty-one with the express consent of the parent or legal guardian and with the belief, which was reasonable under the circumstances, that the person under the age of twenty-one would consume the substance only in the presence of the parent or legal guardian; or

(f) The intoxicating liquor was possessed by the person under the age of twenty-one to be sold or served as allowed by law.

(3) The fact that a person engaged in the conduct specified by this section is prima facie evidence that the

person engaged in that conduct with knowledge of the character, nature, and quantity of the intoxicating liquor possessed, distributed, or sold.

The fact that the defendant distributed or sold intoxicating liquor to a person under the age of twenty-one is prima facie evidence that the defendant knew the transferee was a person under the age of twenty-one, except as provided in subsection (2)(c).

(4) Promoting intoxicating liquor to a person under the age of twenty-one is a misdemeanor. [L 1984, c 122, §1; am L 1986, c 342, §4; am L 1987, c 283, §70; am L 1991, c 206, §2; am L 1992, c 207, §2; am L 2006, c 203, §2; am L 2013, c 54, §1]

Cross References

Overdose prevention; limited immunity, see §329-43.6.

COMMENTARY ON §712-1250.5

Act 122, Session Laws 1984, added the new offense of promoting intoxicating liquor to a minor which prohibits persons from giving liquor to a minor, or allowing a minor to possess intoxicating liquor on property under that person's control. The legislature believed that the passage of this Act would reduce the number of drunk drivers and deaths resulting from drunk driving. Senate Conference Report No. 40.

Act 207, Session Laws 1992, removed the repeal date of Act 342, Session Laws of Hawaii 1986, to permanently raise the minimum drinking age to twenty-one. Conference Committee Report No. 9.

Act 203, Session Laws 2006, clarified that individuals who promote liquor to minors are persons who knowingly sell, offer for sale, influence the sale, serve, deliver, or give intoxicating liquor to a person under the age of twenty-one. House Standing Committee Report No. 1127-06.

Act 54, Session Laws 2013, amended this section to curtail underage drinking by requiring a reckless rather than a knowing state of mind for the misdemeanor crime of promoting intoxicating liquor to a person under the age of twenty-one. The legislature believed that this Act would help increase compliance with the law by necessitating identification checks, at minimum, for those that hold liquor licenses, as well as hold accountable those persons who allow or influence the sale, possession, or consumption of alcohol to a person under the age of twenty-one. House Standing Committee Report No. 1230, Senate Standing Committee Report No. 529.

" **§712-1251 Possession in a motor vehicle; prima facie evidence.** (1) Except as provided in subsection (2), the presence of a dangerous drug, harmful drug, or detrimental drug in a motor vehicle, other than a public omnibus, is prima facie evidence of knowing possession thereof by each and every person in the vehicle at the time the drug was found.

(2) Subsection (1) does not apply to:

(a) Other occupants of the motor vehicle if the substance is found upon the person of one of the occupants therein;

(b) All occupants, except the driver or owner of the motor vehicle, if the substance is found in some portion of the vehicle normally accessible only to the driver or owner; or

(c) The driver of a motor vehicle who is at the time operating it for hire in the pursuit of the driver's trade, if the substance is found in a part of the vehicle used or occupied by passengers. [L 1972, c 9, pt of §1; gen ch 1993]

Revision Note

In subsection (2)(a), "or" deleted pursuant to §23G-15.

COMMENTARY ON §712-1251

Subsection (1) of this section establishes a rule of prima facie evidence regarding the possession of a dangerous drug, harmful drug, or detrimental drug when it is found in a motor vehicle. Section 701-117 sets forth the definition of "prima facie evidence". Subsection (2) provides that the evidentiary rule does not apply to various occupants of a vehicle under certain circumstances. If the substance is found upon the person of one of the occupants, then the evidentiary rule does not apply to other occupants of the vehicle. If it is found in some area of the vehicle normally accessible only to the driver, the rule applies only to the driver. If a drug is found in the part of a hired or chauffeured vehicle used or occupied by passengers, the evidentiary rule does not apply to the driver but does apply to the passenger or passengers.

When any of the specified substances is found in a vehicle, but not upon the person of one of the occupants, it is almost impossible for the prosecutor to prove actual possession by direct evidence. However, the inference, in the absence of contrary evidence which raises a reasonable doubt in the mind of the trier of fact, is overwhelming that if, for example, the substance is in that portion of the vehicle to which only the

driver and owner have access, that the substance is in fact in the possession and under the control of the owner-occupant or driver-occupant. The same holds true for the other provisions of subsections (1) and (2). Therefore, subsections (1) and (2) are designed and provided to let the prosecutor get the case to the jury in situations where direct evidence is difficult to obtain and the weight of a logical inference is sufficient to warrant a special evidentiary rule.

Case Notes

Section permits but does not require the inference of guilt, and is constitutional as applied to dealership quantities of drugs. 61 H. 99, 595 P.2d 1072 (1979).

" **§712-1252 Knowledge of character, nature, or quantity of substance, or age of transferee; prima facie evidence.** (1) The fact that a person engaged in the conduct specified by any section in this part is prima facie evidence that the person engaged in that conduct with knowledge of the character, nature, and quantity of the dangerous drug, harmful drug, detrimental drug, or intoxicating compounds possessed, distributed, or sold.

(2) The fact that the defendant distributed or sold a dangerous drug, harmful drug, detrimental drug, or intoxicating compound to a minor is prima facie evidence that the defendant knew the transferee to be a minor. [L 1972, c 9, pt of §1; am L 1984, c 122, §3; am L 1986, c 342, §5; am L 1987, c 283, §70; am L 1991, c 206, §2; am L 1992, c 207, §2; gen ch 1992]

Cross References

Prima facie evidence, see §701-117.

COMMENTARY ON §712-1252

Much of the difficulty in proving possession of a dangerous drug, harmful drug or detrimental drug when the substance is found in a motor vehicle is also present in proving mens rea with respect to (1) the character, nature, or quantity of the substance possessed, dispensed, or sold, and (2) the transferee's status as a minor. In cases involving offenses defined in this part, direct evidence, on these issues, such as self- incriminating statements, are rare. Section 712-1252 provides an evidentiary rule analogous to that found in §712-1216 (relating to obscenity offenses). It permits the prosecution to get its case before the trier of fact on issues

where direct evidence is difficult to obtain, but it does not change the prosecution's burden of proof.

SUPPLEMENTAL COMMENTARY ON §712-1252

Act 122, Session Laws 1984, amended this section to include intoxicating liquor in regard to prima facie evidence of knowledge of character, nature, or quantity of substance, or age of transferee because of the creation of a new offense of promoting intoxicating liquor to a minor.

Act 207, Session Laws 1992, removed the repeal date of Act 342, Session Laws of Hawaii 1986, to permanently raise the minimum drinking age to twenty-one. Conference Committee Report No. 9.

" **§712-1253 Penalties under other laws.** Any penalty imposed for violation of this chapter or chapter 329 is in addition to, and not in lieu of, any civil or administrative penalty or sanction otherwise authorized by law. [L 1972, c 9, pt of §1; am L 1987, c 176, §9]

" **§712-1254 Bar to prosecution.** If a violation of this part or chapter 329 is a violation of a federal law or the law of another state, a conviction or acquittal under federal law or the law of another state for the same act is a bar to prosecution in this State. [L 1972, c 9, pt of §1]

" **§712-1255 Conditional discharge.** (1) Whenever any person who has not previously been convicted of any offense under this chapter or chapter 329 or under any statute of the United States or of any state relating to a dangerous drug, harmful drug, detrimental drug, or an intoxicating compound, pleads guilty to or is found guilty of promoting a dangerous drug, harmful drug, detrimental drug, or an intoxicating compound under section 712-1243, 712-1245, 712-1246, 712-1248, 712-1249, or 712-1250, the court, without entering a judgment of guilt and with the consent of the accused, may defer further proceedings and place the accused on probation upon terms and conditions. Upon violation of a term or condition, the court may enter an adjudication of guilt and proceed as otherwise provided.

(2) Upon fulfillment of the terms and conditions, the court shall discharge the person and dismiss the proceedings against the person.

(3) Discharge and dismissal under this section shall be without adjudication of guilt and is not a conviction for purposes of this section or for purposes of disqualifications or disabilities imposed by law upon conviction of a crime.

(4) There may be only one discharge and dismissal under this section with respect to any person.

(5) After conviction, for any offense under this chapter or chapter 329, but prior to sentencing, the court shall be advised by the prosecutor whether the conviction is defendant's first or a subsequent offense. If it is not a first offense, the prosecutor shall file an information setting forth the prior convictions. The defendant shall have the opportunity in open court to affirm or deny that the defendant is identical with the person previously convicted. If the defendant denies the identity, sentence shall be postponed for such time as to permit the trial, before a jury if the defendant has a right to trial by jury and demands a jury, on the sole issue of the defendant's identity with the person previously convicted. [L 1972, c 9, pt of §1; am L 1987, c 176, §10; gen ch 1993]

Case Notes

Conditional discharge procedures are not applicable to offense under §712-1247(1)(e), which is not included among the offenses listed in this section. 58 H. 412, 570 P.2d 1323 (1977).

Conditional discharge of defendant under this section is not a final disposition of the case appealable by the State. 60 H. 576, 592 P.2d 832 (1979).

Order granting belated motion for reconsideration or correction of sentence and conditional discharge under section is not a reversal of criminal conviction for purposes of Hawaii Supreme Court rule 2.13 (attorneys convicted of crimes). 73 H. 172, 829 P.2d 1329 (1992).

" **§712-1256 Expunging of court records.** (1) Upon the dismissal of such person and discharge of the proceeding against the person under section 712-1255, this person, if the person was not over twenty years of age at the time of the offense, may apply to the court for an order to expunge from all official records all recordation relating to the person's arrest, indictment, or information, trial, finding of guilt, and dismissal and discharge pursuant to this section.

(2) If the court determines, after hearing, that such person was dismissed and the proceedings against the person discharged and that the person was not over twenty years of age at the time of the offense, it shall enter such order.

(3) The effect of such order shall be to restore such person, in the contemplation of the law, to the status the person occupied before such arrest or indictment or information.

(4) No person as to whom such order has been entered shall be held thereafter under any provision of any law to be guilty

of perjury or otherwise giving a false statement by reason of the person's failures to recite or acknowledge such arrest or indictment or information, or trial in response to any inquiry made of the person for any purpose. [L 1972, c 9, pt of §1; gen ch 1993]

COMMENTARY ON §§712-1253 TO 712-1256

Section 712-1253 assures that the penalty provisions of this part as well as of chapter 329, HRS will not be in lieu of any civil penalties. This is an addition to the proposed draft.

Section 712-1254 is a double jeopardy provision which represents an addition to the proposed draft.

Section 712-1255 is concerned with the conditional discharge of first offenders. If a first offender is guilty of promoting a dangerous drug in the third degree, or promoting a harmful drug in the second or third degrees, or promoting a detrimental drug in the second or third degrees, or promoting intoxicating compounds, the first offender qualifies for a conditional discharge.

If the defendant is under 20 years old, §712-1256 provides that the court records may be expunged upon application. The Code recognizes that many offenders may be young persons who are otherwise without criminal records. The Code attempts to assure proper sanctions, while at the same time allowing for moderation of punishment and sentencing of first offenders.

" **§712-1257 Prohibited cigarette sales of less than twenty.** (1) It shall be unlawful to sell single cigarettes or packs of cigarettes containing less than twenty cigarettes. It further shall be unlawful to sell cigarettes other than in sealed packages originating with the manufacturer and bearing the health warning required by law.

(2) As used in this section, "to sell" includes: to solicit and receive an order for; to have, or keep, or offer, or expose for sale; to deliver for value or in any other way than purely gratuitously; to peddle; to keep with intent to sell; and to traffic in.

(3) "Sale" includes every act of selling as defined in [subsection (2)].

(4) Any person who violates subsection (1), shall be fined not more than $2,500 for the first offense. Any subsequent offense shall subject the person to a fine of not less than $100 and not more than $5,000. Any person who knowingly violates subsection (1) shall be guilty of a class C felony. [L 1996, c 53, §1; am L 2000, c 201, §2]

Cross References

Sale of tobacco or electronic smoking device to minors, see §709-908.

COMMENTARY ON §712-1257

Act 53, Session Laws 1996, added this section to prohibit the sale of single cigarettes or cigarettes in packs of less than twenty and in other than in sealed packages originating with the manufacturer and bearing the required health warning. The legislature found that the sale of cigarettes in amounts of less than twenty was specifically aimed at minors. The legislature sought to prevent the distribution of cigarettes to minors through quantity and price control. House Standing Committee Report No. 924-96, Senate Standing Committee Report No. 2013.

Act 201, Session Laws 2000, amended this section by increasing to a class C felony the penalty for anyone who knowingly sells single cigarettes or packs of cigarettes containing less than twenty cigarettes. Conference Committee Report No. 108.

" **[§712-1258] Tobacco products and electronic smoking devices; persons under twenty-one years of age.** (1) It shall be unlawful to sell or furnish a tobacco product in any shape or form or an electronic smoking device to a person under twenty-one years of age.

(2) Signs using the statement, "The sale of tobacco products or electronic smoking devices to persons under twenty-one is prohibited", shall be posted on or near any vending machine in letters at least one-half inch high and at or near the point of sale of any other location where tobacco products or electronic smoking devices are sold in letters at least one-half inch high.

(3) It shall be unlawful for a person under twenty-one years of age to purchase any tobacco product or electronic smoking device, as those terms are defined in subsection (5). This provision does not apply if a person under the age of twenty-one, with parental authorization, is participating in a controlled purchase as part of a law enforcement activity or a study authorized by the department of health under the supervision of law enforcement to determine the level of incidence of tobacco or electronic smoking devices sales to persons under twenty-one years of age.

(4) Any person who violates subsection (1) or (2), or both, shall be fined $500 for the first offense. Any subsequent offenses shall subject the person to a fine not less than $500 nor more than $2,000. Any person under twenty-one years of age

who violates subsection (3) shall be fined $10 for the first offense. Any subsequent offense shall subject the violator to a fine of $50, no part of which shall be suspended, or the person shall be required to perform not less than forty-eight hours nor more than seventy-two hours of community service during hours when the person is not employed and is not attending school.

(5) For the purposes of this section:

"Electronic smoking device" means any electronic product that can be used to aerosolize and deliver nicotine or other substances to the person inhaling from the device, including but not limited to an electronic cigarette, electronic cigar, electronic cigarillo, or electronic pipe, and any cartridge or other component of the device or related product.

"Tobacco product" means any product made or derived from tobacco that contains nicotine or other substances and is intended for human consumption or is likely to be consumed, whether smoked, heated, chewed, absorbed, dissolved, inhaled, or ingested by other means. "Tobacco product" includes but is not limited to a cigarette, cigar, pipe tobacco, chewing tobacco, snuff, snus, or an electronic smoking device. "Tobacco product" does not include drugs, devices, or combination products approved for sale by the United States Food and Drug Administration, as those terms are defined in the Federal Food, Drug, and Cosmetic Act. [L 2016, c 231, §50]

COMMENTARY ON §712-1258

Act 231, Session Laws 2016, added this section to implement recommendations made by the Penal Code Review Committee convened pursuant to House Concurrent Resolution No. 155, S.D. 1 (2015).

" **[§712-1260] Industrial hemp.** *[Section repealed June 30, 2021. L 2016, c 228, §8.]* The possession, cultivation, sale, receipt, or transfer of industrial hemp as authorized under part II of chapter 141 shall not constitute an offense under this part. [L 2016, c 228, §4]

COMMENTARY ON §712-1260

Act 228, Session Laws 2016, added this section to exempt the possession, cultivation, sale, receipt, or transfer of industrial hemp in accordance with the industrial hemp pilot program established by Act 228 from acts constituting offenses related to drugs and intoxicating compounds. The legislature found that industrial hemp is well suited to Hawaii's climate and soil and can grow to over ten feet in a short period of time with little water and no pesticides. According to estimates by

the Hemp Industries Association, retail sales of industrial hemp products grew to over $620,000,000 annually in 2014. Industrial hemp has over 25,000 uses, including food, fiber, and fuel products, and has high potential to contribute to the future viability of the State's agricultural industry. Conference Committee Report No. 88-16, House Standing Committee Report No. 1272-16.

"[PART V.] NUISANCE ABATEMENT

§712-1270 Places used to commit offenses against public health and morals or other offenses, a nuisance. Every building, premises, or place used for the purpose of violating:

(1) Those laws pertaining to offenses against public health and morals contained in this chapter, except offenses under part IV that do not involve the manufacture or distribution of drugs and activities under part III that involve only social gambling as defined in section 712-1231(a);

(2) Section 132D-14(a)(1) or (3); or

(3) Any offense under part II of chapter 708 that involves a person unlawfully residing on or otherwise occupying real property to which the person has no title, lease, or other legal claim,

and every building, premises, or place in or upon which violations of any of the laws set forth in paragraph (1), (2), or (3) are held or occur, is a nuisance that shall be enjoined, abated, and prevented, regardless of whether it is a public or private nuisance. [L 1979, c 181, pt of §2; am L 1990, c 158, §1; am L 1996, c 246, §1; am L 2010, c 136, §4; am L 2015, c 80, §2; am L 2016, c 154, §1]

COMMENTARY ON §§712-1270 TO 712-1281

Act 80, Session Laws 2015, amended §712-1270 to promote the enforcement of criminal gambling prohibitions by including gambling among the types of criminal offenses that are subject to the nuisance abatement laws. The legislature found that illegal gambling establishments can generate a large volume of cash and lead to neighborhood and community nuisances by becoming a haven for organized crime. Act 80 supplements existing police efforts by providing an additional tool to remedy illegal activity at specific buildings, premises, or places within the State. Senate Standing Committee Report No. 596, House Standing Committee Report No. 1492.

Act 154, Session Laws 2016, amended §712-1270 to remedy the situation of an unlawful occupation of real property by

authorizing civil lawsuits that seek, among other things, an order of abatement that permanently prohibits the trespassers from residing on or entering onto the subject real property. The legislature found that "squatting," to settle on land without title, right, or payment of rent, had become common in certain areas of the State and was a serious nuisance to the owners of the property, adjoining landowners, and neighboring residents. Squatting presented significant legal issues for landowners because the legal process to evict a squatter was costly and time consuming. The problems multiplied when the squatter located on property that had been abandoned by the owner. Because neighboring landowners and residents did not have a property interest in the abandoned parcel, they usually did not have effective legal tools to remove the squatter. There was a lack of effective remedies to protect against noise, drug use, unsanitary conditions, and other illegal activities in their neighborhoods. Conference Committee Report No. 38-16.

Case Notes

Cannot be used to abate gambling offenses. 5 H. App. 463, 701 P.2d 175 (1985).

" **§712-1270.3 Citizen's rights.** Any citizen who brings a nuisance abatement suit against a place used for the purpose of committing:

(1) Fireworks related offenses contained in section 132D-14(a)(1) or (3); or

(2) Drug offenses under part IV of this chapter or who files a complaint with the local police or drug nuisance abatement unit of the department of the attorney general,

shall be entitled to the same rights and protections of victims and witnesses in criminal proceedings in accordance with chapter 801D. [L 2004, c 44, §25; am L 2010, c 136, §5]

" **§712-1270.5 Injunctions against persons.** Nothing in this part shall be construed to prohibit injunctions against persons causing, maintaining, aiding, abetting, or permitting a nuisance from entering or residing in any public or private building, premises, or place, in or upon which the nuisance exists. [L 1998, c 286, §1; am L 2005, c 123, §2]

" **§712-1271 Suit to abate.** (1) Whenever there is reason to believe that a nuisance as defined in this chapter is in existence, kept, or maintained in any county, the attorney general of the State or the prosecutor or prosecuting attorney

of the respective counties shall, or any citizen of the State residing within such county may in the citizen's own name, or any organization, including, but not limited to a tenant organization within such county may in the organization's own name, maintain a suit to abate and prevent the nuisance and to perpetually enjoin the person or persons causing, maintaining, aiding, abetting, or permitting the nuisance, or the owner, lessee, or agent of the building, premises, or place in or upon which the nuisance exists from directly or indirectly causing, maintaining, aiding, abetting, or permitting the nuisance.

(2) No action authorized under this part which seeks to abate or prevent a nuisance shall be filed or maintained against the State or any political subdivision thereof. [L 1979, c 181, pt of §2; gen ch 1993; am L 1996, c 246, §2; am L 1998, c 286, §2; am L 2005, c 123, §3]

" **[§712-1271.5] Standard of proof.** Except as may be otherwise expressly provided, the civil causes of action in this part shall be proved by a preponderance of the evidence. [L 2005, c 123, pt of §1]

" **[§712-1271.6] Protective order.** If proof of the existence of the nuisance depends, in whole or in part, upon the affidavits or testimony of witnesses who are not law enforcement officers, the court, upon a showing of prior threats of violence or acts of violence by any defendant may issue orders to protect those witnesses including, but not limited to, the nondisclosure of the name, address, or any other information that may identify those witnesses. [L 2005, c 123, pt of §1]

" **§712-1272 Temporary writ.** Whenever the existence of a nuisance is shown in a suit brought under this part to the satisfaction of the court or the judge thereof, either by verified petition or affidavit, or both, the court or judge thereof shall allow a temporary writ of injunction to abate and prevent the continuance or recurrence of such nuisance, which injunction may include a provision prohibiting the person or persons causing, maintaining, aiding, abetting, or permitting the nuisance from residing in or entering into the building, premises, or place in or upon which the nuisance exists. The petition in such suit need not be verified, except in those suits brought by a citizen in the citizen's own name, or those suits brought by an organization in its own name, but shall be signed by the party bringing the same and shall include a certification that the complainant believes the allegations of the petition to be true. [L 1979, c 181, pt of §2; gen ch 1993; am L 1996, c 246, §3; am L 2005, c 123, §4]

" **§712-1273 Suit to have precedence.** The suit when brought shall have precedence over all cases, excepting criminal proceedings, election contests, and hearings on injunctions, and in the suit evidence of the general reputation of the building, premises, place, or persons, and of the use or threat of violence shall be admissible for the purpose of proving the existence of the nuisance. [L 1979, c 181, pt of §2; am L 1996, c 246, §4; am L 1998, c 286, §3; am L 2005, c 123, §5]

" **§712-1274 Failure to prosecute.** If the petition is filed by a citizen or by an organization, it shall not be dismissed by the complainant or for want of prosecution except upon a sworn statement by the complainant or the complainant's attorney, setting forth the reasons why the suit should be dismissed, and the dismissal ordered by the court. In case of failure to prosecute any such suit with reasonable diligence, or at the request of the complainant, the court, in its discretion, may substitute any other citizen or organization, including, but not limited to the attorney general or the prosecutor or prosecuting attorney of the county consenting thereto for the complainant. If a suit is brought by a citizen or by an organization and the court finds that there was no reasonable ground or cause therefor, the costs shall be taxed against such citizen or organization, except that no costs shall be taxed against state or county organizations. [L 1979, c 181, pt of §2; am L 1996, c 246, §5]

" **§712-1275 Order of abatement.** If the existence of a nuisance is established in a suit as provided herein, an order of abatement shall be entered as a part of the judgment in the case, which order shall include a provision permanently prohibiting the person or persons causing, maintaining, aiding, abetting, or permitting the nuisance, if said person or persons are a party to the proceeding, from residing in or entering into the building, premises, or place in or upon which the nuisance exists. The court, on the application of the person, may suspend the prohibition if the person is participating in a court-approved treatment and monitoring program which addresses the person's conduct which caused the nuisance. If the court determines that the person has successfully completed the program and that the person is not likely to again create a nuisance, the court may dissolve the injunction against the person. In the event that the court determines that an injunction against the person or persons causing, maintaining, aiding, abetting, or permitting the nuisance will not completely abate the nuisance or that one or more of the persons causing,

maintaining, aiding, abetting, or permitting the nuisance are not parties to the proceeding, the court shall also direct the effectual closing of the building, premises, or place, against its use for any purpose, and that it be kept closed for a period not exceeding one year, unless sooner released, as provided by section 712-1277. While the order remains in effect as to closing, the building, premises, or place shall remain in the custody of the court. The court's orders may also include, but are not limited to, an order suspending or revoking any business, professional, operational, or liquor license. [L 1979, c 181, pt of §2; am L 1996, c 246, §6; am L 2005, c 123, §6]

" **§712-1276 Costs and expenses.** For any attorneys' fees, costs, or expenses incurred in the closing of the building, premises, or place and keeping it closed, or incurred in enforcing the injunction prohibiting the person or persons causing, maintaining, aiding, abetting, or permitting the nuisance from residing or entering into the building, premises, or place in or upon which the nuisance exists, as well as the attorneys' fees, costs, and expenses incurred by the party bringing the action, a reasonable sum shall be allowed by the court. [L 1979, c 181, pt of §2; am L 1996, c 246, §7; am L 2004, c 44, §27; am L 2005, c 123, §7]

" **§712-1277 Owner not guilty of contempt; may pay costs.** If the owner of the building, premises, or place has not been guilty of any criminal contempt of court in the proceedings, and appears and pays all costs, fees, and allowances which are a lien on the building, premises, or place and files a bond in a reasonable amount to be fixed by the court, with sureties, to be approved by the court or judge, conditioned that the owner will immediately abate any such nuisance that may exist at such building, premises, or place and prevent the same from being established or kept thereat for a period of one year thereafter, the court or the judge thereof, may, if satisfied of the owner's good faith, order the building, premises, or place closed under the order of abatement canceled so far as the same may relate to the closing of said building, premises, or place. The release of the building, premises, or place under the provisions of this section does not release it from any judgment, lien, penalty, or liability to which it may be subject by law. [L 1979, c 181, pt of §2; gen ch 1993; am L 1996, c 246, §8]

" **[§712-1277.5] Contempt.** Any person who knowingly violates any order issued pursuant to this part shall be subject to civil contempt as well as punishment for criminal contempt of court under section 710-1077. Nothing in this section shall be

construed in any way to preclude or preempt a criminal prosecution for violation of a controlled substance offense or any other criminal offense. [L 2005, c 123, pt of §1]

" **§712-1278 Fine, costs, lien on place.** Any attorneys' fees, costs, expenses, and fines imposed against any owner of a business, premises or place in any proceedings under this part shall be a lien upon such business, premises, or place, to the extent of the interest of such person therein, enforceable and collectible by execution issued by the order of the court. [L 1979, c 181, pt of §2; am L 1996, c 246, §9; am L 2004, c 44, §28]

" **§712-1279 Termination of lease.** The notice by the owner of any business, premises, or place to the lessee that the lease will be revoked if the lessee continues the maintenance of the nuisance, and other action taken to revoke the lease or to obtain the termination of the nuisance shall be given appropriate consideration by the court in the determination of a criminal contempt action brought against the owner in connection with abatement procedures of this part. [L 1979, c 181, pt of §2; gen ch 1993; am L 1996, c 246, §10]

" **§712-1280 Place.** "Place" as used in this part means any building, structure, or place, or any separate part or portion thereof, whether permanent or not, or the ground itself. [L 1979, c 181, pt of §2; am L 1996, c 246, §11]

" **[§712-1281 Forfeiture; fireworks.]** In addition to any other penalty that may be imposed for violation of section 132D-14(a)(1) or (3), any property used or intended for use in the commission of, attempt to commit, or conspiracy to commit an offense under section 132D-14(a)(1) or (3), or that facilitated or assisted such activity, and any proceeds or other property acquired or maintained with the proceeds from violation of section 132D-14(a)(1) or (3) may be subject to forfeiture pursuant to chapter 712A. [L 2010, c 136, §1]

COMMENTARY ON §§712-1270 TO 712-1281

Act 181, Session Laws 1979, established this part to provide a remedy to abate as nuisances, offenses against public health and morals in the nature of offenses defined as prostitution, the display of indecent matter, and the like. It is based largely on sections 11225 to 11235 of the California Penal Code.

In enacting §712-1279, the legislature thought it desirable to place the burden upon the property owner to take appropriate

action against the lessee to abate the nuisance, but felt that a categorical mandate requiring notice of revocation might raise collateral problems, particularly where chains of subleases were involved. Accordingly, the legislature chose to require the courts to consider the giving of notice and other actions the owner may or may not have taken to abate the nuisance when deliberating upon the issue of criminal contempt. Senate Standing Committee Report No. 892 (1979) states:

> Such treatment prevents the imposition of penalty against the owner who may not have technically given notice but who, under peculiar circumstances, may have taken other reasonable and possibly more effective measures to abate the nuisance, and thereby acted in ... good faith.

Act 158, Session Laws 1990, amended §712-1270 to expand the nuisance law to permit closure of premises where drug offenses repeatedly occur. The legislature emphasized that this amendment is not intended to be applied to innocent landlords whose property may be inadvertently involved in drug offenses. Conference Committee Report No. 30.

Act 246, Session Laws 1996, amended §§712-1270 to 712-1280, by, inter alia, allowing any organization to bring a nuisance abatement suit and providing that the court may order that the person causing the nuisance be excluded from the premises under certain conditions. The Act also allowed the abatement of a nuisance that involves the manufacture as well as the distribution of drugs, and made the language in the statutes more consistent and comprehensive by referring to "buildings" and "premises" as well as a "place." The legislature believed that places used for illicit drugs, prostitution, or pornography were major factors contributing to the decline of neighborhoods, and that permitting any organization to bring a nuisance abatement action and allowing a court to exclude persons causing the nuisance strengthened part IV of chapter 712 to deal with these problems. Conference Committee Report No. 35, Senate Standing Committee Report No. 2618.

Act 286, Session Laws 1998, added §712-1270.5 to allow injunctions against entering or residing in any public or private building, premises, or place to issue against the person causing the nuisance. The legislature found that in 1996, Act 246 was passed, which amended various sections in chapter 712. The purpose of Act 246 was to allow organizations to maintain nuisance abatement suits and thereby obtain injunctive relief against persons utilizing certain buildings, premises, or places, to commit offenses against public health and morals. The legislature also found that the department of the prosecuting attorney, relying on Act 246, began to move for injunctions barring prostitutes from certain areas of Waikiki.

The legal reasoning upon which Act 246 was applied to prostitutes was that prostitutes who solicit on public streets aggressively hinder both pedestrian and vehicular traffic and harass visitors to the point where their activity becomes a public nuisance. However, the circuit courts denied the motions for injunctions against prostitutes on the grounds that the nuisance abatement statute did not expressly apply to individuals.

In passing Act 246, the legislature expressly intended that the court could order, as part of the abatement of the nuisance, the exclusion of the person causing the nuisance from the place, building, or premises involved. Act 286 will solve the apparent ambiguity in the law by specifically stating that nothing in the nuisance abatement law prohibits injunctions against persons causing the nuisance. House Standing Committee Report No. 613-98, Conference Committee Report No. 93.

Act 286, Session Laws 1998, amended §712-1271 to provide that no actions authorized under part V of chapter 712 which seeks to abate or prevent a nuisance shall be filed or maintained against the State or any political subdivision thereof. Conference Committee Report No. 93.

Act 286, Session Laws 1998, amended §712-1273 to allow evidence of a person's general reputation to be introduced to prove the existence of a nuisance. Conference Committee Report No. 93.

Act 44, Session Laws 2004, added §712-1270.3 and amended §§712-1276 and 712-1278, to allow citizens to recover attorneys' fees and to receive the same protection as crime victims do. House Standing Committee Report No. 495-04.

Act 123, Session Laws 2005, added §712-1271.5, to establish that a preponderance of the evidence is the standard of proof applicable to nuisance abatement actions, §712-1271.6, to authorize a court to issue a protective order to prevent the disclosure of the identity of a witness when presented with evidence of acts of violence or prior threats of violence by any defendant in a nuisance abatement action, and §712-1277.5, to subject an individual who knowingly violates a protective order to civil as well as criminal contempt of court.

Act 123 also amended §§712-1270.5, 712-1271, 712-1272, 712-1273, 712-1275, and 712-1276 to, among other things, allow injunctions against persons who maintain, aid, abet, or permit a nuisance from entering or residing in any place where the nuisance exists and enable a court to enter an order suspending or revoking any business, professional, operational, or liquor license if the holder of the license is involved in maintaining, aiding, abetting, or permitting the nuisance. The legislature found that the Act would encourage neighborhood residents to

report community nuisances such as drug activity by increasing the protections for witnesses in nuisance abatement actions, expanding the scope of injunctions to include persons associated with the nuisance, and providing law enforcement additional tools to abate a nuisance. Conference Committee Report No. 11, House Standing Committee Report No. 1288, Senate Standing Committee Report No. 638.

Act 136, Session Laws 2010, added §712-1281 to subject to forfeiture laws property used or intended to be used and proceeds acquired in the commission or attempted commission of the illegal importation, sale, and transfer of fireworks. Act 136 also amended §§712-1270 and 712-1270.3, respectively, to establish a nuisance action under the Penal Code to abate those activities, and to give citizens who bring an action to abate the activities the same rights and protections of victims and witnesses in criminal proceedings. The legislature found that increasing the penalties for violations of fireworks-related laws may serve to curb rampant illegal fireworks in the State. Conference Committee Report No. 18-10, Senate Standing Committee Report No. 3044.

Act 80, Session Laws 2015, amended §712-1270 to promote the enforcement of criminal gambling prohibitions by including gambling among the types of criminal offenses that are subject to the nuisance abatement laws. The legislature found that illegal gambling establishments can generate a large volume of cash and lead to neighborhood and community nuisances by becoming a haven for organized crime. Act 80 supplements existing police efforts by providing an additional tool to remedy illegal activity at specific buildings, premises, or places within the State. Senate Standing Committee Report No. 596, House Standing Committee Report No. 1492.