



**TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
THIRTY-FIRST LEGISLATURE, 2021**

ON THE FOLLOWING MEASURE:
H.B. NO. 887, RELATING TO CRIME.

BEFORE THE:
HOUSE COMMITTEE ON JUDICIARY AND HAWAIIAN AFFAIRS

DATE: Tuesday, February 23, 2021 **TIME:** 2:00 p.m.

LOCATION: State Capitol, Via Videoconference

TESTIFIER(S): Clare E. Connors, Attorney General, or
Farshad M. Talebi, Deputy Attorney General

Chair Nakashima and Members of the Committee:

The Department of the Attorney General (Department) strongly supports this bill.

The purpose of this bill is to amend Hawaii's sex trafficking laws to (1) create a separate offense for sex buyers; (2) eliminate the statute of limitations for the crime of sex trafficking so the offenses can be prosecuted at any time; (3) make a person strictly liable as to the knowledge of the victim's age for the crime of sex trafficking of a minor; (4) change the name of the crime of solicitation of a minor for prostitution to commercial sexual exploitation of a minor, (5) close a legal loophole that allows child exploiters to escape criminal liability when the offer or acceptance is with a third party; (6) change "solicitation of a minor for prostitution" from a Class C to a Class B offense; and (7) change "a fee" to "anything of value" for crimes involving prostitution, commercial sexual exploitation, and sex trafficking.

Section 2 of the bill, at page 3, line 1, through page 4, line 21, adds a new section to chapter 712, Hawaii Revised Statutes (HRS) that creates a separate crime for sex buyers. Currently, the crime of "prostitution" includes both the criminal conduct of those engaged in prostitution and those buying sex. A separate crime for buyers will shift the primary focus from prostituted people to those who victimize them by creating a commercial market of sexual exploitation. Having two separate offenses will allow the State to track arrest and conviction data for sex buyers and use that data to determine

whether law enforcement efforts are effectively combating and reducing sexual exploitation.

Section 3 of the bill, at page 4, line 22, through page 5, line 7, amends section 701-108, HRS, to add sex trafficking to offenses that can be prosecuted at any time. This section eliminates the statute of limitations for sex trafficking so that delays by victims in reporting the offenses will not preclude the prosecution of the offenses. Data shows that victims and survivors of sex trafficking are less likely to seek help from law enforcement while they are under the control of their trafficker and may only be able to report the offenses after they have escaped to a safe and stable situation.

Section 6 of the bill, amends section 712-1202, HRS, by adding a subsection at page 10, lines 3 through 6, which eliminates the state of mind requirement for an offender if the victim was a minor, creating strict liability for the crime of sex trafficking where the victim is a minor. Like other sex offenses involving minors (e.g., sexual assault of a minor), the crime of sex trafficking should not require knowledge of the minor victim's age.

Section 9 of the bill, at page 15, line 1, through page 16, line 20, amends section 712-1209.1, HRS, by changing the name of the crime of "solicitation of a minor for prostitution" to "commercial sexual exploitation of a minor." It is not a crime for a minor to engage in prostitution because by definition a minor is a victim. Therefore, the name of the offense should be consistent with the criminal act by the offender, which is commercially sexually exploiting a minor. By amending section 712-1209.1(1), it also closes a legal loophole that allows child exploiters to escape liability when the offer or acceptance of a sex act has been made by a third party. A trafficker, pimp, or another third party is often the one selling a child victim to the sex buyers. Currently, section 712-1209.1, HRS, does not penalize a child sex buyer if the offer or agreement is made by a third party – the offer or agreement must be made directly to the child victim or a member of law enforcement posing as a minor. The amendment to section 712-1209.1, HRS, corrects this omission and criminalizes offenders who offer or agree to pay to have sex with children even if the offer or agreement is made by a third party.

An additional amendment to section 712-1209.1, HRS, at page 15, lines 20 through 21, changes the classification of “solicitation of a minor for prostitution” from a Class C to a Class B offense to appropriately reflect the seriousness of the crime, which in other jurisdictions, and in federal law, is included in the crime of sex trafficking as a more serious offense.

Throughout the affected statutes, the bill adds the wording “anything of value” to the fee required for a transaction for commercial sexual conduct. Currently, our sex trafficking statutes only criminalize a transaction for “a fee,” which does not encompass many commercial sexual exploitation scenarios in which other things of value are provided, including drugs, goods, food, and housing. “Anything of value” is used in the federal definition and most state jurisdictions.

The Department has made the fight against human trafficking a priority, including by appointing a State Human Trafficking Coordinator and investing resources to improve the statewide response. This bill will enhance the Department’s ability to combat commercial sexual exploitation.

We respectfully ask this Committee to pass this bill.

HB-887

Submitted on: 2/21/2021 11:44:13 AM

Testimony for JHA on 2/23/2021 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Karen M Radius	Individual	Support	No

Comments:

I am Karen Radius, a retired Family Court Judge. I testify individually as a concerned citizen.

I support HB887.

I am the volunteer co-Chair of the Commercial Sexual Exploitation of Children (CSEC) Steering Committee which is made up of members from child and family serving state agencies/branches on Oahu including Family Court, Department of Human Services, Department of Health, Department of Education and state and county law enforcement officials as well as federal officials. We also hear from non profits and service providers as well as entities on the Mainland working on similar concerns. Our primary purposes are to establish an understanding of the issues facing our youth and families, assess the scope of the problem, and determine best practices to provide timely response to victims and to provide better coordination between agencies and service providers as well as better communication and effective prosecution of those who traffick Hawaii's kids.

I support the Attorney General's proposals as set forth in HB887 to complete a comprehensive amendment of our current state criminal laws regarding sex trafficking and commercial sexual exploitation of children. A review of the current statutes as a whole with appropriate amendments is better than a series of individual amendments done over time which could inadvertently be legally problematic and easily result in confusion or internal contradictions in various sections.

The proposed amendments in HB887 would bring Hawaii's statutes more in line with best practices in this field and hopefully lead to greater accountability for offenders.

It is very hard for children and their families who have been victims of commercial sexual exploitation to trust the "system" and accept assistance from those who can help provide steps toward healing and safety if those who have offended against these children are not brought to accountability.

The removal of the statute of limitations for commercial exploitation/sex trafficking is in keeping with other laws that have removed statutes of limitations where there has been

severe trauma inflicted upon the victim. Time is often necessary for the victim to be able to confront the person(s) who reekd havoc upon the victim's life and psyche.

I support the addition/revisions that add the phrase "anything of value" such as in Section 712-1209 and 712-109.1. The child who is commercially exploited is seldom paid cash directly by the buyers and traffickers rarely provide cash paynets directly to child victims. Instead tehy provide goods, food, a place to stay, drugs, etc.

Commercial exploitation of children in Hawaii is real and children on each island and in every neighborhood have been effected. We are becoming more aware of the problem. We can no longer ignore its affects on our girls and our boys and our families.

HB-887

Submitted on: 2/22/2021 10:12:26 AM

Testimony for JHA on 2/23/2021 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Jessica Munoz	Ho'ola Na Pua	Support	No

Comments:

Testimony in support of:

HB887

Submitted by:

Ho'Å• la NÄ• Pua

Chair Shimabukuro, Vice Chair Keohokalole, and Honorable Members,

Ho'Å• la NÄ• Pua is in support of HB 887 proposition to create separate offenses for those who provide anything of value to engage in sexual conduct with another; add sex trafficking to offenses that can be prosecuted; making a person strictly liable for sex trafficking of a minor in terms of the victim's age; changing the name of the crime of "solicitation of a minor for prostitution" to "commercial sexual exploitation of a minor" while closing loopholes in the law that allow offenders to escape liability, and increasing the grade of offense to a class B felony; add "anything of value" to reflect the reality of non-monetary compensation used in commercial sexual exploitation.

In the state of Hawaii, perpetrators have been able to escape criminal culpability by exploiting gaps in our current laws. Updating the terminology in our laws to include "anything of value" as a means of compensation will help further protect victims being exchanged for other non-monetary forms of payment. Amending the law is necessary to hold those who distribute, profit, or buy sexually exploited minors accountable.

It is also imperative, given the severity of the crime, to increase the level of the offense for perpetrators who purchase children for sex to a class B felony. Due to the psychological abuse and manipulative tactics utilized by traffickers, those exploited are often very reluctant to come forward and seek justice until they feel safe from their exploiters. That is why Ho'Å• la NÄ• Pua is also in support of eliminating the statute of limitation for sex trafficking.

Amending terminology in Hawaii's current laws is also vital. Ho'Å• la NÄ• Pua is in full support of changing the name of the crime from "solicitation of a minor for prostitution" to "commercial sexual exploitation of a minor" and eliminating the pronoun "prostitute."

As we advance, this will help Hawai'i properly define and identify those who are sexually exploited as victims and survivors.

Ho'Ā• la NĀ• Pua implores that Hawaii state legislators support HB 877 to properly hold traffickers and exploiters accountable for their actions while making our law consistent with the federal human trafficking definitions and laws.

Respectfully,

Ho'Ā• la NĀ• Pua

STATE OF HAWAI‘I
OFFICE OF THE PUBLIC DEFENDER

**Testimony of the Office of the Public Defender,
State of Hawai‘i to the House Committee on Judiciary & Hawaiian Affairs**

February 23, 2021

H.B. No. 887: RELATING TO CRIME

Chair Nakashima, Vice Chair Matayoshi, and Members of the Committee:

The Office of the Public Defender respectfully opposes H.B. No. 887.

The term “anything of value” is too broad and open to wide interpretation when coupled with the term “offers to provide.” These terms do not appropriately narrow what acts would be deemed commercial sexual exploitation or mere courting or flirting and may include scenarios in modern dating that could unintentionally criminalize behaviors like buying dinner for another person on a date with the expectation of a sexual encounter or buying a present as innocuous as flowers for a potential sexual partner that may result in sexual conduct. Offering to engage in sexual conduct after receiving a piece of jewelry or “anything of value” places ordinary citizens at risk of being in violation of the law and creates a grey area that impacts any sexual encounter between adults where gifts, favors, or anything of value including physical contact may be exchanged as part of the courting process. It would be possible under the proposed measure that “anything of value” could include the simple act of buying someone a drink at a bar or a cup of coffee at a Starbucks during discussions about whether to engage in sexual activity to be construed as an act of commercial sexual exploitation.

A solution to narrow the statute is to add the following words/phrases: “explicitly” or “expressly provide,” and “for the sole purpose of” or “strictly in exchange for.” These recommendations would make it clear that this measure was intended for a purely business or transactional sexual encounter as opposed to a dating or ongoing sexual relationship between consenting adults.

We also oppose the amendments to HRS § 712-1202(4) on page 10 which establishes strict liability as to the state of mind with respect to the attendant circumstances that the victim was a minor. The measure will eliminate the defense that the minor represented himself or herself as an adult. It is not uncommon for minors, including those involved in the sex industry, to hold themselves out at an

age older than they are. It would be draconian and unjust to punish someone with a 20-year prison term who possessed the state of mind to commit simple prostitution with someone who he/she legitimately believed to be an adult. Indeed, adults with no intention or desire to engage in sexual conduct with a minor will be subject to a 20-year prison term. Even a defendant who requests to see identification from the minor and is provided with false identification indicating he/she is 18 years old or older would be unjustly subjected to a class A felony.

H.B. No. 887 removes the statute of limitations for sex trafficking. Statutes of limitations have been established to allow for timely prosecution of criminal offenses. With the passage of time, a criminal charge becomes more difficult to defend against and wrongful convictions are more likely to occur. The memories of witnesses become more inaccurate, witnesses are more likely to become influenced by persons who have interests in the case, and relevant evidence is more difficult to obtain. Thus, under the law, criminal charges must be brought within certain time periods following their commission.

Sex trafficking (HRS § 712-1202) is a Class A felony for which there is currently a six-year statute of limitations. This time period is sufficient for timely and just prosecutions in these types of cases.

If the committee is inclined to extend the statute of limitations, this extension should not be applied retroactively to cases in which the applicable statute of limitations has already expired. Put another way, a statute of limitations that has already expired cannot be revived. In fact, the federal courts have prohibited such *ex post facto* applications, holding in *Stogner v. California*, 539 U.S. 607, 123 S.Ct. 2446, 156 L.Ed.2d 544 (2003) that “a law enacted after expiration of a previously applicable time limitations period violates the *Ex Post Facto* Clause when it is applied to revive a previously time-barred prosecution.”

In addition, defining “minor” as a person who is less than eighteen years of age appears inconsistent with the language found in sexual assault statutes involving minors:

HRS § 707-730(1)(b) provides, “A person commits the offense of sexual assault in the first degree if the person knowingly engages in sexual penetration with another person who is *less than fourteen years old*.” (Emphasis added).

HRS § 707-731(1)(d)(i) provides, “A person commits the offense of sexual assault in the second degree if . . . [t]he person knowingly subjects to sexual

penetration a minor who is *at least sixteen years* old and the person is contemporaneously acting in a professional capacity to instruct, advise, or supervise the minor; provided that . . . [t]he person is not less than five years older than the minor.” (Emphasis added).

HRS § 707-732(1)(b) provides, “ A person commits the offense of sexual assault in the third degree if . . . [t]he person knowingly subjects to sexual contact another person who is *less than fourteen years old* or causes such a person to have sexual contact with the person.” (Emphasis added).

HRS § 707-732(1)(c) provides, “A person commits the offense of sexual assault in the third degree if . . . [t]he person knowingly engages in sexual contact with a person *who is at least fourteen years old but less than sixteen years old* or causes the minor to have sexual contact with the person; provided that . . . [t]he person is not less than five years older than the minor; and [t]he person is not legally married to the minor.” (Emphasis added).

H.B. No. 887 also seeks to prohibit defendants originally charged with the offenses of Commercial Sexual Exploitation and Commercial Sexual Exploitation of a Minor from qualifying for a deferred acceptance of guilty or nolo contendere plea.

The courts should be allowed to maintain their discretion on a case-by-case basis to grant deferrals in these types of cases. Courts cannot exercise this discretion without meeting the requirements of H.R.S. § 853-1, which provides, in pertinent part:

(1) When a defendant voluntarily pleads guilty or nolo contendere, prior to commencement of trial, to a felony, misdemeanor, or petty misdemeanor; (2) It appears to the Court that the defendant is not likely to engage in a criminal course of conduct; and

* * * *

(3) The ends of justice and the welfare of society do not require that the defendant shall presently suffer the penalty imposed by law, the court, without accepting the plea of nolo contendere or entering a judgment of guilt and with the consent of the defendant and after considering the recommendations, if any, of the prosecutor, may defer further proceedings.

If this measure passes, defendants originally charged with these offenses under §712- , 712-1207 (2)(b), 712-1209, 712-1209.1, and 712-1209.5 would be prohibited from requesting a deferral of their charges. As stated in HRS Chapter 853, the trial court, after considering the merits of the case, and hearing from the prosecutor, may or may not grant a defendant's motion to defer the proceedings. In order for the trial court to defer the proceedings, ***it must find that the defendant is not likely to re-offend or engage in a (further) course of criminal conduct, and that the ends of justice and welfare of society do not require the defendant receive a criminal conviction.***

Statutory eligibility does not guarantee a deferral – in fact, because of this unusually high standard for granting a deferral, many requests by defendants to defer their criminal pleas are denied by the trial courts. Defendants must still be deemed worthy of a deferral. Criminal history, seriousness of the offense, history of substance abuse, lack of employment, and previous criminal behavior (even if uncharged) are common reasons argued by prosecutors and cited by judges for a denial of a defendant's motion to defer the acceptance of his or her guilty or no contest plea.

Why is it important that some defendants receive deferrals of their criminal proceedings? A criminal conviction follows an individual for the rest of his/her life. It will impact his/her ability to seek and maintain employment and to receive government benefits. A defendant who is youthful, immature, remorseful and is not likely to re-offend should be allowed, in limited circumstances, to be given the opportunity for a second chance -- a chance to avoid a criminal conviction. Police officers, soldiers, government and private sector employees may lose their jobs if they receive a criminal conviction.

Moreover, the possibility of requesting a deferral -- a chance to avoid a criminal conviction -- is a particularly enticing reason for a defendant to waive his right to a trial and enter a plea. Without the possibility of a deferral, a defendant is more likely to elect a trial. Defense attorneys weigh the strength of their case versus the strength of the State's case in determining whether or not to recommend trial. The likelihood of obtaining an acquittal, favorable verdict, or an improved position for sentencing are factors that defense attorneys consider in deciding to recommend a trial or plea. Without a deferral, defendants will often take their chances at trial. And even when a deferral is granted, a defendant must still comply with conditions in order to earn the possibility of expunging their record.

Thank you for the opportunity to provide testimony in this matter.

DEPARTMENT OF THE PROSECUTING ATTORNEY
CITY AND COUNTY OF HONOLULU

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THE HONORABLE MARK M. NAKASHIMA, CHAIR
HOUSE COMMITTEE ON JUDICIARY AND HAWAIIAN AFFAIRS
Thirty-first State Legislature
Regular Session of 2021
State of Hawai`i

February 23, 2021

RE: H.B. 887, RELATING TO SEX TRAFFICKING.

Chair Nakashima, Vice-Chair Matayoshi and members of the House Committee on Judiciary and Hawaiian Affairs, the Department of the Prosecuting Attorney of the City and County of Honolulu (“Department”) submits the following testimony in support of H.B. 887.

The purpose of H.B. 887 is to provide protection for victims of sex trafficking by strengthening and providing clarification to Hawaii’s sex trafficking laws. Specifically this bill:

(1) Creates the offense of “Commercial sexual exploitation” which addresses sex buyers. Currently, the crime of “prostitution” includes two distinct types of criminal conduct (section 712-1200(a), H.R.S. and §712-1200(b), Hawaii Revised Statutes (H.R.S.)). By creating a distinct and separate crime for buyers, this section places emphasis on the individuals who drive the commercial market of sexual exploitation. Having two offenses will allow us to track this arrest and conviction data.

(2) Changes “a fee” to “anything of value”. This will align our statute with the federal definition and numerous other state jurisdictions as it relates to what is exchanged during a transaction. Often, commercial sexual exploitation does not involve the exchange of money, but rather non-monetary items or amenities such as shelter, drugs or food. This amendment will ensure that our sex trafficking statutes encompass all or nearly all transactions.

(3) Removes the statute of limitations as it pertains to sex trafficking offenses. While victims of sex trafficking under the control of their trafficker, they are less likely to seek help from law enforcement or cooperate with law enforcement in a meaningful manner. This routinely leads to delays in reporting and at times expiration of the statute of limitations to prosecute as a criminal offense. By removing the statute of limitations, this bill ensures that if

and when a case is brought, we are not precluded by time. Nevertheless, the Department notes that the passage of time often weakens a criminal case.

(4) Includes “coercion” as a means of advancing prostitution. Currently, H.R.S. §712-1202(a), only states “advancing prostitution...by force, threat, fraud or intimidation,” and there have been instances when our courts indicated that a particular set of facts did not fit within these existing definitions. One example was where a victim was told she could not eat (or sleep) until she finished a certain amount of work. Adding the term “coercion” would also bring Hawaii’s sex trafficking statute in-line with the federal code.

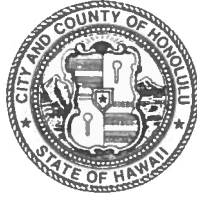
(5) Creates strict liability as to the minor’s age. The Department recognizes that minors are a very vulnerable class and believes that the limited use of strict liability furthers the protections for minors involved in sex offenses; strict liability as to an offender’s knowledge of a minor’s age is already the applicable standard in cases involving sexual assault of a minor. The Department fully supports the concept that sex traffickers should also be strictly liable for knowledge of a victim’s age.

(6) Closes a legal loophole that allows child exploiters to escape liability. Currently, only those who offer, negotiate, or pay the child victim directly are penalized under H.R.S. §712-1209.1. A child victim is not always the one negotiating or being paid directly by the offender. The amendment properly criminalizes those who commercially sexually exploit children regardless of who they negotiate with, which is commonly the trafficker or other third party who is selling the child victim.

For all of the foregoing reasons, the Department of the Prosecuting Attorney of the City and County of Honolulu supports the passage of H.B. 887. Thank you for the opportunity to testify on this matter.

POLICE DEPARTMENT
CITY AND COUNTY OF HONOLULU

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OUR REFERENCE PJ-GK

February 23, 2021

The Honorable Mark M. Nakashima, Chair
and Members
Committee on Judiciary and Hawaiian Affairs
House of Representatives
Hawaii State Capitol
415 South Beretania Street, Room 325
Honolulu, Hawaii 96813

Dear Chair Nakashima and Members:

SUBJECT: House Bill No. 887, Relating to Crime

I am Major Phillip Johnson of the Narcotics/Vice Division of the Honolulu Police Department (HPD), City and County of Honolulu.

The HPD supports House Bill No. 887, Relating to Crime.

This bill creates a separate offense for those who provide anything of value to engage in sexual conduct with another, removes the statute of limitation from the offense of sex trafficking, holds a person strictly liable for sex trafficking of a minor in terms of the victim's age, changes the name of the crime of solicitation of a minor for prostitution to commercial sexual exploitation of a minor, and most importantly, closes loopholes that allow offenders to escape liability. While many bills introduced for this legislative session attempt to address sexual exploitation, this bill proposes comprehensive and robust changes that will help law enforcement effectively investigate sex trafficking cases and hold offenders accountable for their actions.

The HPD urges you to support House Bill No. 887, Relating to Crime, and thanks you for the opportunity to testify.

APPROVED:

Sincerely,

A handwritten signature in black ink, appearing to read "Susan Ballard", written over a horizontal line.

Susan Ballard
Chief of Police

A handwritten signature in black ink, appearing to read "Phillip Johnson", written over a horizontal line.

Phillip Johnson, Major
Narcotics/Vice Division