Hawaii

HRS 0707-0751 ANNOTATIONS

Cross References

Reporting on child abuse, see chapter 350.

Promoting pornography, see §712-1214.

Law Journals and Reviews

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

The Jurisdictional Limits of Federal Criminal Child Pornography Law. 21 UH L. Rev. 73.

COMMENTARY ON §§707-750 AND 751

Act 214, Session Laws 1978, added these sections to prevent the sexual exploitation of children. Dealing with activities involving the participation of children without attempting to define the conduct in terms of pornography, these sections classify the offenses as offenses against the person rather than pornography. It is an offense for anyone to engage in the proscribed activities whether the material or performance involving a minor is pornographic or not. Senate Conference Committee Report No. 27-78, House Conference Committee Report No. 21.

Act 218, Session Laws 1982, amended these sections to clarify that the offense of promoting child abuse applies to the use of minors in pornographic material. Section 707-751 was found to be unconstitutional because "the statute prohibited speech protected by the First and Fourteenth Amendment of the United States Constitution...and because the statute did not incorporate the three-part test defining obscenity as enunciated by the U.S. Supreme Court in the case of Miller v. California, the statute prohibited non-obscene as well as obscene materials." The constitutionality of the section is on appeal but the Legislature found "that any question as to what is being prohibited should be clarified." House Conference Committee Report No. 4, Senate Conference Committee Report No. 3.

Act 91, Session Laws 1988, amended §707-750 by reclassifying the offense of promoting child abuse in the first degree from a class B felony to a class A felony. The legislature found that victims of child abuse are the least able to defend themselves, and the resulting emotional scars of these victims increase the likelihood of further contact with the criminal justice system; therefore, a more severe punishment for this offense is warranted. The legislature also found that reclassifying this offense will make the classification consistent with the current penalty for sexual abuse in the first degree involving a minor. House Standing Committee Report No. 481-88, Senate Standing Committee Report No. 2545.

Act 363, Session Laws 1997, amended §§707-750 and 707-751 to include persons producing or making pornographic material involving minors under the offense of child abuse. The legislature found that under existing child abuse laws, in order for a person to be charged with child abuse, the pornographic materials must show a minor engaged in or assisting others to engage in a sexual act. This loophole in the law allowed persons producing those materials to exploit children by using them in sexually explicit poses without technically violating the law. The legislature believed that it was important to extend the scope of the offense of child abuse to include producing material in which children are exploited through sexually explicit conduct.

The Act also, inter alia, amended the definition of "sexual conduct" to include lascivious exhibition of the genital or pubic area of a minor, and added the definitions of "lascivious" and "community standards", in both §§707-750 and 707-751. Section 707-751 was also amended to include possession of pornographic

material involving children as an offense. Senate Standing Committee Report No. 757, House Standing Committee Report No. 1214.

Act 200, Session Laws 2002, amended these sections by, among other things, defining "child pornography" to encompass computer-generated representations of minors. The legislature found that Act 200 addressed the problem of utilizing computer technology in committing crimes against children. House Standing Committee Report No. 417-02, Conference Committee Report No. 36-02.

Case Notes

Statute not unconstitutionally overbroad. 65 H. 116, 648 P.2d 190.

Hawaii Legal Reporter Citations

Due process. 81-1 HLR 810147.
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[§707-752] Promoting child abuse in the third degree. (1) A person commits the offense of promoting child abuse in the third degree if, knowing or having reason to know its character and content, the person possesses:

(a) Child pornography;

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

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

(2) As used in this section:

"Child pornography" means any pornographic visual representation, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexual conduct, if:

(a) The pornographic production of the visual representation involves the use of a minor engaging in sexual conduct; or

(b) The pornographic visual representation has been created, adapted, or modified to appear that an identifiable minor is engaging in sexual conduct.

"Community standards" means the standards of the State.

"Computer" shall have the same meaning as in section 708-890.

"Lascivious" means tending to incite lust, to deprave the morals with respect to sexual relations, or to produce voluptuous or lewd emotions in the average person, applying contemporary community standards.

"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, and tape or wire recordings.

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

"Pornographic" shall have the same meaning as in section 712-1210.

"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, homosexuality, lesbianism, bestiality, sexual penetration, deviate sexual intercourse, sadomasochistic abuse, or lascivious exhibition of the genital or pubic area of a minor.

"Visual representation" includes but is not limited to undeveloped film and videotape and data stored on computer disk or by electronic means that are capable of conversion into a visual image.

(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 and content of the material. The fact that the person who was employed, used, or otherwise contained in the pornographic material was, at that time, a minor is prima facie evidence that the defendant knew the person to be a minor.

(4) Promoting child abuse in the third degree is a class C felony. [L 2002, c 200, pt of §1]
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[§707-753] Affirmative defense to promoting child abuse. It shall be an affirmative defense to a charge of promoting child abuse in the third degree that the defendant:

(a) Possessed less than three images of child pornography; and

(b) Promptly and in good faith, and without retaining or allowing any person, other than a law enforcement agency, to access any image or copy thereof:

(i) Took reasonable steps to destroy each such image; or

(ii) Reported the matter to a law enforcement agency and afforded that agency access to each such image. [L 2002, c 200, pt of §1]
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HRS 0707-0753 ANNOTATIONS

COMMENTARY ON §§707-752 AND 753

Act 200, Session Laws 2002, added these sections to add the offense of third degree promoting child abuse that prohibits the knowing possession of child pornography and to provide an affirmative defense to [promoting] child abuse that includes cooperation with law enforcement or destruction of the child pornography. House Standing Committee Report No. 417-02.
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[§707-756] Electronic enticement of a child in the first degree. (1) Any person who, using a computer or any other electronic device:

(a) Intentionally or knowingly communicates:

(i) With a minor known by the person to be under the age of eighteen years;

(ii) With another person, in reckless disregard of the risk that the other person is under the age of eighteen years, and the other person is under the age of eighteen years; or

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

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

(i) That is a murder in the first or second degree;

(ii) That is a class A felony; or

(iii) That is an offense defined in section 846E-1;

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

(c) Intentionally or knowingly travels to the agreed upon meeting place at the agreed upon meeting time;

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

(2) Electronic enticement of a child in the first degree is a class B felony. [L 2002, c 200, pt of §1]
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[§707-757] Electronic enticement of a child in the second degree. (1) Any person who, using a computer or any other electronic device:

(a) Intentionally or knowingly communicates:

(i) With a minor known by the person to be under the age of eighteen years;

(ii) With another person, in reckless disregard of the risk that the other person is under the age of eighteen years, and the other person is under the age of eighteen years; or

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

(b) With the intent to promote or facilitate the commission of a felony, agrees to meet with the minor, or with another person who represents that person to be a minor under the age of eighteen years; and

(c) Intentionally or knowingly travels to the agreed upon meeting place at the agreed upon meeting time;

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

(2) Electronic enticement of a child in the second degree is a class C felony. [L 2002, c 200, pt of §1]
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HRS 0707-0757 ANNOTATIONS

COMMENTARY ON §§707-756 AND 757

Act 200, Session Laws 2002, added these sections to create criminal offenses relating to electronic enticement of a child. The legislature found that Act 200 addressed the problem of utilizing computer technology in committing crimes against children. Conference Committee Report No. 36-02.
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[§707-758] Sexual exploitation of a minor. [Section repealed July 1, 2004. L 2002, c 240, §11.] (1) A person commits the offense of sexual exploitation of a minor if that person:

(a) Intentionally, knowingly, or recklessly engages or retains the services of a minor for money or property in consideration to:

(i) Provide, to patrons or customers of a public establishment, exotic or nude dancing or entertainment;

(ii) Provide exotic or nude dancing or entertainment in a private club or event; provided that a patron or customer of a private club or event shall be deemed to engage or retain the services of a minor for purposes of this section; or

(iii) Provide erotic or nude massage services if the person massaged or performing the massage is nude; or

(b) Entices customers through advertising that offers services of a minor in any manner prohibited under paragraph (a).

(2) As used in this section:

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

"Minor" means any person less than eighteen 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.

"Property" means personal property, real property, evidence of debt or contract, or any kind of article of value.

(3) Sexual exploitation of a minor is a class B felony.

(4) A conviction under this section shall subject the defendant to section 712A-4, if applicable. [L 2002, c 240, §2]
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HRS 0707-0758 ANNOTATIONS

COMMENTARY ON §707-758

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.
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