



# Anti-Human Trafficking Legislation Proposal for the 2012 Legislative Session

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A Comprehensive Approach

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## EXECUTIVE SUMMARY

### Practical Purpose of this Legislation Packet

The primary purpose of this Legislation Packet is to align Washington's human trafficking law with the comprehensive model state law and other relevant research. Making this available to the public provides an open-process in the legislative process before each of the nine concepts included in this packet are written into bills. Every stakeholder's input is invaluable, and will also achieve the following goals:

First, this open-process will lead to bills written **applicable to the facts and needs in Washington state** because practitioners can offer invaluable practical input.

Second, this open-process will **enhance the probability of passing them into law** because legislators, grassroots advocates, practitioners, and even potential opponents have all been informed and, ideally, are in agreement with the content of the bill.

Third, this process is **an education process that empowers grassroots advocates** to effectively speak to their legislators on the importance of each concept and advocate in favor of this bill.

### Summary of Content

Washington Engage's mission is to eradicate sex and labor trafficking by providing knowledge and tools that empower government, business and grassroots leaders to take action. For the 2012 Legislative Session, it is our intent to align Washington's human trafficking law with the comprehensive model state law and other relevant research. The policy goals behind the nine legislative concepts in this packet are targeting buyers of sex, improving victim protection, focusing on prevention education, and broadening our criminal provisions to encompass all known forms of modern-day slavery.

### Part I

In order to reach these goals, Washington Engage developed this Anti-Human Trafficking Legislation Proposal, in which we articulate our policy position and our approach in Part I. Although most of the legislative concepts in Part II may appear to only target sex trafficking, Washington Engage's is proposing a practical dual-approach to combat both sex and



labor trafficking in the business sector by regulating those who are subjectively bad actors, and engaging good businesses in proactive prevention.

## Part II

The first three proposals **target buyers** and ask for **stricter penalties with no fiscal note**: (1) Courts should be required to order mandatory restitution for victims of human trafficking, (2) fines for human trafficking related crimes should be established or raised, and (3) property forfeiture should be available in human trafficking cases.

The next three proposed actions aim at **protecting victims**: (4) civil remedies should be made available for *all* victims of human trafficking related crimes, (5) a judicial proceeding to vacate crimes committed as a human trafficking victim should be established, and (6) the Office of Superintendent of Public Instruction should be required to provide educational materials on human trafficking and on how to identify victims to all public school employees.

The last three proposals focus on **broadening Washington's criminal provisions** to effectively prosecute all crimes related to human trafficking: (7) laws should be updated so that Interactive Website Providers such as Craigslist can be held criminally liable for third party content related to advancing prostitution, (8) "sexually explicit performance", which is not included in our code's commercial sex act definition<sup>1</sup>, should be added as a form of human trafficking in order to prosecute traffickers who force their victims to work in strip clubs, appear in pornographic recordings, etc., and (9) Commercial Sexual Abuse of Minors should be added to the list of criminal street gang-related offense to allow adding penalties in cases where Commercial Sexual Abuse of Minors is committed related to gang crimes.

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<sup>1</sup> Per SB 5546 Sec. 2 (c), "commercial sex act" means any act of sexual contact or sexual intercourse for which something of value is given or received.



## Washington Engage Policy Position and Anti-Human Trafficking Legislation Recommendations Packet

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## I. Policy Position of Washington Engage

Washington State has been a leader in anti-human trafficking legislation amongst the 50 states, but research and legislation around the country continue to show the need for a comprehensive approach to accomplish the 4Ps (Prevention, Protection, Prosecution, and Partnership) of anti-trafficking policies.

### 1. Policy Themes for 2012

While Prosecution focuses on the traffickers, Prevention focuses on raising awareness. Practitioners and researchers are now advocating a new approach that combines these two Ps into an emphasis called “**End Demand.**” This approach originated in Sweden where the law shifted to enhance penalties on buyers in 1999 on the basis of gender equality. The Swedish model has been successful in shifting the social norm that “men will buy sex” to a reluctance to buy sex. A few legislation concepts proposed in Part II are based on principles derived from this End Demand approach.<sup>2</sup>

- a. **Target Buyers of Sex** by enhancing penalties on buyers of sex because research that survey buyers consistently conclude that they are easier to be deterred by higher penalties than traffickers..
- b. **Improve Victim Protection** by enhancing financial penalties on both the suppliers and buyers of sex human trafficking to provide funding desperately needed for victim restoration and prevention measures.
- c. **Ensure the Same Rights and Protection** for victims of all forms of human trafficking: Several of our state’s criminal codes have common elements that meet the standard of modern-day slavery.<sup>3</sup>
- d. **Primary Prevention** includes disseminating prevention materials in schools.
- e. **Broaden and Update our criminal provisions** to properly prosecute those who engage in the various forms of modern-day slavery.

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<sup>2</sup> See Appendix for a summary of a few key principles that support the End Demand approach.

<sup>3</sup> Human trafficking, commercial sexual abuse of minors, and promoting prostitution I all meet the standard of modern-day slavery. States like Minnesota and Maryland have combined promoting prostitution and sex trafficking into the same code.

## 2. Engaging and Regulating Businesses

In their efforts to fight sex and labor trafficking in Washington state, consumers and legislators are increasingly proposing and supporting laws that regulate Washington's businesses. In the past two years alone, our State Legislature passed or updated two such laws ([HB 1133](#) and [SB 6332](#)). Similarly, California legislators passed the Transparency in Supply Chain Act<sup>4</sup>, which impacts many Washington-based businesses and requires public disclosure of supply chain and trafficking prevention policies. On the federal level, this law is now being considered as a possible amendment to the Trafficking Victims Protection Reauthorization Act ([HR 2830](#)). If successful, this amendment would impact all businesses in the U.S. with gross receipts of over \$100 million. As the momentum behind the abolitionist movement is growing rapidly, consumers are putting increasing pressure on legislators to regulate the business community with regard to sex and labor trafficking.

At Washington Engage, we believe integrating prevention of human trafficking into businesses' strategy and operation is inevitable because of the aforementioned legislation and increasing consumer demand. For this reason, we advocate a dual approach regarding the business sector. First, promote legislation that target businesses knowingly or has reason to know that they engage in illicit practices like some massage parlors and even some interactive website providers. Second, promote self-regulation by encouraging businesses to adopt policies and practices that are effective and low cost. The latter is a common sense approach that will not only promote effective prevention of human trafficking, but encourage businesses to become socially responsible while requiring minimal government resources to legislate and regulate.

To help achieve business self-regulation, **Washington Engage is launching a business-facing social responsibility initiative to empower local businesses and business associations to recognize and prevent trafficking.** We provide local businesses with *effective policies* and *best practices* to prevent trafficking-related risks, build a peer-to-peer network, and engage government leaders. By joining this initiative, businesses **mitigate risks**, **prevent costly legislation**, and **attract new customers** while providing leadership that builds safer, thriving communities.

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<sup>4</sup> This Act was passed in 2010 with a 1/1/2012 effective date. [http://www.leginfo.ca.gov/pub/09-10/bill/sen/sb\\_0651-0700/sb\\_657\\_bill\\_20090227\\_introduced.pdf](http://www.leginfo.ca.gov/pub/09-10/bill/sen/sb_0651-0700/sb_657_bill_20090227_introduced.pdf)



Please join our efforts to help small to medium size businesses fight trafficking in our communities. **Legislators**, your leadership can influence and assist business associations to create effective policies in partnership with government agencies. **Business owners and trade associations**, your voice can raise awareness within the business community and promote business-initiated policies that will protect businesses and our communities from this crime. **Grassroots advocates**, you can use your consumer power to create change in business practices in your backyard.

## II. Legislation Proposal

### 1. Mandatory Restitution Penalties for Promoting Prostitution I, Human Trafficking, and Promoting Commercial Sexual Abuse of Minors

#### a. Policy Rationale

Mandatory restitution is an important justice tool to compensate actual losses incurred by human trafficking victims as they are in desperate need for restoration. Restitution usually includes losses actually incurred, not future medical and mental rehabilitation. Polaris Project's model human trafficking statute has specific language recommendation available for this statute. The National Association of Attorneys General's Pillars of Hope Presidential Initiative has made this provision a legislative goal for all states.

#### b. Current Washington State law

Per RCW 9.94A.753, restitution shall be ordered under the following conditions:

- i. When the offense results in injury to any person or damage to or loss of property (9.94A.753 (5)); and
- ii. In all cases where the victim is entitled to benefits under the Crime Victims Compensation Act (Chapter 7.68 RCW). The Department of Labor and Industries ("L&I"), which administers the crime victims compensation fund "may petition the court within one year of entry of the judgment and sentence for entry of a restitution order." (9.94A.753 (7)).

Since Commercial Sexual Abuse of Minors (CSAM) victims are entitled to crime victims' compensation per Sec. 6 of [SB 6476](#) passed in 2010, our current code mandates the court to order restitution or the Department of L&I may petition. It is not clear whether restitution was ordered in the two known CSAM conviction cases in 2011.

[http://seattletimes.nwsourc.com/html/localnews/2014898331\\_pimp29m.html](http://seattletimes.nwsourc.com/html/localnews/2014898331_pimp29m.html)

[http://www.pnwlocalnews.com/south\\_king/aub/news/115684364.html](http://www.pnwlocalnews.com/south_king/aub/news/115684364.html)

(In addition, the current RCW 7.68.070 online appears not consistent with the session law Sec. 6 of SB 6476.)

#### c. Similar Federal and State Legislation

Mandatory restitution is available for human trafficking victims under federal law [18 USC 1593](#), and in recent comprehensive human trafficking bills passed in Vermont's [H.153](#) and in Massachusetts' [S00820](#) in 2011. Mandatory restitution usually pays the victim for lost income, attorney's fees, medical expense and other professional services, and other expenses the victim actually incurs

Cases of restitution in federal courts:

- *US v. Sabhmani*, 599 F.3d 215 (2<sup>nd</sup> Cir. 2010)
- The fund should go directly to compensate for the survivor’s work, even if illegal. See *US v. MAMMEDOV*, 304 Fed.Appx. 922, 2008 WL 5411080 (C.A.2 (N.Y.)).
- **Tacoma Man Gets 9-Year Term For Sex Trafficking [Washington]:** A 24-year-old Tacoma man was sentenced to nine years in prison for human trafficking. The judge also added three years of supervised release and imposed a \$130,000 restitution fee. Source: <http://www.thenewstribune.com/2011/09/30/1845849/tacoma-man-gets-9-year-term-for.html>]

d. Proposed language

One of the End Demand principles supports no differentiation in policy between sex human trafficking and promoting prostitution. Therefore, the recommendation is to require the court to order mandatory restitution during sentencing for:

- i. victims of human trafficking (RCW 9A.40.100), promoting prostitution I (RCW 9A.88.070), and promoting commercial sexual abuse of minors (RCW 9.68A.101) during sentencing; and
- ii. defendants who plead guilty to lesser offenses from those listed above based on the prosecutor’s recommendation.

Also, include specific language of the restitution requirement in RCW 9.94A.753 next to the felony level of all these crime’s codes (RCW 9A.40.100, 9A.88.070, 9.68A.101) to emphasize its importance and implementation.

## 2. Raise Fines for Offenders of the Following Crimes: Human Trafficking, Promoting Prostitution, Patronizing a Prostitute, and Permitting Prostitution

### a. Policy Rationale

Raising fines will not only lower the supply and demand<sup>5</sup> for commercial sex; collected fines will be used to support victim restoration, police training, and reverse sting operations.

### b. Current Washington State Law

No fine is attached to those convicted of human trafficking under RCW 9A.40.100. Promoting prostitution fine is merely \$300 while patronizing a prostitute is \$150 (RCW 9A.88.120). Fines for crimes related to commercial sexual abuse of minors were raised in 2010 to \$5000 (RCW 9.68A.105).

### c. Similar Federal and State Legislation

The strategy of raising fines was successful in Sweden as well as in Chicago, where the fines collected were used to help prostituted people.<sup>6</sup> (See Appendix for more information.)

### d. Proposed language

- i. Impose a \$3000 fine on defendants convicted of human trafficking under RCW 9A.40.100.
- ii. Raise the current fine for promoting prostitution under RCW 9A.88.070-080 from the current \$300 to \$2500. (RCW 9A.88.120 (1)(c)) Repeated offender will pay \$3500 and will be a registered sex offender.
- iii. Raise the current fines for patronizing a prostitute under RCW 9A.88.110 from \$150 to \$1500. (RCW 9A.88.120 (1)(c)) Repeated offender will pay \$2500 and will be a registered sex offender.
- iv. Raise the current fines for permitting prostitution under RCW 9A.88.090 from \$50 to \$1500. (RCW 9A.88.120 (1)(c)) Second offense will be \$2500 and \$5000 thereafter.
- v. The offender's fine paid to the State in i-iii will be reduced by the amount paid to a lower level jurisdiction that imposes a fine for similar crime also.

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<sup>5</sup> See Appendix # B quoting research that support the potential effectiveness of ending demand when buyers have to pay a substantial fine.

<sup>6</sup> In 2009 alone, \$16,000 in fines was collected. Shively, M., McLaughlin, K, Durchslag, R., McDonough, et al, (August 2010). *Developing a National Action Plan for Eliminating Sex Trafficking. Final Report.* (6-19)



- vi. Eliminate all offenders of prostitution related crimes' option to have their fines dismissed when they choose statutory or non-statutory diversion agreement at whatever level of jurisdiction. See RCW 9.68A.105 (1)(b) & (c) and RCW 9A.88.120
- vii. Add language in the escape clause per RCW 9.68A.105 (1)(b) & (c) that the defendant has to show documents to prove the inability to pay fines.

### 3. Property Forfeiture for Human Trafficking Crimes

#### a. Policy Rationale

Our state law in RCW 69.50.505 details the various circumstances under which real or personal property may be subject to seizure and forfeiture when such property has a nexus with the manufacturing or commercial sale of controlled substance.

Enacting similar forfeiture provisions for human trafficking will deter those who engage in this crime and can provide additional funding for victim protection.

#### b. Current Washington State Law

- i. See current Seizure and Forfeiture codes related to controlled substances under RCW 69.50.505,
- ii. A bill ([HB 2952](#)<sup>7</sup>) proposed in 2008 was an attempt of property forfeiture for property related crimes when the local governing authority has designated an area subject to conveyances based on evidence of disproportionate arrest related to prostitution crimes. The language in this bill may have a vagueness issue because it did not prescribe the basis on which a local governing authority should designate an area.

#### c. Similar Federal and State Legislation

- i. Georgia's HB 200<sup>8</sup> (Section 1 (g)) included forfeiture of property: *All real and personal property of every kind used or intended for use in the course of, derived from, or realized through a violation of this Code section shall be subject to forfeiture to the state.*
- ii. Federal law under [18 USC 1594\(d\)](#)  
The court shall order a defendant convicted of human trafficking charges to forfeit to the United States
  - any property, real or personal, that was used or intended to be used to commit or to facilitate the commission of such violation; and
  - any property, real or personal, constituting or derived from, any proceeds that such person obtained, directly or indirectly, as a result of such violation

#### d. Proposed action

The current Seizure and Forfeiture Code in the Uniform Controlled Substance Act can be modified to suit human trafficking cases. The actual language in the code should be a product of recommendations from police and victim advocates who have worked with such cases.

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<sup>7</sup> <http://apps.leg.wa.gov/documents/billdocs/2007-08/Pdf/Bills/House%20Bills/2952-S.pdf>

<sup>8</sup> Georgia HB200, [http://www1.legis.ga.gov/legis/2011\\_12/versions/hb200\\_HB\\_200\\_APP\\_7.htm](http://www1.legis.ga.gov/legis/2011_12/versions/hb200_HB_200_APP_7.htm), Sec. 1 (g).

#### 4. Include Commercial Sexual Abuse of Minors (CSAM) and Promoting Prostitution I into the Criminal Profiteering Act and Raise Awareness of this Civil Remedy Rights' Availability

##### a. Policy Rationale

Civil remedy is an important justice tool available for human trafficking victims. While mandatory restitution is limited to actual losses and damage a victim incurs, judgments from civil actions provide for future counseling and medical services. Moreover, a victim can file for civil remedies without a criminal conviction of the perpetrator. Because victims of Commercial Sexual Abuse of Minors and Promoting Prostitution I often are subject to elements of human trafficking, the same civil remedies should also be available for these victims.

##### b. Current Washington State Law

- i. Human trafficking victims can file for civil remedies under the state's Criminal Profiteering Act **without requiring the perpetrator to be convicted** of the crime. The Attorney General's Office or the county prosecutor can also file on behalf of the victim. RCW 9A.82.100 (1)(b).
- ii. In addition to civil remedies, RCW 9A.82.120 also permits the state Attorney General or county prosecutors to file a lien on the defendant's property once criminal action related to human trafficking is filed.
- iii. This provision was passed in 2003, making Washington the first state to provide civil remedy for human trafficking victims. However, no action has been filed under this provision yet.
- iv. Polaris Project rated Washington State as not having this provision in their [state rating report](#). Washington Engage has notified them of this omission, and Polaris Project has responded to correct this rating in their next report after their verification process.

##### c. Similar Federal and State Legislation

- i. The Predator Accountability Act<sup>9</sup> was adopted in Illinois in 2006, but no case has been filed under this act either as of the end of 2010.
- ii. Federal legislation has made this civil remedy available to trafficking victims as part of the TVPRA of 2003. (18 USC 1595)

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<http://ilga.gov/legislation/ilcs/ilcs3.asp?ActID=2812&ChapAct=740%26nbsp%3BILCS%26nbsp%3B128%2F&ChapterID=57&ChapterName=CIVIL+LIABILITIES&ActName=Predator+Accountability+Act%2E>



d. Proposed language

- i. Insert CSAM and Promoting Prostitution I codes next to the human trafficking code in RCW 9A.82.100 (1)(a).
- ii. Washington Engage and our partner organizations would like the Attorney General's Office to reach out to the Washington State Bar Association and the Washington Association of Prosecuting Attorneys to educate their members on the availability of this provision.

## 5. Vacate Convictions for Human Trafficking Survivors

### a. Policy Rationale

Probable cause to arrest is the only means to retain law enforcement's authority to remove victims from danger because human trafficking victims are often in denial of their victimization or are under great fear to seek help. Therefore, retaining language in our law prohibiting prostitution regardless of age is imperative for the purpose of removing victims from their traffickers who are often violent. In order to properly protect human trafficking victims, a judicial proceeding to vacate crimes committed as a human trafficking victim should be available to ensure that these crimes can be expunged from their records.

### b. Current Washington State law

- i. Only prostituted minors are decriminalized for first alleged prostitution offense per SB 6476 passed in 2010. (RCW 13.40.070)
- ii. In 2009, the Legislature under HB 1505 adopted a hybrid model, giving prosecutors the discretion to divert if the victim agrees to participate in a wraparound services program when it is available. (RCW 13.40.213). In Washington, only the City of Seattle has this program available.
- iii. Current RCW related to vacating criminal records is under RCW 9.94A. 640.

### c. Similar Federal and State legislation

States with the legal procedures available for vacating convictions for human trafficking survivors are [Maryland](#)<sup>10</sup>, [Nevada](#)<sup>11</sup>, [Illinois](#)<sup>12</sup>, and [Pennsylvania](#)<sup>13</sup>.

- i. [In Georgia](#)<sup>14</sup>, the law provides an affirmative defense to sexual crimes when the accused can show that he or she is a victim of human trafficking.
- ii. These states enacted a defense or vacation proceeding for sex trafficking victims' sexual crimes **only**, but not other crimes that traffickers often coerce or deceive victims to commit.

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<sup>10</sup> Maryland's Senate Bill 327 <http://mlis.state.md.us/2011rs/billfile/sb0327.htm>

<sup>11</sup> Nevada's AB 6 [http://www.leg.state.nv.us/Session/76th2011/Bills/AB/AB6\\_EN.pdf](http://www.leg.state.nv.us/Session/76th2011/Bills/AB/AB6_EN.pdf)

<sup>12</sup> Illinois SB 2191,

<http://www.trendtrack.com/taxis/walks/il/text.html?link=http%3A//www.ilga.gov/legislation/BillStatus.asp?DocNum%3D2191%26GAID%3D11%26DocTypeID%3DSB%26LegID%3D58390%26SessionID%3D84%26GA%3D97>

<sup>13</sup> Pennsylvania S 885,

<http://www.legis.state.pa.us/cfdocs/billinfo/billinfo.cfm?syear=2011&sind=0&body=S&type=B&BN=0885>

<sup>14</sup> Georgia HB200, [http://www1.legis.ga.gov/legis/2011\\_12/versions/hb200\\_HB\\_200\\_APP\\_7.htm](http://www1.legis.ga.gov/legis/2011_12/versions/hb200_HB_200_APP_7.htm)

d. Proposed language

A judicial proceeding to vacate all criminal records should be available in cases where evidence supports that the accused committed crimes because of force, fraud, or coercion as a human trafficking victim. For minors who are victims of commercial sexual abuse and the crime considered for the vacating proceeding is related to sexual crimes, no force, fraud or coercion by the trafficker should be required for the vacating conviction decision.

**6. Require the Office of Superintendent of Public Instruction (OSPI) to use existing funding to work with the Office of Crime Victims Advocacy to provide materials on human trafficking to all directors of student services and develop a strategy to prevent trafficking of children**

a. Policy Rationale

Primary prevention aims at stopping events before they occur, or ensuring that people do not become afflicted by crime (or disease), rather than treating its symptoms. Primary prevention in the education system entails two levels of strategy. First, raise awareness amongst staff on human trafficking and to develop a strategy of prevention. Second, consider integrating awareness of human trafficking to educate youth about the risk of becoming prostituted, the risk of pornography addiction that contributes to the demand for buying sex and other forms of sexual exploitation.

b. Current Washington State law

None.

c. Similar Federal and State legislation

Maryland passed [a bill](#) requiring the state's Department of Education (MSDE) to use existing funding to provide awareness and training on human trafficking for directors of student services in local school systems, including strategies for the prevention of trafficking of children.

d. Proposed action

The OSPI shall use existing funding and resources available from NGOs and the Office of Crime Victims Advocacy to provide materials on human trafficking to all directors of student services, and to develop a strategy to prevent trafficking of children.

Due to limited funding, it is difficult for the OSPI to carry out the task of providing prevention materials. The OSPI can work with the Office of Crime Victims Advocacy and/or with existing non-governmental organizations (NGOs) similar to the way the 2010 human trafficking poster bill was delegated to Seattle Against Slavery to work with the Department of Transportation.

## 7. Update Promoting Prostitution II to Open a Path to hold Interactive Website Providers Criminally Liable for Third Party Content related to Advancing Prostitution.

### a. Policy Rationale

The internet has shifted the majority of prostitution and sex trafficking activities from the street to the internet. Collaborative joint actions taken by many state attorneys general requesting interactive website (IW) providers like Craigslist to monitor such postings have produced some effect, but these activities have not diminished even after Craigslist shut down their “Erotic Service” section. Legal scholars have been advocating policy change by updating criminal codes to impose criminal liability on IW providers who have knowledge or should have known of such posting, and do not abate the problem.<sup>15,16</sup> Their writings explore various ways that law makers could find possible inroads to update codes to hold IW providers criminally liable their sites target specific geographic locations in our State, have reason to know that third party content on their sites “advance prostitution,” and fail to provide adequate defense.

Combinations of actions that include prosecutors putting IW providers on notice of possible criminal liability, requesting IW providers to proactively abate the problem through technology and/or manual monitoring, and updating relevant codes are needed to possibly open the path to hold them criminally liable.

### b. Current Washington State law

Several key elements in Promoting Prostitution II and our state’s corporate criminal responsibility (RCW 9A.08.030) are quite broad to make holding IW providers criminally liable for third party content a possibility.

- i. Knowledge (9A.08.010) implies knowledge based on inquiry notice, not only subjective knowledge.
- ii. Advance prostitution (9A.88.030) includes “*he who causes or aids a person to commit or engage in prostitution, procures or solicits customers for prostitution ... engages in any other conduct designed to institute, aid, or facilitate an act or enterprise of prostitution.*”
- iii. High managerial agent (9A.08.030(1)(c)) means “*an officer or director of a corporation or any other agent in a position of comparable authority with respect to*

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<sup>15</sup> John E.D. Larkin, *CRIMINAL AND CIVIL LIABILITY FOR USER GENERATED CONTENT: CRAIGSLIST, A CASE STUDY*, Journal of Technology Law and Policy (June 2010).

<sup>16</sup> Shahrzad T. Radbod, *CRAIGSLIST--A CASE FOR CRIMINAL LIABILITY FOR ONLINE SERVICE PROVIDERS*, Berkeley Technology Law Journal, Annual Review 2010.

*the formulation of corporate policy or the supervision in a managerial capacity of subordinate employees.”*

**c. Similar Federal and State legislation**

Court cases have upheld immunity in favor of IW providers for third party’s content under the Communications Decency Act ([47 U.S.C. § 230\(c\)](#))<sup>17</sup>. In addition, the Communications Decency Act (CDA) also includes a section ([47 U.S.C. § 230\(e\)\(3\)](#)) that bars state laws from imposing civil liability that are inconsistent with the aforementioned section in the Act. However, the CDA does not provide unlimited immunity to IW providers on publication of third-party content based on criminal liability and state laws that are consistent with this section.<sup>18</sup>

Caselaw: In Fair Housing Council of San Fernando Valley v. Roommates.Com, LLC, 521 F.3d 1157 C.A.9 (Cal.), 2008,<sup>19</sup> the 9<sup>th</sup> Circuit imposed civil liability on the defendant for violating the Fair Housing Act because it *materially* contributed to the violation based on the design of its interactive service. This is a departure from the argument that the CDA provides unlimited immunity to IW providers for third party contents.

**d. Proposed language**

Promoting Prostitution II in RCW 9A.88.080 should be amended as follows.

(1) A person is guilty of promoting prostitution in the second degree if he or she or a corporation knowingly or has reason to know:

- (a) Profits from prostitution; or
- (b) Advances prostitution.

(2) Where a corporation profits from or advances prostitution using a computer, computer network, or the Internet, it shall be an absolute affirmative defense that the corporation employed a filtering program designed to prevent advancing or profiting from prostitution, or took other steps to avoid advancing or profiting from prostitution that were reasonable under the circumstances.

(3) Promoting prostitution in the second degree is a class C felony.

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<sup>17</sup> [Zeran v. America Online, Inc., 129 F.3d 327, 330 \(4th Cir.1997\)](#)

<sup>18</sup> 47 USC § 230 (e) (1,3). <http://codes.lp.findlaw.com/uscode/47/5/II/I/230>

<sup>19</sup> In Roommates.com, the court held the defendant liable for violating the Fair Housing Act which is the same civil violation charged in Chicago Lawyers, because it “materially contributed” to the content of the website that violated the Fair Housing Act.

## 8. Add “Sexually Explicit Performance” as a Form of Servitude Punishable under Promoting Commercial Sexual Abuse of a Minor and Human Trafficking.

### a. Policy Rationale

Modern-day slavery appears in a variety of forms, and how the human trafficking code is written determines what type of modern-day slavery can be prosecuted. Because human trafficking should cover all activities capable of generating a profit for exploiters, from housework to agricultural work to commercial sex acts, the definition used should be very broad.<sup>20</sup> “Sexually explicit performance” goes beyond the definition of commercial sex act (sexual intercourse or sexual contact) and includes “a broader range of commercial sexual acts, including activity that may be legal in the absence of coercion or the involvement of minors.”<sup>21</sup> Including this is important as there are known cases in other states where traffickers who placed minors working in strip clubs were prosecuted under sex trafficking.

### b. Current Washington State law

Our human trafficking and CSAM codes only include commercial sex act which is limited to either sexual intercourse or sexual contact. Therefore, victims who are subject to “only” sexually explicit conduct or performance (stripping, pornographic recording, etc.) not involving sexual contact are not considered human trafficking victims in Washington State.

Some argue that sexually explicit performance can already be prosecuted as involuntary servitude or forced labor, but this argument puts minors at a great disadvantage because unlike sex trafficking, “labor” and involuntary servitude types of trafficking require proof of force, fraud, or coercion for minors.

### c. Similar Federal and State legislation

At least 11 states (AL, AZ, IA, MD, MI, MN, NH, NY, OK, RI, SC) include “sexually explicit performance” into their human trafficking code to prosecute traffickers who gain anything of value by subjecting their victims to sexually explicit performance. The definition for “sexually explicit performance” commonly used by these states is “a live or

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<sup>20</sup> “Commentary of MODEL PROVISIONS OF COMPREHENSIVE STATE LEGISLATION TO COMBAT HUMAN TRAFFICKING,” Polaris Project, p.1.

<sup>21</sup> “Top 15 Problem Areas in State Bills in Trafficking in Persons,” Polaris Project, Problem #4.  
[http://www.polarisproject.org/storage/documents/policy\\_documents/Top%2015%20Problem%20Areas%20in%20State%20Bills%20on%20Trafficking.pdf](http://www.polarisproject.org/storage/documents/policy_documents/Top%2015%20Problem%20Areas%20in%20State%20Bills%20on%20Trafficking.pdf)

public act or a recording intended to arouse or satisfy the sexual desires or appeal to the prurient interest of patrons.” No proof of force, fraud or coercion is required for victims under 18 years of age. Kansas does not have “sexually explicit conduct/performance,” but includes an alternative broad wording, “satisfies the sexual gratification of the person or another.”

b. Proposed language

Because human trafficking victims of all ages are known to be subject to sexually explicit conduct or performance (stripping, pornographic recording, etc.), both the human trafficking code and CSAM code should include “sexually explicit performance” and provide this definition:

- “a sexual act performed in public or private, recorded or live, intended to arouse or satisfy the sexual desires or appeal to the prurient interest of patrons.

## 9. Including CSAM into the Gang Crime

### a. Policy Rationale

Law enforcement is noticing the increase in gangs prostituting minors to support their gang life styles.<sup>22</sup> Including CSAM as a gang crime will enable adding penalties if sentencing enhancement is sought in cases where CSAM committed is related to gang crimes.

### b. Current Washington State Law

Human trafficking and promoting prostitution are both included in the definition of criminal street gang-related offense in RCW 9.94A.030 (14)(f).

### d. Similar Federal and State legislation

California added pimping and human trafficking to their criminal street gang crime in 2011 per ab 918.

### e. Proposed language

Promoting commercial sexual abuse of minors (9.68A.101) should be added to the definition.

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<sup>22</sup> On 12/4/2010, Yakima Herald reported that an 11-year old was prostituted by gang. <http://www.yakima-herald.com/stories/2010/12/04/ganging-together>

## Appendix: Recent research emphasizes End Demand to Combat Sex Human Trafficking

Washington Engage’s Law and Policy focus has been conducting studies based on legal scholars and practitioners’ recommendations at both the national and local levels.

A. The focus on prostituted youth (and not adults) limits the potential to combat the overall problem of sex trafficking.<sup>23</sup>

**Common perception:** *Focusing on commercial sexual exploitation of minors is “low-hanging fruit” and can produce easy “wins” to build public support.*

**Truth:** *Law is a codification of social norms and values, and provides parameters, mandates, and authority for taking action against proscribed behavior.* (Shively, 10-1)

- Instead of focusing on sexual exploitation of minors, combating sex trafficking requires changing the social norm that “men will buy sex<sup>24</sup>” because a “substantial portion of the population accepts, tolerates commercial sex<sup>25</sup>”. The Swedish model’s success in raising fines and penalty on buyers has not only raised a substantial sum to assist victims, but the law also aimed at enhancing gender equality. Evidence shows gender equality was enhanced because it has created a normative “paradigm shift” in Sweden from “men will buy sex” toward a reluctance to buy sex (Shively 10-13, 14).
- Victims of human trafficking, promoting prostitution, or commercial sexual abuse of minors (CSAM) are all subject to similar treatments by their pimps or traffickers. Currently, victims of promoting prostitution, CSAM, and human trafficking have different rights in our state code. For this reason, prosecutors’ discretion in choosing which code to use greatly affects the rights available to the victim.

**Recommendation:** all codes related to prostitution should be reviewed together with human trafficking codes to effectively combat sex trafficking by shifting social norms through law codification, and to confer equal victim rights to prostituted persons.

B. Focus should be on End Demand, i.e. targeting buyers in order to advance primary prevention

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<sup>23</sup> Shively, M., McLaughlin, K, Durchslag, R., McDonough, et al, (August 2010). *Developing a National Action Plan for Eliminating Sex Trafficking. Final Report.* (2-53)

<sup>24</sup> Police’s anecdotal comment shows that even some jurors appeared to express sympathy for buyers who are merely seeking a date when they patronize a “prostitute.”

<sup>25</sup> *Ibid*, Note 1, (2-52)

***Common perception:** most people and policy-makers tend to focus on the villains by prosecuting traffickers, and the most vulnerable by servicing victims. (Shively 2-49)*

***Truth:** Evidence shows that focusing on prosecuting buyers (johns) will produce a greater impact on commercial sex markets than merely prosecuting pimps, the supplier.<sup>26</sup> Lowering demand will remove the other side of the equation that fuels the growth of sex trafficking.*

- Research shows that there are lessons to be learned from the collective evidence that the prosecution of drug traffickers only shows marginal or temporary impact on drug trafficking. As long as the demand for commercial sex is strong, pimps and traffickers will find ways to avoid prosecution.
- A substantial number of men said they would not have purchased sex if they had known the harm to the prostituted person, and that they would not purchase sex if they knew they would be caught.
- Studies show that the following consequence will deter men who buy sex for reasons other than pathological sickness<sup>27</sup>:
  - public exposure such as a billboard announcement, a newspaper notice, or an Internet webpage; or a letter to their family or employer
  - increased fines, increased criminal penalties, suspension of driver's license, or car impoundment as deterrents if laws and penalties were actually enforced<sup>28</sup>

**Recommendation:** Focus on End Demand Strategy through **education** and **law enforcement intervention focusing on end demand.**<sup>29</sup>

C. End Demand cannot separate prostitution and sex trafficking

***Common perception:** decriminalizing prostitution should be available to those who choose to be sex workers and law enforcement should not target them.*

***Truth:** Decriminalizing prostitution is not the answer because evidence from the Netherlands and Germany where prostitution is legal suggests that sex trafficking actually increases greatly as a result of decriminalization.*

Practitioners emphasize that education and law enforcement cannot practically differentiate between prostitution and sex trafficking. Therefore, in order to end trafficking, End Demand necessitates targeting those who patronize prostitutes and not be concerned about whether the prostituted person is a trafficking victim or not.

<sup>26</sup> *Ibid*, (2-54)

<sup>27</sup> *Ibid*, A) Seeking Intimacy; B) Seeking sex without intimacy; C) Seeking variety; D) Seeking thrills.

<sup>28</sup> Samantha Healy Vardaman & Linda Smith, *A Legislative Framework for Combating Domestic Minor Sex Trafficking*, Regent University Law Review, 280-281 (2010-2011).

<sup>29</sup> *Ibid*, Note 1, (5-2)

**Recommendation:** Decriminalization should not be instituted. However, comprehensive services to sex trafficking victims, such as vacating convictions related to crimes committed as a result of trafficking victimization should be made available.

D. End Demand should discourage the use of the term “sex workers” and be guided by Survivor Leadership that addresses public health risks associated with prostitution and using survivors’ experience to guide policies

*Common perception: those who choose to be sex workers should be permitted to have that choice.*

*Truth: The public health risks associated with prostitution, including violence inflicted on them from buyers and traffickers, are well documented and acknowledged. (Shively 6-34) Survivor Leadership has successfully created institutional change through a collaborative project called End Demand Illinois. (Shively 1-12)*

- Research shows the following health risks for prostituted persons: enduring violence in the hands of buyers and pimps, highest suicide rate of any groups, and five to 60 times higher rate of infectious disease than the general population. Combating sex trafficking from a public health standpoint is likely to be more cost effective than devoting resources to the criminal justice sector. Therefore, calling prostituted persons “sex workers” is not a term that should be normalized because of the public health risks.
- Survivor Leadership is the best way to render respect to prostituted people by channeling their experience to guide public policy and effective restoration of victims.

**Recommendation:** Discourage the use of the term “sex workers” for public health reasons out of respect for prostituted people because practitioners’ estimate is that a very high percentage of them are not volunteers in the first place. Great consideration should be given to coordinating Survivor Leadership to guide public policies and victim restoration.

*This recommendation does not have a corresponding legislation concept included in this packet because Survivor Leadership is a newer concept and needs further study. Washington Engage has shared this concept with some survivors who desire to pursue not only restoration of victims, but to empower survivors to advocate for policy change in our social and justice systems.*