



# Second Draft of Report #27 - Human Trafficking and Related Statutes

SUBMITTED FOR ADVISORY GROUP REVIEW  
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This Draft Report contains recommended reforms to District of Columbia criminal statutes for review by the D.C. Criminal Code Reform Commission's statutorily designated Advisory Group. A copy of this document and a list of the current Advisory Group members may be viewed on the website of the D.C. Criminal Code Reform Commission at [www.ccrdc.dc.gov](http://www.ccrdc.dc.gov).

This Draft Report has two main parts: (1) draft statutory text for an enacted Title 22 (Title 22E) of the D.C. Code; and (2) commentary on the draft statutory text. The commentary corresponding to provisions in each Subtitle is separately paginated. The commentary explains the meaning of each provision and considers whether existing District law would be changed by the provision.

Any Advisory Group member may submit written comments on any aspect of this Draft Report to the D.C. Criminal Code Reform Commission. The Commission will consider all written comments that are timely received from Advisory Group members. Additional versions of this Draft Report may be issued for Advisory Group review, depending on the nature and extent of the Advisory Group's written comments. The D.C. Criminal Code Reform Commission's final recommendations to the Council and Mayor for comprehensive criminal code reform will be based on the Advisory Group's timely written comments and approved by a majority of the Advisory Group's voting members.

The deadline for the Advisory Group's written comments on the Second Draft of Report #27, Human Trafficking and Related Statutes is June 19, 2020.

Oral comments and written comments received after these dates may not be reflected in the next draft or final recommendations. All written comments received from Advisory Group members will be made publicly available and provided to the Council on an annual basis.

**RCC § 22E-1601. Forced Labor or Services.**

- (a) *Offense.* An actor commits forced labor or services when that actor:
  - (1) Knowingly causes a person to engage in labor or services;
  - (2) By means of a coercive threat, express or implied, or debt bondage.
- (b) *Exclusions from liability.* A person does not commit an offense under this section for threats of legal employment actions, such as threats of termination, demotion, reduced pay or benefits, or scheduling changes, in order to compel an employee to provide labor or services.
- (c) *Penalties.*
  - (1) Subject to any general penalty enhancements under this title, and the offense penalty enhancement in subsection (c) of this section, forced labor or services is a Class [X] crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
  - (2) *Penalty enhancements.* In addition to any general penalty enhancements under this title, the penalty classification for any gradation of this offense is increased in severity by one class when, in addition to the elements of the offense:
    - (A) The actor was reckless as to the fact that the complainant was under 18 years of age; or
    - (B) The actor held the complainant, or caused the complainant to provide services, for more than 180 days.
- (d) *Definitions.* The terms “knowingly,” and “recklessly” have the meanings specified in RCC § 22E-206; the terms “coercive threat” “debt bondage” “labor,” and “services,” have the meanings specified in RCC § 22E-701.

**COMMENTARY**

***Explanatory Note.** This section establishes the forced labor or services offense for the Revised Criminal Code (RCC). This offense criminalizes knowingly causing another person to engage in labor or services either by means of coercive threat or debt bondage. This offense replaces the forced labor offense in the current D.C. Code,<sup>1</sup> and attempt and penalty provisions relevant to that offense which are separately codified in the current D.C. Code.<sup>2</sup>*

Paragraph (a)(1) specifies that forced labor or services requires that an actor knowingly causes a person to engage in labor or services. The paragraph specifies that a “knowingly” culpable mental state applies, a defined term<sup>3</sup> which requires that the actor was practically certain that he or she would cause a person to engage in labor or services. The terms “labor” and “services” are defined under RCC § 22E-701.<sup>4</sup>

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<sup>1</sup> D.C. Code § 22-1832.

<sup>2</sup> D.C. Code § 22-1837.

<sup>3</sup> RCC § 22E-206(b).

<sup>4</sup> For further discussion on these terms, see Commentary to RCC § 22E-701.

Paragraph (a)(2) specifies that forced labor or services requires that the actor cause another person to engage in labor or services either by means of a coercive threat,<sup>5</sup> express or implied, or debt bondage. “Coercive threat” is defined under RCC § 22E-701, and is comprised of seven different forms of threats. “Debt bondage” is also defined under RCC § 22E-701, and requires that the person perform labor or services to pay off a real or alleged debt under one of three specified circumstances.<sup>6</sup> Per the rule of interpretation under RCC § 22E-207, the “knowingly” culpable mental state also applies to this element. The actor must be practically certain both that he or she is using coercive threats or debt bondage, and that the coercive or debt bondage *causes* the other person to engage in labor or services.

Subsection (b) specifies that threats of legal employment actions are not a basis for liability under the forced labor or services statute. Such threats, which otherwise might satisfy the requirement of a coercive threat, may be a sufficient basis for other human trafficking offenses.<sup>7</sup>

Subsection (c)(1) specifies relevant penalties for the offense.

Paragraph (c)(2) provides penalty enhancements applicable to this offense. Subparagraph (c)(2)(A) specifies that if a person commits forced labor or services and was reckless as to the complainant being under 18 years of age, an enhancement of one penalty class applies. “Reckless” is a defined term,<sup>8</sup> here requiring that the actor was aware of a substantial risk that the complainant was under 18 years of age and such conduct deviated from a reasonable standard of care. Subparagraph (c)(2)(B) specifies that if the actor held the complainant or caused the complainant to provide labor or services for a total of more than 180 days, the offense classification may be increased in severity by one class.<sup>9</sup> Per the rule of interpretation in RCC § 22E-207, the “recklessly” culpable mental state in subparagraph (c)(2)(A) applies to the conduct in subparagraph (c)(2)(B). Even if both penalty enhancements are proven, the most the penalty can be increased is one class. The penalty enhancement under paragraph (c)(2) shall be applied in addition to any general penalty enhancements under this title.

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<sup>5</sup> A coercive threat may come in the form of a verbal or written communication, however gestures or other conduct may also suffice. In addition, the statute specifies that the coercive threat need not be explicit. Communications and conduct that are implicitly threatening given the circumstances may satisfy this element. For example, if a person consistently beats people who refuse to comply with his demands, this pattern of conduct may constitute a coercive threat when that person makes similar demands of others. In addition, ongoing infliction of harm may constitute a coercive threat, if it communicates that harm will continue in the future.

<sup>6</sup> Debt bondage requires that complainant provides labor, services, or commercial sex acts to satisfy a debt and one of the following conditions apply: 1) the value of the labor, services, or commercial sex acts, as reasonably assessed, is not applied toward the liquidation of the debt; 2) the length and nature of the labor, services, or commercial sex acts are not respectively limited and defined; or 3) the amount of the debt does not reasonably reflect the value of the items or services for which the debt was incurred.

<sup>7</sup> Threats that go beyond ordinary and legal employment actions are subject to liability. For example, the exception under this provision would not apply to a store manager who threatens to fire an employee unless that employee agrees to work for 24 hours without respite.

<sup>8</sup> RCC § 22E-206 (d).

<sup>9</sup> This enhancement may apply if the combined time in which a person was held and provided labor or services is greater than 180 days, even if the person did not provide labor or services for the entire time. If a person was held for 100 days, and provided labor or services for 81 days, this penalty enhancement would apply.

Subsection (d) cross references applicable definitions located elsewhere in the RCC.

***Relation to Current District Law.*** *The revised forced labor or services statute changes current District law in three main ways.*

First, by reference to the RCC’s “coercive threats” definition, the forced labor or services statute does not provide liability for causing another to provide labor or services by fraud or deception. The current statutory definition of “coercion” includes “fraud or deception,”<sup>10</sup> and by extension the current forced labor or services statute includes using fraud or deception to cause a person to provide labor or services. By contrast, the RCC’s “coercive threats” definition does not include fraud or deception,<sup>11</sup> and such conduct is not a sufficient basis for forced labor or services liability. A person who uses deception or fraud to cause another person to engage in labor or services has not committed forced labor or services unless that person also uses one of the other coercive means listed in the RCC’s definition or holds another person in debt bondage.<sup>12</sup> While using deception to cause another to engage in labor or services is wrongful, it does not warrant equal punishment to using coercive threats or debt bondage and could provide major felony liability for common employment disputes.<sup>13</sup> Rather, a person who causes another to provide labor or services through fraud or deception may still be liable under the RCC’s revised fraud<sup>14</sup> statute, a property offense with penalties based on the economic harm suffered. This change improves the penalty proportionality of the revised offense.

Second, by reference to the RCC’s “coercive threats” definition, the revised forced labor or services offense criminalizes restricting another person’s access to a controlled substance that the person owns or to prescription medication that the person owns. The current D.C. Code statutory definition of “coercion” in the human trafficking chapter provides liability for “facilitating or controlling” a person’s access to any controlled substance or addictive substance. These terms are not defined by statute and have not been interpreted by the DCCA. By contrast, the revised forced labor or services offense only provides liability for threatening to restrict a person’s access to controlled substances that the person owns or prescription medication that the person owns.<sup>15</sup> Restricting a person’s access to a controlled substance or prescription medication that the

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<sup>10</sup> D.C. Code § 22-1831 (3)(D).

<sup>11</sup> RCC § 22E-701.

<sup>12</sup> Forced labor may involve deceptive or fraudulent conduct *in addition* to other coercive means. For example, a person who initially lures a laborer with the false promise of high wages, and then coerces the laborer to provide labor or services under threat of bodily injury could be convicted under the RCC’s forced labor statute. *E.g., United States v. Bradley*, 390 F.3d 145 (1st Cir. 2004).

<sup>13</sup> For instance, under the current statutory definition of “coercion,” a person may be liable for forced labor or services, subject to a 20 year maximum imprisonment, for falsely stating the terms of an employee’s advancement eligibility or scope of work duties at the time of hiring.

<sup>14</sup> RCC § 22E-2201. The revised fraud statute criminalizes taking property of another by means of deception. The term “property” is defined as “anything of value” including “services[.]” RCC § 22E-701.

<sup>15</sup> A person can satisfy this subsection by providing a controlled substance, so long as that person explicitly or implicitly threatens that his or her access to those substances will be limited. For example, a person can behave coercively by giving heroin to a heroin addict to compel him to behave in a particular way if the person causes the addict to fear that his access to heroin will be limited in the future.

person does not yet own does not constitute this form of per se coercive threat.<sup>16</sup> Similarly, restricting a person’s access to an addictive substance that is not a controlled substance or prescription medication also does not constitute this form of per se coercive threat. This change likely eliminates liability for compensating someone with a controlled substance or prescription medication as part of an otherwise clear and consensual transaction,<sup>17</sup> and precludes arguments that an employer’s attempts to limit an employee’s access to legal and readily available addictive substances like tobacco or alcohol constitute forced labor or services.<sup>18</sup> However, in some circumstances, such conduct may still fall within another per se form of coercive threat or the catch-all form of coercive threat.<sup>19</sup> Eliminating the facilitation of access to any addictive substance as a form of coercive threat prevents the possibility of criminalizing relatively less coercive conduct.<sup>20</sup> This change improves the clarity and proportionality of the revised statute.

Third, the revised forced labor or services offense authorizes enhanced penalties if the actor was reckless as to whether the complainant was under 18 years of age. The current forced labor offense does not authorize enhanced penalties based on the age of the complainant. The D.C. Code includes a general penalty enhancement for “crimes of violence” committed against persons under the age of 18, but forced labor is not currently listed in the definition of a “crime of violence.”<sup>21</sup> By contrast, the revised forced labor or services offense provides a penalty enhancement based on the complainant being a minor. This change improves the consistency and proportionality of the revised statutes.

*Five other changes to the forced labor statute may constitute a substantive change to current District law.*

First, by reference to the RCC’s definitions of “labor” and “services”, the revised forced labor or services offense specifically excludes causing a person to engage in commercial sex acts. The current D.C. Code forced labor statute and relevant definitions refer generally to labor and services without specifying whether commercial sex acts are included. Neither DCCA case law nor legislative history addresses the matter.<sup>22</sup> However, it is notable that the D.C. Code human trafficking statutes sometimes appear to

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<sup>16</sup> For example, a drug trafficker refusing to sell a controlled substance to a person does not constitute this form of coercive threat.

<sup>17</sup> For example, compensating a person with a controlled substance may constitute “facilitation” under the current forced labor statute due to the definition of “coercion.”

<sup>18</sup> For example, an employer who predicates a person’s employment on not smoking tobacco or drinking alcohol may be liable for “controlling” the employee’s access to the substance.

<sup>19</sup> For example, if a person is severely addicted to a controlled substance, and relies on the actor as the sole provider of that substance, threatening to restrict the person’s access to that substance may in some cases constitute a coercive threat under the catch all provision.

<sup>20</sup> For example, under current law inducing a person who is a regular tobacco user to perform any service by offering cigarettes in exchange arguably constitutes forced labor, an offense punishable by up to 20 years imprisonment. In addition, although alcohol is an addictive substance, it is not a controlled substance and thus is readily available. Facilitating a person’s access to alcohol is not inherently coercive, as it is relatively easy for a person to obtain alcohol by other means, as compared to controlled substances.

<sup>21</sup> D.C. Code § 22-1331 (4).

<sup>22</sup> At least one federal circuit court has held that the federal forced labor statute includes coercing another person into engaging in commercial sex acts. *United States v. Kaufman*, 546 F.3d 1242, 1260 (10th Cir. 2008) (holding that the term “labor” as used in the federal forced labor statute includes induced nudity and sexual acts recorded on video).

use the term “labor” as if it did not include commercial sex acts.<sup>23</sup> By contrast, the revised definitions of “labor” and “services” explicitly exclude commercial sex acts, and the revised forced labor or services statute’s use of those definitions explicitly excludes the use of coercion or debt bondage to cause another to engage in commercial sex acts. Such conduct instead is criminalized under the RCC’s forced commercial sex offense.<sup>24</sup> This change improves the clarity and consistency of the revised offenses, and reduces unnecessary overlap.

Second, by reference to the RCC’s definition of “coercive threats,” forced labor or services includes causing a person to engage in labor or services by threatening that any person will commit an offense against persons or a property offense.<sup>25</sup> The current “coercion” definition does not explicitly include threats to “commit any criminal offense against persons” but does include threats of “force” and “threats of physical restraint,” conduct that appears to constitute the criminal offenses of assault, kidnapping, or criminal restraint. In addition, the current statutory definition of “coercion” generally includes “serious harm or threats of serious harm,” which broadly covers “any harm . . . that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or to continue to perform labor, services, or commercial sex acts to avoid incurring that harm.”<sup>26</sup> The revised definition of “coercive threats” and the RCC crime of forced labor or services together specify that a threat to commit any criminal offense against persons is categorically a basis for liability, even if it would otherwise be unclear whether the crime would constitute “serious harm” under the residual clause in paragraph (2)(G) of the coercion definition. This change improves the clarity and consistency of the revised statutes.

Third, the revised statute specifies that threats of ordinary and legal employment actions are not a basis for liability under the forced labor or services statute. The current D.C. Code “coercion” definition includes “serious harm,” which is defined as “any harm . . . that is sufficiently serious under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or to continue to perform labor, services, or commercial sex acts to avoid incurring that harm.”<sup>27</sup> There is no relevant DCCA case law as to whether legal employment actions could be sufficient to compel a reasonable person to perform labor or services. The revised statute prevents liability for forced labor or services where the coercion consists only of ordinary and legal employer demands. Such conduct does not warrant criminalization as a serious felony. This change improves the clarity and proportionality of the revised statute.

Fourth, the revised statute allows for enhanced penalties if the actor recklessly held the complainant or caused the complainant to engage in labor or services for a total

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<sup>23</sup> *E.g.*, D.C. Code § 22-1833, entitled “Trafficking in labor or commercial sex acts” includes as an element that, “Coercion will be used or is being used to cause the person to provide labor or services or to engage in a commercial sex act”. The specification of both “labor” and “commercial sex act” in the offense suggests the former does not include the latter.

<sup>24</sup> RCC § 22E-1602.

<sup>25</sup> RCC § 22E-701.

<sup>26</sup> D.C. Code § 22-1831 (7).

<sup>27</sup> *Id.*

of more than 180 days. The D.C. Code forced labor, trafficking in labor or commercial sex, and sex trafficking of children statutes are subject to a penalty enhancement if “the victim is held or provides services for more than 180 days[.]”<sup>28</sup> However, the current statute does not specify any culpable mental state, nor does it clarify whether this 180 day threshold is based on the *total* of the days the complaint engaged in labor or services in addition to the days the complainant was held. There is no relevant DCCA case law. To resolve these ambiguities, the revised statute specifies that the enhancement applies if the actor recklessly holds the complainant, or causes the complainant to engage in labor or services for a total number of days that exceeds 180. This change clarifies and may improve the proportionality of the revised statute.

Fifth, the revised offense allows for offense-specific penalty enhancements and general penalty enhancements. The current D.C. Code forced labor, trafficking in labor or commercial sex, and sex trafficking of children statutes are subject to a penalty enhancement if “the victim is held or provides services for more than 180 days[.]”<sup>29</sup> However, neither this penalty enhancement nor other general penalty enhancements defined in the D.C. Code applicable to human trafficking specify how the enhancements interrelate—e.g., whether multiple enhancements can be applied, and to what effect. DCCA case law does not specifically address the relationship between the penalty enhancements applicable to human trafficking statutes specifically, and the D.C. Code provisions concerning repeat offender enhancements,<sup>30</sup> hate crime enhancements,<sup>31</sup> and pretrial release penalty enhancements.<sup>32</sup> To resolve this ambiguity, the revised statute specifies that the revised statute’s penalty enhancements apply in addition to any general penalty enhancements based on RCC § 22E-605 Limitations on Penalty Enhancements, § 22E-606 Repeat Offender Penalty Enhancements, § 22E-607 Hate Crime Penalty Enhancement, or § 22E-608 Pretrial Release Penalty Enhancements. This change improves the clarity and may improve the proportionality of the revised statute.

*One other change to the forced labor statute is clarificatory, and is not intended to change current District law.*

The revised statute uses the term “actor” instead of the terms “individual or business,” as used in the current forced labor statute.<sup>33</sup> “Actor” is a defined term<sup>34</sup>, which means “a person accused of any offense.” The term “person” is also a defined term<sup>35</sup>, and includes a “partnership, company, corporation, association, organization[.]” The term “actor” includes both individuals and businesses, and the use of this term is not intended to change current District law.

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<sup>28</sup> D.C. Code § 22-1837.

<sup>29</sup> *Id.*

<sup>30</sup> D.C. Code §§ 22-1804; 22-1804a.

<sup>31</sup> D.C. Code §§ 22-3701; 22-3702; 22-3703.

<sup>32</sup> D.C. Code § 23-1328.

<sup>33</sup> D.C. Code § 22-1832.

<sup>34</sup> RCC § 22E-701.

<sup>35</sup> RCC § 22E-701.



**RCC § 22E-1602. Forced Commercial Sex.**

- (a) *Offense.* An actor commits forced commercial sex when that actor:
- (1) Knowingly causes the complainant to engage in or submit to a commercial sex act with or for another person;
  - (2) In one or more of the following ways:
    - (A) By using physical force that causes bodily injury to, overcomes, or restrains any person;
    - (B) By making a coercive threat, express or implied;
    - (C) By debt bondage; or
    - (D) By administering or causing to be administered to the complainant, without the complainant’s effective consent, a drug, intoxicant, or other substance:
      - (i) With intent to impair the complainant’s ability to express unwillingness to engage in the commercial sex act; and
      - (ii) In fact, the drug, intoxicant, or other substance renders the complainant:
        - (I) Asleep, unconscious, substantially paralyzed, or passing in and out of consciousness;
        - (II) Substantially incapable of appraising the nature of the commercial sex act; or
        - (III) Substantially incapable of communicating unwillingness to engage in the commercial sex act.
- (b) *Penalties.*
- (1) Subject to the general penalty enhancements in under this title, and the offense penalty enhancement in subsection (c) of this section, forced commercial sex is a Class [X] crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
  - (2) *Penalty enhancements.* In addition to any general penalty enhancements in under this title, the penalty classification for any gradation of this offense is increased in severity by one class when, in addition to the elements of the offense:
    - (A) The actor was reckless as to the fact that the complainant was under 18 years of age, or, in fact, the complainant was under 12 years of age; or
    - (B) The actor recklessly held the complainant, or caused the complainant to provide commercial sex acts, for a total of more than 180 days.
- (c) *Definitions.* The terms “knowingly,” and “recklessly” have the meanings specified in RCC § 22E-206; the term “in fact” has the meaning specified in RCC §22E-207; the terms “business,” “coercive threat” “commercial sex act,” and “debt bondage” have the meanings specified in RCC § 22E-701.

## COMMENTARY

***Explanatory Note.*** *This section establishes the forced commercial sex offense for the Revised Criminal Code (RCC). This offense criminalizes knowingly causing a person to engage in a commercial sex act by means of physical force, a coercive threat, debt bondage, or by administering a drug or other intoxicant. There is no analogous offense under the current human trafficking chapter, although conduct constituting forced commercial sex may violate the current forced labor statute. This offense also replaces aspects of several offenses in chapter 27 of the current D.C. Code, including: conduct to “compel” or attempt to compel a person into prostitution under the pandering statute;<sup>1</sup> compelling an individual to live life or prostitution against his or her will;<sup>2</sup> and causing a spouse or domestic partner “by force, fraud, coercion, or threats...to lead a life of prostitution.”<sup>3</sup> To the extent that certain statutory provisions authorizing extended periods of supervised release<sup>4</sup> apply to the current forced labor or services statute, these provisions are replaced in relevant part by the revised offensive forced commercial sex offense.*

Paragraph (a)(1) specifies that forced commercial sex requires that an actor knowingly causes the complainant to engage in or submit to a commercial sex act with or for<sup>5</sup> another person.<sup>6</sup> The paragraph specifies that a “knowingly” culpable mental state

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<sup>1</sup> D.C. Code §22-2705. The pandering statute makes it a crime to “cause, compel . . . or attempt to cause or compel . . . any individual . . . to engage in prostitution[.]” The precise effect on D.C. law is unclear, as the D.C. Court of Appeals has not clearly defined what constitutes “compelling” a person to engage in prostitution. It is possible that some coercive means that would constitute “compelling” under the pandering statute do not fall within the revised “coercive threat” definition. In addition, the pandering statute provides for enhanced penalties when the person caused or compelled to engage in prostitution is under the age of 18. D.C. Code §22-2705 (2). The penalty provision under the RCC’s forced commercial sex statute replaces this provision in the current pandering statute.

<sup>2</sup> D.C. Code § 22-2706. This statute makes it a crime to “by threats or duress, to detain any individual against such individual’s will, for the purpose of prostitution or a sexual act or sexual contact, or to compel any individual against such individual’s will, to reside with him or her or with any other person for the purposes of prostitution or a sexual act or sexual contact.” This conduct may also be criminalized under the RCC’s kidnapping statute, RCC § 22E-1401 or criminal restraint statute, RCC § 22E-1402.

<sup>3</sup> D.C. Code § 22-2708. This statute makes it a crime to “by force, fraud, intimidation, or threats, places or leaves, or procures any other person or persons to place or leave, a spouse or domestic partner in a house of prostitution, or to lead a life of prostitution[.]” This conduct will be criminalized under the RCC’s forced commercial sex statute. However, the RCC’s forced commercial sex statute is narrower than § 22-2708. The forced commercial sex statute does not criminalize causing another person to provide commercial sex acts by means of deception or fraud.

<sup>4</sup> D.C. Code § 24-403.01(b)(4) (“ In the case of a person sentenced for an offense for which registration is required by the Chapter 40 of Title 22, the court may, in its discretion, impose a longer term of supervised release than that required or authorized by paragraph (2) or (3) of this subsection, of: . . . (A) Not more than 10 years[.]” D.C. Code §22-4001(8) defines “registration offense” to include “Any offense under the District of Columbia Official Code that involved a sexual act or sexual contact without consent or with a minor[.]” To the extent the current forced labor or services offense covers sexual acts or contacts without consent, D.C. Code § 22-403.01 may authorize an extended period of supervised release.

<sup>5</sup> The words “or for” clarify that the offense includes a person engaging masturbatory conduct for another person to observe.

<sup>6</sup> An actor who compels a person to engage in a commercial sex act with *the actor* himself or herself may be subject to liability under sex assault offenses defined under Chapter 13.

applies, which requires that the accused was practically certain that he or she would cause another person to engage in or submit to a commercial sex act. The term “commercial sex act” is defined under RCC § 22E-701.<sup>7</sup> Paragraph (a)(1) also specifies that the actor must cause the complainant to engage in or submit to commercial sex act with or for another person, which means that the act must be with or for someone other than the actor. This element may be satisfied if the actor causes the complainant to engage in a commercial sex act with a third party, or if the actor causes the complainant to engage in masturbatory conduct for a third party.<sup>8</sup>

Paragraph (a)(2) specifies the prohibited means by which the actor must cause a person to engage in or submit to a commercial sex act. Per the rule of interpretation under RCC § 22E-207, the “knowingly” culpable mental state also applies to this paragraph, which requires that the actor is practically certain that the means listed in subparagraphs (a)(2)(A)-(D) *cause* the complainant to engage in or submit to a commercial sex act.

Under subparagraph (a)(2)(A) the actor must use physical force that causes “bodily injury” to, overcomes, or restrains any person. “Bodily injury” is defined in RCC § 22E-701 as “physical pain, physical injury, illness, or any impairment of physical condition.” Per the rule of interpretation under RCC § 22E-207, the “knowingly” culpable mental state also applies to this subparagraph, which here requires that the actor was practically certain that the actor used force that caused bodily injury to overcome or restrain any person.

Under subparagraph (a)(2)(B), the actor must use an express or implied coercive threat to cause a person to engage in or submit to a commercial sex act. “Coercive threat” is defined under RCC § 22E-701 and includes multiple per se types of threats, as well as a flexible standard referring to a threat of any harm sufficiently serious to cause a reasonable person in the complainant’s situation to comply.<sup>9</sup> Per the rule of interpretation under RCC § 22E-207, the “knowingly” culpable mental state also applies to this subparagraph, which here requires that the actor was practically certain he was making a coercive threat, express or implied.

Under subparagraph (a)(2)(C), the actor must use debt bondage to cause a person to engage in or submit to a commercial sex act. “Debt bondage” is defined under RCC § 22E-701 and requires that the person perform labor or services to pay off a real or alleged debt under one of three specified circumstances.<sup>10</sup> Per the rule of interpretation under RCC § 22E-207, the “knowingly” culpable mental state also applies to this element. The actor must be practically certain both that he or she is using coercive threats or debt bondage, and that the coercive threat or debt bondage *causes* the other person to engage in a commercial sex act.

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<sup>7</sup> For further discussion of these terms, see Commentary to RCC § 22E-1601.

<sup>8</sup> Masturbation is not explicitly included in the definition of “commercial sex act.” However, the term “commercial sex act” is defined to include any sexual act or sexual contact performed in exchange for anything of value. To the extent that conduct commonly understood as masturbation meets the definition of sexual act or sexual contact, if it performed in exchange for anything of value, it constitutes a “commercial sex act.”

<sup>9</sup> For further discussion of this term, see Commentary to RCC § 22E-701.

<sup>10</sup> For further discussion of this term, see Commentary to RCC § 22E-701.

Under subparagraph (a)(2)(D), the actor must administer, or cause to be administered, to the complainant an intoxicant or other substance without the complainant's "effective consent." "Effective consent" is a defined term in RCC § 22E-701 that means "consent other than consent induced by physical force, an express or implied coercive threat, or deception." In addition, the actor must administer the intoxicant or other substance "with intent" to impair the complainant's ability to express unwillingness to engage in the commercial sex act (sub-subparagraph (a)(2)(D)(i)). "Intent" is a defined term in RCC § 22E-206 that here means the actor was practically certain that administering the intoxicant or other substance would impair the complainant's unwillingness to engage in the commercial sex act. Per RCC § 22E-205, the object of the phrase "with intent to" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that the drug or intoxicant impaired the complainant's ability to express unwillingness to engage in the commercial sex act, only that the actor believed to a practical certainty that it would. However, sub-subparagraph (a)(2)(D)(ii) does require that the intoxicant or other substance have a specified effect on the complainant. The intoxicant or other substance must, "in fact," render the complainant asleep, unconscious, substantially paralyzed, or passing in and out of consciousness (sub-subparagraph (a)(2)(D)(ii)(I)), "substantially incapable of appraising the nature of the commercial sex act" (sub-subparagraph (a)(2)(D)(ii)(II)), or "substantially incapable of communicating unwillingness to engage in the commercial sex act" (sub-subparagraph (a)(2)(D)(ii)(III)). "In fact," a defined term in RCC § 22E-207, is used to indicate that there is no culpable mental state requirement as to a given element, here the required effect of the intoxicant or other substance on the complainant.

Subsection (b)(1) specifies relevant penalties for the offense.

Paragraph (b)(2) provides penalty enhancements applicable to this offense. Subparagraph (b)(2)(A) specifies that if a person commits forced commercial sex and was reckless as to the complainant being under 18 years of age, an enhancement of one penalty class applies. "Reckless" is a defined term,<sup>11</sup> here requiring that the actor was aware of a substantial risk that the complainant was under 18 years of age and such conduct deviated from a reasonable standard of care. Alternatively, subparagraph (b)(2)(A) also specifies that if a person commits forced commercial sex, and in fact, the complainant is under the age of 12, an enhancement of one penalty class applies. The term "in fact" specifies that no culpable mental state is required as to the complainant being under the age of 12. Subparagraph (b)(2)(B) specifies that if the actor held the complainant or caused the complainant to engage in commercial sex acts for a total of more than 180 days, the offense classification may be increased in severity by one class.<sup>12</sup> Subparagraph (b)(2)(B) specifies that a "recklessly" culpable mental state applies to this enhancement. Even if more than one penalty enhancement is proven, the most the penalty can be increased is one class. The penalty enhancement under subsection (b)

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<sup>11</sup> RCC § 22E-206.

<sup>12</sup> This enhancement may apply if the combined time in which a person was held and engaged in commercial sex acts is greater than 180 days, even if the person did not engage in commercial sex acts for the entire time. If a person was held for 100 days, and engaged in commercial sex acts for 81 days, this penalty enhancement would apply.

shall be applied in addition to any general penalty enhancements in RCC §§ 22E-605-608.

Subsection (c) cross references applicable definitions located elsewhere in the RCC.

*Relation to Current District Law.* The RCC’s forced commercial sex offense changes current District law in three main ways.

First, RCC forced commercial sex act creates a standardized penalty and enhancements for coercing or using debt bondage to cause a person to engage in a commercial sexual act. Although the current human trafficking chapter does not have a separate forced commercial sex offense, conduct constituting forced commercial sex could be charged under several current Chapter 27 offenses, with maximum sentences ranging from five years<sup>13</sup> to twenty years.<sup>14</sup> In contrast, the revised forced commercial sex act provides a single penalty, with applicable enhancements. This change improves the consistency and proportionality of the revised statutes.

Second, by reference to the RCC’s “coercive threats” definition, the forced commercial sex statute criminalizes restricting another person’s access to a controlled substance that the person owns or to prescription medication that the person owns. The current D.C. Code statutory definition of “coercion” in the human trafficking chapter provides liability for “facilitating or controlling” a person’s access to any controlled substance or addictive substance. These terms are not defined by statute and have not been interpreted by the DCCA. By contrast, the forced commercial sex offense only provides liability for threatening to restrict a person’s access to controlled substances that the person owns or prescription medication that the person owns.<sup>15</sup> Restricting a person’s access to a controlled substance or prescription medication that the person does not yet own does not constitute this form of per se coercive threat.<sup>16</sup> Similarly, restricting a person’s access to an addictive substance that is not a controlled substance or prescription medication also does not constitute this form of per se coercive threat. This change likely eliminates liability for compensating someone with a controlled substance or prescription medication as part of an otherwise clear and consensual transaction,<sup>17</sup> and precludes arguments that an actor’s attempts to limit another person’s access to legal and readily available addictive substances like tobacco or alcohol constitute forced commercial sex.<sup>18</sup> However, in some circumstances, such conduct may still fall within another per se form

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<sup>13</sup> D.C. Code § 22-2705.

<sup>14</sup> D.C. Code § 22-2706.

<sup>15</sup> A person can satisfy this subsection by providing a controlled substance, so long as that person explicitly or implicitly threatens that his or her access to those substances will be limited. For example, a person can behave coercively by giving heroin to a heroin addict to compel him to behave in a particular way if the person causes the addict to fear that his access to heroin will be limited in the future.

<sup>16</sup> For example, a drug trafficker refusing to sell a controlled substance to a person does not constitute this form of coercive threat.

<sup>17</sup> For example, compensating a person with a controlled substance may constitute “facilitation” under the current forced labor statute due to the definition of “coercion.”

<sup>18</sup> For example, an actor who limits a person’s access to tobacco or alcohol may be liable for “controlling” the person’s access to the substance.

of coercive threat or the catch-all form of coercive threat.<sup>19</sup> Eliminating the facilitation of access to any addictive substance as a form of coercive threats prevents the possibility of criminalizing relatively less coercive conduct.<sup>20</sup> This change improves the clarity and proportionality of the revised statute.

Third, the revised forced commercial sex offense authorizes enhanced penalties if the actor was reckless as to whether the complainant was under 18 years of age, or if the complainant was, in fact, under 12 years of age. It is unclear if the current forced labor and services statute criminalizes forced commercial sex acts, but even if it does, the current forced labor and services statute offense does not authorize enhanced penalties based on the age of the complainant. The D.C. Code includes a general penalty enhancement for “crimes of violence” committed against persons under the age of 18, but forced labor or services is not currently a “crime of violence.”<sup>21</sup> By contrast, the revised trafficking in forced commercial sex offense provides a penalty enhancement based on recklessness as to whether the complainant was under the age of 18, or based on strict liability if the complainant was under the age of 12. This change improves the consistency and proportionality of the revised statutes.

*Eight other changes to the forced commercial sex statute may constitute a substantive change to current District law that improve the clarity, consistency, and proportionality of the revised offense, and eliminate overlap with other offenses.*

First, by reference to the RCC’s definition of “coercive threats,” the forced commercial sex statute does not provide liability for causing another to engage in commercial sex by fraud or deception. The current forced labor offense criminalizes using “coercion to cause person to provide labor or services”<sup>22</sup> and “coercion” is defined to include “fraud or deception.”<sup>23</sup> If commercial sex acts fall within the definition of “labor or services,” then under current law using fraud or deception to cause a person to engage in commercial sex acts constitutes forced labor. However, the current code does not specify whether “labor or services” includes commercial sex acts, and there is no relevant DCCA case law. The RCC’s “coercive threats” definition does not include fraud or deception,<sup>24</sup> and such conduct is not a sufficient basis for forced commercial sex liability. A person who uses deception or fraud to cause another person to engage in commercial sex has not committed forced commercial sex unless that person also uses one of the other coercive means listed in the RCC’s definition or holds another person in

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<sup>19</sup> For example, if a person is severely addicted to a controlled substance, and relies on the actor as the sole provider of that substance, threatening to restrict the person’s access to that substance may in some cases constitute a coercive threat under the catch all provision.

<sup>20</sup> For example, under current law inducing a person who is a regular tobacco user to perform any service by offering cigarettes in exchange arguably constitutes forced labor, an offense punishable by up to 20 years imprisonment. In addition, although alcohol is an addictive substance, it is not a controlled substance and thus is readily available. Facilitating a person’s access to alcohol is not inherently coercive, as it is relatively easy for a person to obtain alcohol by other means, as compared to controlled substances.

<sup>21</sup> D.C. Code § 22-1331 (4).

<sup>22</sup> D.C. Code § 22-1832.

<sup>23</sup> D.C. Code § 22-1831.

<sup>24</sup> RCC § 22E-1601.

debt bondage.<sup>25</sup> While using deception to cause another to engage in commercial sex is wrongful, it does not warrant equal punishment to using other means of coercion or debt bondage and could provide major felony liability for what amount to disputes over payments for consensual commercial sex.<sup>26</sup> Rather, a person who causes another to engage in commercial sex through fraud or deception may still be liable under the RCC's revised fraud<sup>27</sup> statute, a property offense with penalties based on the economic harm suffered. This change improves the penalty proportionality of the revised statutes.

Second, by reference to the RCC's definition of "coercive threats" the forced commercial sex offense includes causing a person to engage in a commercial sex act by threatening that any person will commit an offense against persons, or property offense.<sup>28</sup> The current "coercion" definition does not explicitly include threats to commit any "an offense against persons" but does include threats of "force, threats of force, physical restraint, or threats of physical restraint," conduct that appears to constitute the criminal offenses of assault or kidnapping. In addition, the current statutory definition of "coercion" generally includes "serious harm or threats of serious harm," which broadly covers "any harm . . . that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or to continue to perform labor, services, or commercial sex acts to avoid incurring that harm."<sup>29</sup> By contrast, the revised definition of "coercive threats" and the RCC crime of forced commercial sex together specify that a threat to commit any offense against persons or property offense is categorically a basis for liability, even if it would otherwise be unclear whether the crime would constitute "serious harm" under the residual clause in paragraph (2)(G) of the current coercion definition. This change improves the clarity and consistency of the revised statutes.

Third, the RCC forced commercial sex act offense specifies what types of conduct constitute a crime when used to compel a person to engage in prostitution. Various offenses under Chapter 27 of the current D.C. Code make it a crime to "compel" a person to "engage in prostitution"<sup>30</sup>; "by threats or duress, to detain any individual against such individual's will for the purpose of prostitution or a sexual act or sexual contact"<sup>31</sup>; to "compel any individual, to reside with him or her or with any other person for the purposes of prostitution or a sexual act or sexual contact"<sup>32</sup>; or to use "force, fraud, intimidation, or threats" to "place[] or leave[] . . . a spouse or domestic partner in a house of prostitution, or to lead a life of prostitution[.]"<sup>33</sup> The current D.C. Code does not

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<sup>25</sup> Forced commercial sex may involve deceptive or fraudulent conduct *in addition* to other coercive means. For example, if a person initially lures a sex worker with the false promise of high wages, and then coerces the person to provide labor under threat of bodily injury could be convicted under the RCC's forced commercial sex statute. *E.g., United States v. Bradley*, 390 F.3d 145 (1st Cir. 2004).

<sup>26</sup> For instance, under the current statutory definition of "coercion," a person would coerce another if he or she causes that person to engage in a commercial sex act by a lie about how much would be paid.

<sup>27</sup> RCC §22E-2201. The revised fraud statute criminalizes taking property of another by means of deception. The term "property" is defined as "anything of value" including "services[.]" RCC § 22E-701.

<sup>28</sup> RCC § 22E-701.

<sup>29</sup> D.C. Code § 22-1831 (7).

<sup>30</sup> D.C. Code § 22-2705.

<sup>31</sup> D.C. Code § 22-2706.

<sup>32</sup> *Id.*

<sup>33</sup> D.C. Code § 22-2708.

define the terms “threats,” “duress,” “detain,” “force,” “fraud,” or “intimidation” for the as used in Chapter 27, and there is no relevant D.C. Court of Appeals (DCCA) case law interpreting these terms. In contrast, the revised statute refers to the defined terms “coercive threat” and “debt bondage,” and specifies that physical force that causes bodily injury, and administering a drug, intoxicant, or other substance are barred means of compelling a person to engage in a commercial sex act constitutes a criminal offense. This change improves the clarity and consistency of the revised statutes.

Fourth, the RCC forced commercial sex offense requires a person to act with a “knowing” culpable mental state. Statutes under Chapter 27<sup>34</sup> that are replaced in whole or in part by the RCC’s forced commercial sex offense do not specify culpable mental states, and there is no relevant DCCA case law on this issue. In contrast, the RCC forced commercial sex act offense specifies one consistent, defined culpable mental state. Applying a knowledge or intent requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.<sup>35</sup> This change improves the clarity, consistency, and proportionality of the revised statutes.

Fifth, the RCC forced commercial sex offense requires only a single commercial sexual act for liability. Offenses under Chapter 27 criminalize detaining a person “for the purpose of prostitution,”<sup>36</sup> or compelling a person to “lead a life or prostitution,”<sup>37</sup> and make no reference to the number of occasions in which a person is compelled to engage in prostitution. There is no relevant DCCA case law on the unit of prosecution for these offenses, and it appears that compelling a person to engage in prostitution numerous times may constitute only a single violation of these statutes. In addition, it is possible that coercing a person to engage in a commercial sex act may constitute forced labor under the current statute.<sup>38</sup> However, the current forced labor statute does not specify whether commercial sex acts constitute labor or services, and if they do, whether multiple commercial sex acts may be prosecuted as more than one instance of forced labor. In contrast, the RCC forced commercial sex act offense provides liability for each separate commercial sexual act. This change improves the clarity and proportionality of the revised statutes.<sup>39</sup>

Sixth, the RCC forced commercial sex statute requires that the actor caused the complainant to engage in a commercial sex act with or for a person other than the actor. It is unclear if the current forced labor or services statute criminalizes coerced commercial sex, and if it does, whether the actor must have caused the complainant engage in a commercial sex act with someone other than the actor. There is no relevant

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<sup>34</sup> D.C. Code § 22-2705; D.C. Code § 22-2706; D.C. Code 22-2708.

<sup>35</sup> *See, Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) (“[O]ur cases have explained that a defendant generally must ‘know the facts that make his conduct fit the definition of the offense,’ even if he does not know that those facts give rise to a crime. (Internal citation omitted)”).

<sup>36</sup> D.C. Code § 22-2706.

<sup>37</sup> *Id.*

<sup>38</sup> D.C. Code § 22-1832.

<sup>39</sup> Under the revised offense, a person who uses a coercive threat or debt bondage to compel another person to engage in more than one commercial sex act may be convicted for multiple counts of forced commercial sex. However, whether multiple convictions are permitted in a given case is governed by the merger analysis set for under RCC § 22E-214.



DCCA case law. To resolve this ambiguity, the revised statute specifies that the offense requires that the actor caused the person to engage in a commercial sex act with another person. This change improves the clarity of the revised statute, and reduces unnecessary overlap.

Seventh, the revised statute allows for enhanced penalties if the actor recklessly held the complainant or caused the complainant to engage in commercial sex acts for a total of more than 180 days. The D.C. Code forced labor, trafficking in labor or commercial sex, and sex trafficking of children statutes are subject to a penalty enhancement if “the victim is held or provides services for more than 180 days[.]”<sup>40</sup> However, the current statute does not specify any culpable mental state, nor does it clarify whether this 180 day threshold is based on the *total* of the days the complaint engaged in labor or services in addition to the days the complainant was held. There is no relevant DCCA case law. To resolve these ambiguities, the revised statute specifies that the enhancement applies if the actor recklessly holds the complainant, or causes the complainant to engage in commercial sex acts for a total number of days exceeds that 180. This change clarifies and may improve the proportionality of the revised statute.

Eighth, the revised offense allows for offense-specific penalty enhancements and general penalty enhancements. The current D.C. Code forced labor, trafficking in labor or commercial sex, and sex trafficking of children statutes are subject to a penalty enhancement if “the victim is held or provides services for more than 180 days[.]”<sup>41</sup> However, neither this penalty enhancement nor other general penalty enhancements defined in the D.C. Code applicable to human trafficking specify how the enhancements interrelate—e.g., whether multiple enhancements can be applied, and to what effect. DCCA case law does not specifically address the relationship between the penalty enhancements applicable to human trafficking statutes specifically, and the D.C. Code provisions concerning repeat offender enhancements,<sup>42</sup> hate crime enhancements,<sup>43</sup> and pretrial release penalty enhancements.<sup>44</sup> To resolve this ambiguity, the revised statute specifies that the revised statute’s penalty enhancements apply in addition to any general penalty enhancements based on RCC § 22E-605 Limitations on Penalty Enhancements, § 22E-606 Repeat Offender Penalty Enhancements, § 22E-607 Hate Crime Penalty Enhancement, or § 22E-608 Pretrial Release Penalty Enhancements. This change improves the clarity and may improve the proportionality of the revised statute.

*Three changes to the forced commercial sex offense statute are clarificatory in nature and not intended to substantively change current District law.*

First, the forced commercial sex offense explicitly criminalizes as a human trafficking offense causing a person to engage in commercial sex acts by means of coercive threat or debt bondage. It is unclear whether the current forced labor statute criminalizes the use of coercion or debt bondage to cause a person to engage in commercial sex acts. The current forced labor offense requires that the actor “use

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<sup>40</sup> D.C. Code § 22-1837.

<sup>41</sup> D.C. Code § 22-1837.

<sup>42</sup> D.C. Code §§ 22-1804; 22-1804a.

<sup>43</sup> D.C. Code §§ 22-3701; 22-3702; 22-3703.

<sup>44</sup> D.C. Code § 23-1328.

coercion to cause a person to provide labor or services” or to “keep any person in debt bondage.”<sup>45</sup> However, the current D.C. Code does not specify whether “labor or “services” include commercial sex acts. “Labor” is currently defined as “work that has economic or financial value,” and “services” is currently defined as “legal or illegal duties or work done for another, whether or not compensated.”<sup>46</sup> There is no relevant D.C. DCCA case law. The current D.C. Code, however, contains several prostitution-related offenses that do appear to criminalize coercing a person to engage in commercial sex acts.<sup>47</sup> The revised statute, however, specifies that the use of coercive threats to cause a person to engage in commercial sex is not only criminal, but a human trafficking offense. There is no clear justification for distinguishing the harm of using coercive threats to cause a person perform commercial sex when the complainant is a person who other times chooses to engage in commercial sex work from someone who has not engaged in such work. This change improves the clarity, organization, and proportionality of the revised statutes.

Second, the RCC defines a “commercial sex act” as “any sexual act or sexual contact on account of which or for which anything of value is given to, promised to, or received by any person.”<sup>48</sup> Chapter 27 defines “prostitution” as “a sexual act or contact with another person in return for giving or receiving anything of value.”<sup>49</sup> The RCC’s definition of “commercial sexual act” definition is essentially equivalent to the current Chapter 27 definition of prostitution. The RCC’s definition of “commercial sex act” is not intended to differ in any substantive way from the current code’s definition of “prostitution.”

Third, the revised statute uses the term “actor” instead of the terms “individual or business,” as used in the current forced labor statute.<sup>50</sup> “Actor” is a defined term<sup>51</sup>, which means “a person accused of any offense.” The term “person” is also a defined term<sup>52</sup>, and includes a “partnership, company, corporation, association, organization[.]” The term “actor” includes both individuals and businesses, and the use of this term is not intended to change current District law.

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<sup>45</sup> D.C. Code § 22-1832.

<sup>46</sup> D.C. Code § 22-1831.

<sup>47</sup> D.C. Code §§ 22-2705; 22-2706; 22-2708.

<sup>48</sup> RCC § 22E-701.

<sup>49</sup> D.C. Code § 22-2701.01(3).

<sup>50</sup> D.C. Code § 22-1832.

<sup>51</sup> RCC § 22E-701.

<sup>52</sup> RCC § 22E-701.

**RCC § 22E-1603. Trafficking in Labor or Services.**

- (a) *Offense.* An actor commits trafficking in labor or services when that actor:
- (1) Knowingly recruits, entices, houses, transports, provides, obtains, or maintains by any means, a person;
  - (2) With intent that, as a result, the person will be caused to provide labor or services by means of a coercive threat, express or implied, or debt bondage.
- (b) *Penalties.*
- (1) Subject to the general penalty enhancements under this title, and the offense penalty enhancement in subsection (c) of this section, trafficking in labor or services is a Class [X] crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
  - (2) *Penalty enhancements.* In addition to any general penalty enhancements in under this title, the penalty classification for any gradation of this offense is increased in severity by 1 class when, in addition to the elements of the offense, 1 or more of the following is proven:
    - (A) The actor was reckless as to the fact that the complainant was under 18 years of age; or
    - (B) The actor held the complainant, or caused the complainant to provide services, for a total of more than 180 days.
- (c) *Definitions.* The terms “intent,” “knowingly,” and “recklessly” have the meanings specified in RCC § 22E-206; the terms “actor,” “coercive threat,” “commercial sex act,” “complainant,” and “debt bondage” have the meanings specified in RCC § 22E-701.

**COMMENTARY**

***Explanatory Note.** This section establishes the trafficking in labor or services offense for the Revised Criminal Code (RCC). This offense criminalizes knowingly recruiting, enticing, housing, transporting, providing, obtaining, or maintaining another person, with intent that, as a result, anyone will cause that person to provide labor or services by means of coercive threat or debt bondage. Trafficking persons for commercial sex acts is criminalized under the separate trafficking in forced commercial sex offense. The RCC’s trafficking in labor or services offense, along with the RCC’s trafficking in forced commercial sex offense<sup>53</sup>, replaces the trafficking in labor or commercial sex acts statute<sup>54</sup> under the current D.C. Code.*

Paragraph (a)(1) specifies that trafficking in labor or services requires that an actor knowingly recruits, entices, houses, transports, provides, obtains, or maintains by any means, a person. The words entice, transport, provide, obtain, and maintain by any means are intended to have the same meaning as under current law. The word “houses” is intended to include provision of shelter, even if only temporarily. Paragraph (a)(1)

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<sup>53</sup> RCC § 22E-1604.

<sup>54</sup> D.C. Code § 22-1833.

specifies that a “knowingly” culpable mental state applies, which requires that the actor was practically certain that he or she would entice, house, transport, provide, obtain, and maintain a person.

Paragraph (a)(2) specifies that the person must have acted “with intent that” the trafficked person will be caused, as a result, to provide labor or services by means of a coercive threat, express or implied,<sup>55</sup> or debt bondage. “Intent” is a defined term in RCC § 22E-206 that here means the actor was practically certain that the trafficked person will be caused, as a result, to provide labor or services by means of a coercive threat or debt bondage. Per RCC § 22E-205, the object of the phrase “with intent that” is not an objective element that requires separate proof—only the actor’s culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that the trafficked person actually performs labor or services, only that the actor believed to a practical certainty that he or she would do so. The words “as a result” require a nexus between the trafficking activity, and the labor or services that the trafficked person will perform. Housing, transporting, etc. a person in a manner that is unrelated to that person providing labor or services is not criminalized under this section, even if the actor was practically certain that the person would be caused to provide labor or services by means of coercive threat or debt bondage.<sup>56</sup>

Paragraph (b)(1) specifies relevant penalties for the offense.

Paragraph (b)(2) provides penalty enhancements applicable to this offense. Subparagraph (b)(1)(A) specifies that if a person commits trafficking in labor or services and was reckless as to the complainant being under 18 years of age, an enhancement of one penalty class applies. “Reckless” is a defined term,<sup>57</sup> here requiring that the actor was aware of a substantial risk that the complainant was under 18 years of age and such conduct deviated from a reasonable standard of care. Subparagraph (b)(2)(B) specifies that if the complainant was held or provides services for more a total of more than 180 days, the offense classification may be increased in severity by one class.<sup>58</sup> Subparagraph (b)(2)(B) specifies that a “recklessly” culpable mental state applies to this enhancement. Even if both penalty enhancements are proven, the most the penalty can be increased is one class. The penalty enhancement under subsection (b) shall be applied in addition to any general penalty enhancements in RCC §§ 22E-605-608.

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<sup>55</sup> A coercive threat may come in the form of a verbal or written communication, however gestures or other conduct may also suffice. In addition, the statute specifies that the coercive threat need not be explicit. Communications and conduct that are implicitly threatening given the circumstances may satisfy this element. For example, if a person consistently beats people who refuse to comply with his demands, this pattern of conduct may constitute a coercive threat when that person makes similar demands of others. In addition, ongoing infliction of harm may constitute a coercive threat, if it communicates that harm will continue in the future.

<sup>56</sup> For example, if a taxi driver gives a ride to a person running an errand, practically certain that the next day that person will be coerced into performing labor, if there is no relationship between that errand and the labor the person will perform, the taxi driver cannot be held liable for trafficking in labor or services.

<sup>57</sup> RCC § 22E-206 (d).

<sup>58</sup> This enhancement may apply if the combined time in which a person was held and provided labor or services is greater than 180 days, even if the person did not provide labor or services for the entire time. If a person was held for 100 days, and provided labor or services for 81 days, this penalty enhancement would apply.

Subsection (c) cross references applicable definitions located elsewhere in the RCC.

***Relation to Current District Law.*** *The trafficking in labor or services offense changes current District law in six main ways.*

First, by reference to the RCC’s definitions of “labor” and “services”, the revised offense excludes liability for trafficking persons who will engage in commercial sex acts. The current trafficking in labor or commercial sex acts offense criminalizes trafficking persons who will engage in labor, services, *or* commercial sex acts.<sup>59</sup> In contrast, the RCC re-organizes the current trafficking in labor or commercial sex acts into two separate offenses. This change improves the organization of the revised offense.

Second, by reference to the RCC’s “coercive threat” definition, the trafficking in labor or services statute does not provide liability for trafficking a person who will be caused to provide labor or services by fraud or deception. The current statutory definition of “coercion” includes “fraud or deception,”<sup>60</sup> and by extension the current trafficking in labor or commercial sex acts statute references using fraud or deception to cause a person to provide labor or service. By contrast, the RCC’s “coercive threat” definition does not include fraud or deception,<sup>61</sup> and trafficking a person who will be tricked into performing labor or services is not a sufficient basis for liability under the revised trafficking in labor or services offense. The revised offense only provides liability for trafficking a person who will be caused to provide labor or services under threat of one of the means listed in the RCC’s definition of “coercive threats,” or by subjecting the person to debt bondage.<sup>62</sup> While using deception to cause another to engage in labor or services is wrongful, it does not warrant equal punishment to using other means of coercion or debt bondage and could provide major felony liability for common employment disputes and those engaged in such schemes.<sup>63</sup> Rather, a person who encourages or assists a person who causes another to provide labor or services through fraud or deception may still be liable as an accomplice<sup>64</sup> under the RCC’s revised fraud<sup>65</sup> statute, a property offense with penalties based on the economic harm suffered. This change improves the penalty proportionality of the revised statute.

Third, by reference to the RCC’s “coercive threat” definition, the revised trafficking in labor or services offense criminalizes trafficking when the coercion at issue

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<sup>59</sup> D.C. Code § 22-1833.

<sup>60</sup> D.C. Code § 22-1831 (3)(D).

<sup>61</sup> RCC § 22E-701.

<sup>62</sup> Trafficking in labor or services may involve deceptive or fraudulent conduct *in addition* to other coercive means. For example, a person who traffics a laborer knowing that he or she was initially lured with the false promise of high wages, and will be coerced into providing labor under threat of bodily injury could be convicted under the RCC’s trafficking in labor or services statute. *E.g., United States v. Bradley*, 390 F.3d 145 (1st Cir. 2004).

<sup>63</sup> For instance, under the current statutory definition of “coercion,” a person may be liable for trafficking in labor or commercial sex acts, subject to a [] year maximum imprisonment, for transporting a laborer to a job, knowing that the employer at the time of hire falsely stated the rate of pay or work duties that will be expected.

<sup>64</sup> RCC § 22E-210.

<sup>65</sup> RCC § 22E-2201. The revised fraud statute criminalizes taking property of another by means of deception. The term “property” is defined as “anything of value” including “services[.]” RCC § 22E-701.

is restricting another person's access to a controlled substance that the person owns or to prescription medication that the person owns. The current D.C. Code statutory definition of "coercion" in the human trafficking chapter provides liability for "facilitating or controlling" a person's access to any addictive substance. These terms are not defined by statute and have not been interpreted by the DCCA. By contrast, the revised trafficking in labor or services offense only provides liability for trafficking a person who will be caused to provide labor or services under threat of restricting access to controlled substances that the person owns or prescription medication that the person owns. Restricting a person's access to a controlled substance or prescription medication that the person does not yet own does not constitute this form of per se coercive threat.<sup>66</sup> Similarly, restricting a person's access to an addictive substance that is not a controlled substance or prescription medication also does not constitute this form of per se coercive threat. This change likely eliminates liability for trafficking someone knowing that they will be compensated with a controlled substance or prescription medication as part of an otherwise clear and consensual transaction,<sup>67</sup> and precludes arguments that trafficking an employee knowing that an employer seeks to limit the employee's access to legal and readily available addictive substances like tobacco or alcohol constitutes trafficking in labor or services.<sup>68</sup> However, in some circumstances, such conduct may still fall within another per se form of coercive threat or the catch-all form of coercive threat.<sup>69</sup> Eliminating liability for trafficking where the harm is the facilitation of access to any addictive substance as a form of coercion prevents the possibility of criminalizing relatively less coercive conduct.<sup>70</sup> This change improves the clarity and proportionality of the revised statute.

Fourth, the revised trafficking in labor or services offense requires that the actor acted *with intent* that the trafficked person will be caused to provide labor or services by means of coercive threat or debt bondage. The current statute includes acting "with reckless disregard of the fact that" coercion will be used to cause the person to provide labor or services. By contrast, the revised statute requires that the actor was practically certain that the complainant will be caused to perform labor or services by means of a coercive threat or debt bondage.<sup>71</sup> Requiring that the actor was at least practically

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<sup>66</sup> For example, a drug trafficker refusing to sell a controlled substance to a person does not constitute this form of coercive threat.

<sup>67</sup> For example, compensating a person with a controlled substance may constitute "facilitation" under the current forced labor statute due to the definition of "coercion."

<sup>68</sup> For example, an employer who predicates a person's employment on not smoking tobacco or drinking alcohol may be liable for "controlling" the employee's access to the substance, and a person knowingly recruiting an employee into such circumstances may be liable for trafficking.

<sup>69</sup> For example, if a person is severely addicted to a controlled substance, and relies on the actor as the sole provider of that substance, threatening to restrict the person's access to that substance may in some cases constitute a coercive threat under the catch all provision.

<sup>70</sup> For example, under current law inducing a person who is a regular tobacco user to perform any service by offering cigarettes in exchange arguably constitutes coercion, and knowingly recruiting a person into such employment an offense punishable by up to 20 years imprisonment. In addition, although alcohol is an addictive substance, it is not a controlled substance and thus is readily available. Facilitating a person's access to alcohol is not inherently coercive, as it is relatively easy for a person to obtain alcohol by other means, as compared to controlled substances.

<sup>71</sup> For example, if a taxi driver overhears his passenger make comments which suggest that upon arrival at her destination, she may be coerced into performing labor or services, the driver is not guilty of trafficking

certain that the person will be caused to provide labor or services by means of coercive threat or debt bondage may avoid disproportionate penalties for persons who were unaware that the person would be coerced into providing labor or services.<sup>72</sup> This change improves the proportionality of the revised statute.

Fifth, the revised trafficking in labor or services offense requires that an actor's trafficking activity occur with intent that the complainant *as a result will* provide labor or services. The current D.C. Code trafficking in labor or commercial sex acts statute does not specify any relationship between the transporting, housing, etc., and the performance of labor or services. Consequently, it appears that there is criminal liability when a person transports, houses, etc. a person in a manner that is entirely unrelated to the coerced labor or services.<sup>73</sup> The current D.C. Code statute also states that it applies when "coercion will be used or is being used."<sup>74</sup> By contrast, the revised statute requires a causal relationship between the trafficking activity, and the person performing labor or services. The actor's trafficking conduct need not be the sole or primary cause of the complainant being coerced by a threat or debt bondage, but there must be a causal link to a future result.<sup>75</sup> This revision excludes persons who may provide assistance to a complainant (e.g. housing, meals) that are unrelated to the coerced acts.<sup>76</sup> This change improves the proportionality of the revised criminal code.

Sixth, the revised trafficking in labor or services offense authorizes enhanced penalties if the actor was reckless as to whether the complainant was under 18 years of age. The current trafficking in labor or commercial sex acts offense does not authorize enhanced penalties based on the age of the complainant. The D.C. Code includes a general penalty enhancement for "crimes of violence" committed against persons under the age of 18, but trafficking in labor is currently not a "crime of violence."<sup>77</sup> By contrast, the revised trafficking in labor or services offense provides a penalty

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in labor or services if the driver is only aware of a substantial risk, but not practically certain, that the passenger will be coerced into engaging labor or services.

<sup>72</sup> Under the rule of imputation of knowledge for deliberate ignorance set forth in RCC § 22E-208, an actor who traffics a person with recklessness that the person will be caused to provide labor or services by means of coercive threat or debt bondage may be held liable, if the actor avoided confirming or failed to investigate whether the trafficked person will be coerced into providing labor or services, with the purpose of avoiding criminal liability.

<sup>73</sup> For example, if a taxi driver gives a ride to a person running an errand, knowing that the next day that person will be coerced into performing labor, if there is no relationship between that errand and the labor the person will perform, the taxi driver cannot be held liable for trafficking in labor or services.

<sup>74</sup> D.C. Code § 22-1833.

<sup>75</sup> The result may be imminent or in the distant future, so long as the actor's conduct is causally linked and other elements of the offense are met. For example, an actor who drives people in a van to a District work site and believes to a practical certainty that as a result they will perform commercial labor or services by coercive threats, either immediately or weeks later, may be guilty of trafficking in labor or services.

<sup>76</sup> For example, there is not the required causal link where a waiter in a public restaurant serves a meal to a person, believing (due to an overheard conversation) to a practical certainty that the person will perform labor or services under coercive threat later that week. Also, there would not be a causal link to a future act of labor or services, or liability for trafficking in labor or services for a shelter driver who transports persons known to have performed labor or services by coercive threats to a shelter.

<sup>77</sup> D.C. Code § 22-1331 (4).

enhancement based on the complainant being a minor. This change improves the consistency and proportionality of the revised statutes.

*In addition, the revised trafficking in labor offense makes three other changes that may constitute a substantive change to current District law.*

First, by reference to the RCC’s definition of “coercive threat,” trafficking in labor or services includes causing a person to engage in labor or services by threatening that any person will “commit any criminal offense against persons” or any “property offense.”<sup>78</sup> The current “coercion” definition does not explicitly include threats to “commit any criminal offense against persons” but does include threats of “force, threats of force, physical restraint, or threats of physical restraint,” conduct that appears to constitute the criminal offenses of assault or kidnapping. In addition, the current statutory definition of “coercion” generally includes “serious harm or threats of serious harm,” which broadly covers “any harm . . . that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or to continue to perform labor, services, or commercial sex acts to avoid incurring that harm.”<sup>79</sup> The revised definition of “coercive threat” and the RCC crime of trafficking in labor or services together specify that trafficking a person with intent that any person will use threats to commit any criminal offense against persons or property offense to compel labor or services is categorically a basis for liability, even if it would otherwise be unclear whether the threat would constitute “serious harm” under the residual clause in paragraph (2)(G) of the coercion definition. This change improves the clarity and consistency of the revised statutes.

Second, the revised trafficking in labor or services statute replaces the word “harbor” with “houses.” The current D.C. Code trafficking statute refers to “harboring” as one of many types of predicate conduct, including “recruit, entice, harbor, transport, provide, obtain, or maintain.” “Harboring” is not statutorily defined, and there is no relevant D.C. Court of Appeals (DCCA) case law. To resolve this ambiguity, in the revised statute the word “houses” replaces the word “harbor.” The RCC reference to “houses” may be narrower than “harbor,”<sup>80</sup> although the term “houses” is intended to broadly refer to the provision of physical shelter, including temporary shelter. This change clarifies and may improve the proportionality of the revised statute.

Third, the revised statute allows for enhanced penalties if the actor recklessly held the complainant or caused the complainant to engage in labor or services for a total of more than 180 days. The D.C. Code trafficking in labor or services statute is subject to a penalty enhancement if “the victim is held or provides services for more than 180 days[.]”<sup>81</sup> However, the current statute does not specify any culpable mental state, nor does it clarify whether this 180 day threshold is based on the *total* of the days the complaint engaged in labor or services in addition to the days the complainant was held. There is no relevant DCCA case law. To resolve these ambiguities, the revised statute

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<sup>78</sup> RCC § 22E-701.

<sup>79</sup> D.C. Code § 22-1831 (7).

<sup>80</sup> The verb form of the word “harbor” is defined by Meriam-Webster’s Dictionary as, “to give shelter or refuge to[.]” <https://www.merriam-webster.com/dictionary/harbor>

<sup>81</sup> D.C. Code §22-1837 (a)(2).



specifies that the enhancement applies if the actor recklessly holds the complainant, or causes the complainant to engage in labor or services for a total number of days exceeds that 180. This change clarifies and may improve the proportionality of the revised statute.

*One other change to the trafficking in labor or services statute is clarificatory, and is not intended to substantively change current District law.*

The revised statute uses the term “actor” instead of the terms “individual or business,” as used in the current forced labor statute.<sup>82</sup> “Actor” is a defined term<sup>83</sup>, which means “a person accused of any offense.” The term “person” is also a defined term<sup>84</sup>, and includes a “partnership, company, corporation, association, organization[.]” The term “actor” includes both individuals and businesses, and the use of this term is not intended to change current District law.

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<sup>82</sup> D.C. Code § 22-1832.

<sup>83</sup> RCC § 22E-701.

<sup>84</sup> RCC § 22E-701.

**RCC § 22E-1604. Trafficking in Forced Commercial Sex.**

- (a) *Offense.* An actor commits trafficking in forced commercial sex when that actor:
- (1) Knowingly recruits, entices, houses, transports, provides, obtains, or maintains by any means, the complainant;
  - (2) With intent that, as a result, the complainant will be caused to engage in or submit to a commercial sex act with or for another person in one or more of the following ways:
    - (A) By physical force that causes bodily injury to, overcomes, or restrains any person;
    - (B) By a coercive threat, express or implied;
    - (C) By debt bondage;
    - (D) By a drug, intoxicant, or other substance, administered to the complainant without the complainant’s effective consent.
- (b) *Penalties.*
- (1) Subject to any general penalty enhancements under this title, and the offense penalty enhancement in paragraph (b)(1) of this section, trafficking in forced commercial sex is a Class [X] crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
  - (2) *Penalty enhancements.* In addition to any general penalty enhancements under this title, the penalty classification for any gradation of this offense is increased in severity by 1 class when, in addition to the elements of the offense, 1 or more of the following is proven:
    - (A) The actor was reckless as to the fact that the complainant was under 18 years of age, or, in fact, the complainant was under 12 years of age; or
    - (B) The actor recklessly held the complainant, or caused the complainant to provide commercial sex acts, for a total of more than 180 days.
- (c) *Definitions.* The terms “intent,” “knowingly,” and “recklessly,” have the meanings specified in RCC § 22E-206; the term “in fact” has the meaning specified in RCC § 22E-207; the terms “actor,” “coercive threat,” “commercial sex act,” and “debt bondage” have the meanings specified in RCC § 22E-701.

**COMMENTARY**

***Explanatory Note.** This section establishes the trafficking in forced commercial sex offense for the Revised Criminal Code (RCC). This offense criminalizes knowingly recruiting, enticing, housing, transporting, providing, obtaining, or maintaining another person, with intent that, as a result, the person will be caused to engage in a commercial sex act by means of physical force that causes bodily injury, a coercive threat, debt bondage, or a drug, intoxicant, or other substance. The RCC’s trafficking in forced commercial sex offense, along with the RCC’s trafficking in labor or services offense<sup>85</sup>,*

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<sup>85</sup> RCC § 22E-1603.

*replaces the trafficking in labor or commercial sex acts statute<sup>86</sup> under the current D.C. Code. The revised offense also replaces portions of the pandering statute<sup>87</sup> the compelling an individual to live life or prostitution against his or her will statute,<sup>88</sup> and the abducting or enticing a child from his or her home for purposes of prostitution; harboring such child statute<sup>89</sup> in Chapter 27 of the current D.C. Code. To the extent that certain statutory provisions authorizing extended periods of supervised release<sup>90</sup> apply to the current trafficking in labor or commercial sex acts statute, these provisions are replaced in relevant part by the revised trafficking in forced commercial sex acts statute.*

Paragraph (a)(1) specifies that trafficking in forced commercial sex requires that an actor knowingly recruits, entices, houses, transports, provides, obtains, or maintains by any means, the complainant. The words entice, transport, provide, obtain, and maintain by any means are intended to have the same meaning as under current law. The word “houses” is intended to include provision of shelter, even if only temporarily. Paragraph (a)(1) specifies that a “knowingly” culpable mental state applies, which requires that the actor was practically certain that he or she would entice, house, transport, provide, obtain, or maintain the complainant.

Paragraph (a)(2) specifies that the actor must have acted with intent that the complainant will be caused, as a result, to engage in or submit to a “commercial sex act” by one of the means listed in subparagraphs (a)(2)(A)-(D). The term “commercial sex act” is a defined term.<sup>91</sup> “Intent” is a defined term in RCC § 22E-206 that here means the actor was practically certain that the complainant will be caused to engage in or submit to a commercial sex act by means specified in subparagraphs (a)(2)(A)-(D). Per RCC § 22E-205, the object of the phrase “with intent that” is not an objective element that requires separate proof—only the actor’s culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that the trafficked person actually engages in or submits to a commercial sex act, only that the actor believed to a practical certainty that he or she would do so. The words “as a result” require a nexus between the

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<sup>86</sup> D.C. Code § 22-1833.

<sup>87</sup> D.C. Code § 22-2705. The pandering statute makes it a crime for “any parent, guardian, or other person having legal custody of the person of an individual, to consent to the individual’s being taken, detained, or used by any person, for the purpose of prostitution or a sexual act or sexual contact.” This conduct will be criminalized under the RCC’s trafficking in commercial sex statute.

<sup>88</sup> D.C. Code § 22-2706. This statute makes it a crime to “by threats or duress, to detain any individual against such individual’s will, for the purpose of prostitution or a sexual act or sexual contact, or to compel any individual against such individual’s will, to reside with him or her or with any other person for the purposes of prostitution or a sexual act or sexual contact.” This conduct may also be criminalized under the RCC’s kidnapping statute, RCC § 22E-1401 or criminal restraint statute, RCC § 22E-1402.

<sup>89</sup> D.C. Code § 22-2704.

<sup>90</sup> D.C. Code § 24-403.01(b)(4) (“In the case of a person sentenced for an offense for which registration is required by the Chapter 40 of Title 22, the court may, in its discretion, impose a longer term of supervised release than that required or authorized by paragraph (2) or (3) of this subsection, of: . . . (A) Not more than 10 years[.]” D.C. Code §22-4001(8) defines “registration offense” to include “Any offense under the District of Columbia Official Code that involved a sexual act or sexual contact without consent or with a minor[.]” To the extent the current trafficking in labor or commercial sex acts offense involves sexual acts or contacts without consent, D.C. Code § 22-403.01 may authorize an extended period of supervised release.

<sup>91</sup> RCC § 22E-701.

trafficking activity, and the commercial sex act that the trafficked person will engage in or submit to. Housing, transporting, etc. a person in a manner that is unrelated to that person providing labor or services is not criminalized under this section, even if the actor was practically certain that the person would be caused to engage in or submit to a commercial sex act by one of the means listed in subparagraphs (a)(2)(A)-(D).<sup>92</sup>

Paragraph (a)(2) also specifies that the actor must cause the complainant to engage in or submit to a commercial sex act with or for another person, which means that the act must be with or for someone other than the actor.<sup>93</sup> This element may be satisfied if the actor intends that the complainant will engage in or submit to a commercial sex act with a third party, or that the complainant will engage in masturbatory conduct for a third party.<sup>94</sup>

Under subparagraph (a)(2)(A) the actor must intend that the trafficked person will be caused to engage in or submit to a commercial sex act by means of physical force that causes “bodily injury” to, overcomes, or restrains any person. “Bodily injury” is defined in RCC § 22E-701 as “physical pain, physical injury, illness, or any impairment of physical condition.”

Under subparagraph (a)(2)(B), the actor must intend that a coercive threat, express or implied, will be used to cause the complainant to engage in or submit to a commercial sex act. “Coercive threat” is defined under RCC § 22E-701 and includes multiple per se types of threats, as well as a flexible standard referring to a threat of any harm sufficiently serious to cause a reasonable person in the complainant’s situation to comply.<sup>95</sup>

Under subparagraph (a)(2)(C), the actor must intend that debt bondage will be used to cause a person to engage in or submit to a commercial sex act. “Debt bondage” is defined under RCC § 22E-701 and requires that the person perform labor or services to pay off a real or alleged debt under one of three specified circumstances.<sup>96</sup>

Under subparagraph (a)(2)(D), the actor must intend that the administration of an intoxicant or other substance without the complainant’s “effective consent” will be used to cause the complainant to engage in or submit to a commercial sex act. “Effective consent” is a defined term in RCC § 22E-701 that means “consent other than consent induced by physical force, an express or implied coercive threat, or deception.” “Intent” is a defined term in RCC § 22E-206 that here means the actor was practically certain that the complainant would be caused to engage in or submit to a commercial sex act by

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<sup>92</sup> For example, if a taxi driver gives a ride to a person running an errand, practically certain that the next day that person will be coerced into performing a commercial sex act, if there is no relationship between that errand and the commercial sex act the person will perform, the taxi driver cannot be held liable for trafficking in forced commercial sex.

<sup>93</sup> An actor who traffics a person with intent that the person engage in a commercial sex act *with the actor* by means of a coercive threat or debt bondage may be subject to liability under sex assault offenses defined under Chapter 13.

<sup>94</sup> Masturbation is not explicitly included in the definition of “commercial sex act.” However, the term “commercial sex act” is defined to include any sexual act or sexual contact performed in exchange for anything of value. To the extent that conduct commonly understood as masturbation meets the definition of sexual act or sexual contact, if it performed in exchange for anything of value, it constitutes a “commercial sex act.”

<sup>95</sup> For further discussion of this term, see Commentary to RCC § 22E-701.

<sup>96</sup> For further discussion of this term, see Commentary to RCC § 22E-701.

administration of a drug, intoxicant or other substance. Per RCC § 22E-205, the object of the phrase “with intent to” is not an objective element that requires separate proof—only the actor’s culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that anyone administered a drug, intoxicant, or other substance.

Subsection (b)(1) specifies relevant penalties for the offense.

Paragraph (b)(2) provides penalty enhancements applicable to this offense. Subparagraph (b)(2)(A) specifies that if a person commits trafficking in forced commercial sex and was reckless as to the complainant being under 18 years of age, an enhancement of one penalty class applies. “Reckless” is a defined term,<sup>97</sup> here requiring that the actor was aware of a substantial risk that the complainant was under 18 years of age and such conduct deviated from a reasonable standard of care. Alternatively, subparagraph (b)(2)(A) also specifies that if a person commits trafficking in forced commercial sex, the complainant was, in fact, under the age of 12, an enhancement of one penalty class applies. The term “in fact” specifies that no culpable mental state is required if the complainant was under the age of 12. Paragraph (b)(2)(B) specifies that if the actor held the complainant or caused the complainant to engage in commercial sex acts for a total of more than 180 days, the offense classification may be increased in severity by one class.<sup>98</sup> Subparagraph (b)(2)(B) specifies that a “recklessly” culpable mental state applies to this enhancement. Even if more than one penalty enhancement is proven, the most the penalty can be increased is one class. The penalty enhancement under paragraph (b)(2) shall be applied in addition to any general penalty enhancements in RCC §§ 22E-605-608.

Subsection (c) cross references applicable definitions located elsewhere in the RCC.

***Relation to Current District Law.*** *The trafficking in forced commercial sex statute changes current District law in seven main ways.*

First, the RCC trafficking in forced commercial sex offense is codified in a separate and distinct manner from the offense of trafficking in labor or services. The D.C. Code currently criminalizes in one statute trafficking persons who will engage in labor, services, *or* commercial sex acts.<sup>99</sup> In contrast, the RCC re-organizes the current trafficking in labor or commercial sex acts into two separate offenses and clarifies that commercial sex acts are not part of the revised definitions of “labor” and “services.” This change improves the organization of the revised offenses.

Second, by reference to the RCC’s “coercive threats” definition, the trafficking in forced commercial sex statute does not provide liability for trafficking a person who will be caused to engage in or submit to a commercial sex act by means of fraud or deception. The current statutory definition of “coercion” includes “fraud or deception,”<sup>100</sup> and by

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<sup>97</sup> RCC § 22E-206.

<sup>98</sup> This enhancement may apply if the combined time in which a person was held and provided labor or services is greater than 180 days, even if the person did not provide labor or services for the entire time. If a person was held for 100 days, and provided labor or services for 81 days, this penalty enhancement would apply.

<sup>99</sup> D.C. Code § 22-1833.

<sup>100</sup> D.C. Code § 22-1831 (3)(D).

extension the current trafficking in labor or commercial sex acts statute references using fraud or deception to cause a person to engage in a commercial sex act. By contrast, the RCC’s “coercive threat” definition does not include fraud or deception,<sup>101</sup> and trafficking a person who will be tricked into performing commercial sex is not a sufficient basis for liability under the revised trafficking in forced commercial sex offense. The revised offense only provides liability for trafficking a person who will be caused to engage in a commercial sex act under threat of one of the means listed in the RCC’s definition of “coercive threat,” or by subjecting the person to debt bondage.<sup>102</sup> While using deception to cause another to engage in commercial sex is wrongful, it does not warrant equal punishment to using other means of coercion or debt bondage.<sup>103</sup> Rather, a person who encourages or assists a person who causes another to provide commercial sex through fraud or deception may still be liable as an accessory<sup>104</sup> under the RCC’s revised fraud<sup>105</sup> statute, a property offense with penalties based on the economic harm suffered. This change improves the penalty proportionality of the revised statute.

Third, by reference to the RCC’s “coercive threat” definition, the revised trafficking in forced commercial sex offense criminalizes trafficking when the coercion at issue is restricting another person’s access to a controlled substance that the person owns or to prescription medication that the person owns. The current D.C. Code statutory definition of “coercion” in the human trafficking chapter provides liability for “facilitating or controlling” a person’s access to any addictive substance, and by extension the current trafficking in labor or commercial sex acts statute references facilitating or controlling access to addictive substances to cause a person to engage in a commercial sex act. These terms are not defined by statute and have not been interpreted by the DCCA. By contrast, the revised trafficking in forced commercial sex offense only provides liability for trafficking a person who will be caused to provide a commercial sex act under threat of restricting access to controlled substances that the person owns or prescription medication that the person owns. Restricting a person’s access to a controlled substance or prescription medication that the person does not yet own does not constitute this form of coercive threat.<sup>106</sup> Restricting a person’s access to an addictive substance that is not a controlled substance or prescription medication also does not constitute this form of coercive threat. This change eliminates liability for trafficking someone knowing that they will be compensated with a controlled substance or

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<sup>101</sup> RCC § 22E-701.

<sup>102</sup> Trafficking in forced commercial sex may involve deceptive or fraudulent conduct *in addition* to other coercive means. For example, a person who traffics a worker knowing that he or she was initially lured with the false promise of high wages, and will also be coerced into engaging in commercial sex acts under threat of bodily injury may be convicted under the RCC’s trafficking in forced commercial sex statute. *E.g., United States v. Bradley*, 390 F.3d 145 (1st Cir. 2004).

<sup>103</sup> For instance, under the current statutory definition of “coercion,” a person may be liable for trafficking in labor or commercial sex acts, subject to a [ ] year maximum imprisonment, for transporting a laborer to a job, knowing that the employer at the time of hire falsely stated the rate of pay or work duties that will be expected.

<sup>104</sup> RCC § 22E-210.

<sup>105</sup> RCC § 22E-2201. The revised fraud statute criminalizes taking property of another by means of deception. The term “property” is defined as “anything of value” including “services[.]” RCC § 22E-701.

<sup>106</sup> For example, a drug trafficker refusing to sell a controlled substance to a person does not constitute this form of coercive threat.

prescription medication as part of an otherwise clear and consensual transaction,<sup>107</sup> and precludes arguments that trafficking a person knowing that someone will seek to limit that person's access to legal and readily available addictive substances like tobacco or alcohol constitutes trafficking in forced commercial sex acts.<sup>108</sup> However, in some circumstances, such conduct may still fall within another per se form of coercive threat or the catch-all form of coercive threat.<sup>109</sup> Eliminating liability for trafficking where the harm is the facilitation of access to any addictive substance as a form of coercion prevents the possibility of criminalizing relatively less coercive conduct.<sup>110</sup> These changes improve the clarity and proportionality of the revised statute.

Fourth, the revised trafficking in forced commercial sex offense requires that the actor acted *with intent* that the complainant will be caused to engage a commercial sex act by means of coercive threat or debt bondage. The current statute includes acting “with reckless disregard of the fact that” coercion or debt bondage will be used to cause the person to engage in a commercial sex act. By contrast, the revised statute requires that the actor was practically certain that the complainant will be caused to engage in a commercial sex act by means of a coercive threat or debt bondage.<sup>111</sup> Requiring that the actor was at least practically certain that the person will be caused to engage in a commercial sex act by means of coercive threat or debt bondage avoids disproportionate penalties for persons who were unaware that the person would be coerced into providing labor or services.<sup>112</sup> This change improves the proportionality of the revised statute.

Fifth, the revised trafficking in forced commercial sex offense requires that an actor's trafficking activity occur with intent that the complainant *as a result will* provide a commercial sex act. The current D.C. Code trafficking in labor or commercial sex acts statute does not specify any relationship between the transporting, housing, etc., and the performance of labor or services. Consequently, it appears that there is criminal liability

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<sup>107</sup> For example, compensating a person with a controlled substance may constitute “facilitation” under the current forced labor statute due to the definition of “coercion.”

<sup>108</sup> For example, a person who recruits someone to perform commercial sex acts, knowing that another will predicate performance of the commercial sex work on not smoking tobacco or drinking alcohol may be liable for “controlling” the employee's access to the substance, and may be liable for trafficking.

<sup>109</sup> For example, if a person is severely addicted to a controlled substance, and relies on the actor as the sole provider of that substance, threatening to restrict the person's access to that substance may in some cases constitute a coercive threat under the catch all provision.

<sup>110</sup> For example, under current law inducing a person who is a regular tobacco user to perform any service by offering cigarettes in exchange arguably constitutes coercion, and knowingly recruiting a person into such employment an offense punishable by up to [] years imprisonment. In addition, although alcohol is an addictive substance, it is not a controlled substance and thus is readily available. Facilitating a person's access to alcohol is not inherently coercive, as it is relatively easy for a person to obtain alcohol by other means, as compared to controlled substances.

<sup>111</sup> For example, if a taxi driver overhears his passenger make comments which suggest that upon arrival at her destination, she may be coerced into performing a commercial sex act, the driver is not guilty of trafficking in forced commercial sex if the driver is only aware of a substantial risk, but not practically certain, that the passenger will be coerced into engaging in a commercial sex act.

<sup>112</sup> Under the rule of imputation of knowledge for deliberate ignorance set forth in RCC § 22E-208, an actor who traffics a person with recklessness that the person will be caused to engage in a commercial sex act by means of coercive threat or debt bondage may be held liable, if the actor avoided confirming or failed to investigate whether the trafficked person will be coerced into engaging a commercial sex act, with the purpose of avoiding criminal liability.

when a person transports, houses, etc. a person in a manner that is entirely unrelated to the coerced labor or services.<sup>113</sup> The current D.C. Code statute also states that it applies when “coercion will be used or is being used.”<sup>114</sup> By contrast, the revised statute requires a causal relationship between the trafficking activity, and the person performing a commercial sex act. The actor’s trafficking conduct need not be the sole or primary cause of the complainant being coerced by a threat or debt bondage, but there must be a causal link to such a future result.<sup>115</sup> This revision excludes persons who may provide assistance to a complainant (e.g. housing, meals) that are unrelated to the coerced acts.<sup>116</sup> This change improves the proportionality of the revised criminal code.

Sixth, the revised trafficking in forced commercial sex offense authorizes enhanced penalties if the actor was reckless as to whether the complainant was under 18 years of age, or if the complainant was, in fact, under 12 years of age. The current trafficking in labor or commercial sex acts offense does not authorize enhanced penalties based on the age of the complainant. The D.C. Code includes a general penalty enhancement for “crimes of violence” committed against persons under the age of 18, but trafficking in labor or commercial sex acts is not currently a “crime of violence.”<sup>117</sup> By contrast, the revised trafficking in forced commercial sex offense provides a penalty enhancement based on recklessness as to whether the complainant was under the age of 18, or based on strict liability if the complainant was under the age of 12. This change improves the consistency and proportionality of the revised statutes.

Seventh, the revised RCC trafficking in forced commercial sex offense specifies what types of conduct are sufficient to “compel” a person to engage in prostitution.<sup>118</sup> Under Chapter 27, the current code makes it a crime “by threats or duress, to detain any individual against such individual’s will for the purpose of prostitution or a sexual act or sexual contact”<sup>119</sup> or to “compel any individual, to reside with him or her or with any other person for the purposes of prostitution or a sexual act or sexual contact,”<sup>120</sup> or to “forcibly abduct a child under 18 from his or her home or usual abode, or from the custody and control of the child’s parents or guardian.”<sup>121</sup> The current code also makes it a crime to use “force, fraud, intimidation, or threats” to “place[] or leave[] . . . a spouse or

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<sup>113</sup> For example, if a taxi driver gives a ride to a person running an errand, knowing that the next day that person will be coerced into performing a commercial sex act, if there is no relationship between that errand and the commercial sex act that the person will perform, the taxi driver cannot be held liable for trafficking in forced commercial sex.

<sup>114</sup> D.C. Code § 22-1833.

<sup>115</sup> The result may be imminent or in the distant future, so long as the actor’s conduct is causally linked and other elements of the offense are met. For example, an actor who drives people in a van to a District house and believes to a practical certainty that as a result they will perform commercial sex acts by coercive threats, either immediately or weeks later, may be guilty of trafficking in forced commercial sex.

<sup>116</sup> For example, there is not the required causal link where a waiter in a public restaurant serves a meal to a person, believing (due to an overheard conversation) to a practical certainty that the person will perform a commercial sex act under coercive threat later that week. Also, there would not be a causal link to a future commercial sex act, or liability for trafficking in forced commercial sex for a shelter driver who transports persons known to have performed commercial sex acts by coercive threats to a shelter.

<sup>117</sup> D.C. Code § 22-1331 (4).

<sup>118</sup> D.C. Code § 22-2706.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> D.C. Code §22-2704.



domestic partner in a house of prostitution, or to lead a life of prostitution[.]”<sup>122</sup> The current code does not define the terms “threats,” “duress,” “detain,” “force,” “forcibly,” “fraud,” or “intimidation,” and there is no relevant D.C. Court of Appeals (DCCA) case law interpreting these terms. In contrast, the revised statute refers to the defined terms “coercive threat” and “debt bondage,” and specifies that physical force that causes bodily injury, and administering a drug, intoxicant, or other substance are barred means of compelling a person to engage in a commercial sex act constitutes a criminal offense. This change improves the clarity and consistency of revised statutes.

Eighth, the RCC trafficking in forced commercial sex offense requires a person to act with a “knowing” culpable mental state. Statutes under Chapter 27<sup>123</sup> that are replaced in whole or in part by the RCC’s trafficking in forced commercial sex offense do not specify culpable mental states, and there is no relevant DCCA case law on this issue. In contrast, the RCC trafficking in forced commercial sex act offense specifies one consistent, defined culpable mental state of knowing. Applying a knowledge or intent requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.<sup>124</sup> This change improves the clarity and consistency of the criminal code, and improves the proportionality of penalties.

Ninth, the RCC trafficking in forced commercial sex offense creates a standardized penalty and enhancements. The offenses under Chapter 27 that are replaced by the RCC’s trafficking in forced commercial sex offense allow for a variety of penalties. Depending on which Chapter 27 offense an actor was prosecuted under, conduct that would constitute trafficking in forced commercial sex could be subject to maximum penalties ranging from 5 years<sup>125</sup> to 20 years.<sup>126</sup> In contrast, the RCC forced commercial sex offense applies a consistent penalty and enhancements. This change improves the consistency of the criminal code, and proportionality of the revised statutes.

*Beyond these nine changes to current District law, four other aspects of the revised trafficking in forced commercial sex acts may constitute a substantive change to current District law.*

First, by reference to the RCC’s definition of “coercive threat,” trafficking in forced commercial sex includes trafficking a person, with intent that, as a result, the person will be compelled to engage in a commercial sex act under threat that any person will commit an offense against persons or a property offense.”<sup>127</sup> The current “coercion” definition does not explicitly include threats to commit any offenses against persons or property offenses but does include threats of “force, threats of force, physical restraint, or threats of physical restraint,” conduct that appears to constitute the criminal offenses of assault or kidnapping. In addition, the current statutory definition of “coercion” generally includes “serious harm or threats of serious harm,” which broadly covers “any harm . . .

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<sup>122</sup> D.C. Code § 22-2708.

<sup>123</sup> D.C. Code § 22-2704; D.C. Code § 22-2705; D.C. Code 22-2706.

<sup>124</sup> *See, Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) (“[O]ur cases have explained that a defendant generally must ‘know the facts that make his conduct fit the definition of the offense,’ even if he does not know that those facts give rise to a crime. (Internal citation omitted)”).

<sup>125</sup> D.C. Code § 22-2705.

<sup>126</sup> D.C. Code § 22-2704.

<sup>127</sup> RCC § 22E-701.

that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or to continue to perform labor, services, or commercial sex acts to avoid incurring that harm.”<sup>128</sup> The revised definition of “coercive threats” and the RCC crime of forced commercial sex together specify that a threat to commit any criminal offense against persons or property offense is categorically a basis for liability, even if it would otherwise be unclear whether the crime would constitute “serious harm” under the residual clause in paragraph (2)(G) of the coercion definition. This change improves the clarity and consistency of the revised statutes.

Second, the revised trafficking in forced commercial sex offense includes acting with intent that a person will administer a drug, intoxicant, or other substance to the complainant without the complainant’s effective consent. The current trafficking statute does not explicitly include trafficking a person who will be administered a drug, intoxicant, or other substance without that person’s effective consent. However, the statute includes the use of “coercion,” which is defined to include force, and “facilitating or controlling a person’s access to an addictive or controlled substance or restricting a person’s access to prescription medication[.]”<sup>129</sup> Administering a drug, intoxicant, or other substance without effective consent may constitute force, or facilitation of a person’s access to an addictive or controlled substance. There is no relevant D.C. Court of Appeals (DCCA) case law. To resolve this ambiguity, the revised statute clarifies that trafficking a person with intent that the person will engage in or submit to a commercial sex act by means of administration of a drug, intoxicant, or other substance without effective consent constitutes trafficking in forced commercial sex. This change clarifies and may improve the proportionality of the revised statute.

Third, the revised trafficking in forced commercial sex statute replaces the word “harbor” with “houses.” The current D.C. Code trafficking statute refers to “harboring” as one of many types of predicate conduct, including “recruit, entice, harbor, transport, provide, obtain, or maintain.” “Harboring” is not statutorily defined, and there is no relevant D.C. Court of Appeals (DCCA) case law. To resolve this ambiguity, in the revised statute the word “houses” replaces the word “harbor.” The RCC reference to “houses” may be narrower than “harbor,”<sup>130</sup> although the term “houses” is intended to broadly refer to the provision of physical shelter, including temporary shelter. This change clarifies and may improve the proportionality of the revised statute.

Fourth, the revised trafficking in forced commercial sex statute requires that the actor had intent that the complainant would be caused to engage in or submit to a commercial sex act with a person other than the actor. The current statute does not specify whether the actor must have intent that the complainant engage in a commercial sex act with someone other than the actor, and there is no relevant DCCA case law. In contrast, the revised statute specifies that the actor must have had intent that the complainant would engage in a commercial sex act with someone other than the actor.

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<sup>128</sup> D.C. Code § 22-1831 (7).

<sup>129</sup> D.C. Code § 22-1831 (3)(F).

<sup>130</sup> The verb form of the word “harbor” is defined by Meriam-Webster’s Dictionary as, “to give shelter or refuge to[.]” <https://www.merriam-webster.com/dictionary/harbor>

This change improves the clarity of the revised criminal code, and reduces unnecessary overlap.

Fifth, the revised statute allows for enhanced penalties if the actor recklessly held the complainant or caused the complainant to engage in commercial sex acts for a total of more than 180 days. The D.C. Code trafficking in labor or commercial sex statute is subject to a penalty enhancement if “the victim is held or provides services for more than 180 days[.]”<sup>131</sup> However, the current statute does not specify any culpable mental state, nor does it clarify whether this 180 day threshold is based on the *total* of the days the complaint engaged in commercial sex acts in addition to the days the complainant was held. There is no relevant DCCA case law. To resolve these ambiguities, the revised statute specifies that the enhancement applies if the actor recklessly holds the complainant, or causes the complainant to engage in commercial sex acts for a total number of days exceeds that 180. This change clarifies and may improve the proportionality of the revised statute.

*In addition, one change to the trafficking in forced commercial sex statute is clarificatory, and not intended to substantively change current District law.*

The revised statute uses the term “actor” instead of the terms “individual or business,” as used in the current forced labor statute.<sup>132</sup> “Actor” is a defined term<sup>133</sup>, which means “a person accused of any offense.” The term “person” is also a defined term<sup>134</sup>, and includes a “partnership, company, corporation, association, organization[.]” The term “actor” includes both individuals and businesses, and the use of this term is not intended to change current District law.

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<sup>131</sup> D.C. Code §22-1837 (a)(2).

<sup>132</sup> D.C. Code § 22-1832.

<sup>133</sup> RCC § 22E-701.

<sup>134</sup> RCC § 22E-701.

**RCC § 22E-1605. Sex Trafficking of a Minor or Adult Incapable of Consenting.**

- (a) *Offense.* An actor commits sex trafficking of minors when that actor:
- (1) Knowingly recruits, entices, houses, transports, provides, obtains, or maintains by any means the complainant;
  - (2) With intent that the complainant, as a result, will be caused to engage in or submit to a commercial sex act with or for another person;
  - (3) With recklessness as to the fact that complainant is:
    - (A) Under the age of 18 years;
    - (B) Incapable of appraising the nature of the commercial sex act or of understanding the right to give or withhold consent to the commercial sex act, either due to a drug, intoxicant, or other substance, or, due to an intellectual, developmental, or mental disability or mental illness when the actor has no similarly serious disability or illness; or
    - (C) Incapable of communicating unwillingness to engage in the commercial sex act.
- (a) *Penalties.*
- (1) Subject to any general penalty enhancements in this title and the offense penalty enhancement in subsection (b) of this section, sex trafficking of a minor or adult incapable of consenting is a Class [X] crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
  - (2) *Penalty enhancements.* In addition to any general penalty enhancements under this title, the penalty classification for this offense is increased in severity by one class when, in addition to the elements of the offense, the person recklessly held the complainant, or caused the complainant to provide commercial sex acts for a total of more than 180 days.
- (c) *Definitions.* The terms “intent,” “knowingly,” and “recklessly,” have the meanings specified in RCC § 22E-206; the term “in fact” has the meaning specified in RCC § 22E-207; the terms “actor,” and “commercial sex act” have the meanings specified in RCC § 22E-701.

**COMMENTARY**

***Explanatory Note.** This section establishes the sex trafficking of a minor or adult incapable of consenting offense for the Revised Criminal Code (RCC). This offense criminalizes knowingly recruiting, enticing, housing, transporting, providing, obtaining, or maintaining another person, with intent that, as a result, the person will be caused to engage in a commercial sex act, and with recklessness as to that person being under the age of 18, or incapable of appraising the nature of the commercial sex act or communicating unwillingness to engage in the commercial sex act. The revised sex trafficking of a minor or adult incapable of consenting offense replaces the current sex trafficking of children statute<sup>135</sup> and part of the abducting or enticing a child from his or*

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<sup>135</sup> D.C. Code § 22-1834.

*her home for purposes of prostitution; harboring such child statute.*<sup>136</sup> *To the extent that certain statutory provisions authorizing extended periods of supervised release*<sup>137</sup> *apply to the current sex trafficking of children statute, these provisions are replaced in relevant part by the revised sex trafficking of a minor or adult incapable of consenting statute.*

Paragraph (a)(1) specifies that sex trafficking of a minor or adult incapable of consenting requires that a person knowingly recruits, entices, houses, transports, provides, obtains, or maintains by any means, another person. The words “entice, transport, provide, obtain, and maintain by any means” are intended to have the same meaning as under current law. The word “houses” is intended to include provision of shelter, even if only temporarily. Paragraph (a)(1) specifies that a “knowingly” culpable mental state applies, which requires that the actor was practically certain that he or she would entice, house, transport, provide, obtain, or maintain another person.

Paragraph (a)(2) specifies that sex trafficking of a minor or adult incapable of consenting requires that the actor acted “with intent that” the trafficked person, as a result, would be caused to engage in or submit to a commercial sex act with or for another person. The term “commercial sex act” is a defined term.<sup>138</sup> “Intent” is a defined term in RCC § 22E-206 that here means the actor was practically certain that the complainant would be caused to engage in a commercial sex act with another person. Per RCC § 22E-205, the object of the phrase “with intent that” is not an objective element that requires separate proof—only the actor’s culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that the trafficked person actually performs a commercial sex act, only that the actor believed to a practical certainty that he or she would do so. The words “as a result” require a nexus between the trafficking activity, and the commercial sex act that the trafficked person will perform. Housing, transporting, etc. a person in a manner that is unrelated to that person providing labor or services is not criminalized under this section, even if the actor was practically certain that the person would be caused to engage in a commercial sex act.<sup>139</sup>

This paragraph also specifies that the actor must cause the complainant to engage in a commercial sex act with or for another person.<sup>140</sup> This element may be satisfied if the actor causes the complainant to engage in a commercial sex act with a third party, or if the actor causes the complainant to engage in masturbatory conduct for a third party.<sup>141</sup>

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<sup>136</sup> D.C. Code § 22-2704.

<sup>137</sup> D.C. Code § 24-403.01(b)(4) (“ In the case of a person sentenced for an offense for which registration is required by the Chapter 40 of Title 22, the court may, in its discretion, impose a longer term of supervised release than that required or authorized by paragraph (2) or (3) of this subsection, of: . . . (A) Not more than 10 years[.]” D.C. Code §22-4001(8) defines “registration offense” to include “Any offense under the District of Columbia Official Code that involved a sexual act or sexual contact without consent or with a minor[.]” To the extent the current sex trafficking of children offense covers sexual acts or contacts with a minor, D.C. Code § 22-403.01 may authorize an extended period of supervised release.

<sup>138</sup> RCC § 22E-701.

<sup>139</sup> For example, if a taxi driver gives a ride to a person running an errand, knowing that the next day that person will be coerced into engaging in a commercial sex act, if there is no relationship between that errand and the commercial sex act, the taxi driver cannot be held liable for trafficking in forced commercial sex.

<sup>140</sup> An actor who traffics a person with intent that the person engage in a commercial sex act *with the actor* may be subject to liability under sex assault offenses defined under Chapter 13.

<sup>141</sup> Masturbation is not explicitly included in the definition of “commercial sex act.” However, the term “commercial sex act” is defined to include any sexual act or sexual contact performed in exchange for

Paragraph (a)(3) specifies that the actor was reckless as to the trafficked person satisfying one of the elements listed in subparagraphs (a)(3)(A)-(C). Subparagraph (a)(3)(A) requires that the complainant is under the age of 18. Subparagraph (a)(3)(B) requires that the complainant is incapable of appraising the nature of the commercial sex act or of understanding the right to give or withhold consent to the commercial sex act, either due to a drug, intoxicant, or other substance, or, due to an intellectual, developmental, or mental disability or mental illness when the actor has no similarly serious disability or illness. Subparagraph (a)(3)(C) requires that the complainant is incapable of communicating unwillingness to engage in the commercial sex act, regardless of the complainant's state of mind. The "reckless" mental state in paragraph (a)(3) applies to subparagraphs (a)(3)(A)-(C), which requires that the actor consciously disregarded a substantial risk that the trafficked person is under the age of 18, incapable of appraising the nature of the commercial sex act or of understanding the right to give or withhold consent, or incapable of communicating unwillingness to engage in the commercial sex act.

Subsection (b)(1) specifies relevant penalties for the offense.

Paragraph (b)(2) provides a penalty enhancement applicable to this offense. If the actor recklessly held the complainant, or caused the complainant to provide commercial sex acts for a total of more than 180 days, the offense classification may be increased in severity by one class.<sup>142</sup> The penalty enhancement under paragraph (b)(2) shall be applied in addition to any general penalty enhancements in RCC §§ 22E-605-608.

Subsection (c) cross references applicable definitions located elsewhere in the RCC.

***Relation to Current District Law.** The RCC's sex trafficking of a minor or adult incapable of consenting offense clearly changes current District law in one main way with respect to the current sex trafficking of children offense. To the extent it replaces current D.C. Code § 22-2704, the revised sex trafficking of a minor or adult incapable of consenting offense clearly changes current District law in three main ways. The revised statute also clearly changes current District law by explicitly criminalizing trafficking adults who are unable to consent to commercial sex acts.*

First, the revised sex trafficking of a minor or adult incapable of consenting statute requires proof that a person was reckless as to the person trafficked being under 18. Subsection (a) of the current sex trafficking of children offense requires the actor to be "knowing or in reckless disregard of the fact that the person has not attained the age of 18 years," but does not define the culpable mental state terms.<sup>143</sup> However, subsection (b) of the current statute further states that "In a prosecution... in which the defendant had a reasonable opportunity to observe the person recruited, enticed... or maintained,

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anything of value. To the extent that conduct commonly understood as masturbation meets the definition of sexual act or sexual contact, if it performed in exchange for anything of value, it constitutes a "commercial sex act."

<sup>142</sup> This enhancement may apply if the combined time in which a person was held and engaged in commercial sex acts is greater than 180 days, even if the person did not engage in commercial sex acts for the entire time. If a person was held for 100 days, and engaged in commercial sex acts for 81 days, this penalty enhancement would apply.

<sup>143</sup> D.C. Code § 22-1834.

the government need not prove that the defendant knew that the person had not attained the age of 18 years.”<sup>144</sup> Consequently, the current statute’s drafting is ambiguous as to whether “recklessness” always suffices to prove liability (as appears to be stated in subsection (a)) or whether a knowing culpable mental state always is required for liability except where there is a reasonable opportunity to view the complainant (as appears to be stated in subsection (b)). There is no case law on point, however legislative history indicates that the latter interpretation of the statute is correct,<sup>145</sup> and recklessness as to the complainant’s age is insufficient for liability except when the actor has a reasonable opportunity to observe the complainant. Notably, D.C. Code § 22-2704 requires that the trafficked person is under the age of 18, but does not specify a culpable mental state for this element, and there is no relevant DCCA case law. In contrast, the RCC sex trafficking of a minor or adult incapable of consenting statute requires a culpable mental state of recklessness, a defined term, and omits the limitation about a reasonable opportunity to observe the child. It is not clear why reasonable observation, uniquely, is treated as being such strong evidence of age that a lower culpable mental state is required where there is such an opportunity.<sup>146</sup> Requiring recklessness as to a complainant being under 18 years of age is consistent with similar age-based circumstances required in other offenses in the RCC and current D.C. Code. This change improves the clarity and consistency of the revised statute.

Second, the revised sex trafficking of a minor or adult incapable of consenting statute specifies that a “knowingly” mental state applies to result elements of the offense. A knowing culpable mental state already is required for the similar sex trafficking of children offense.<sup>147</sup> However, D.C. Code § 22-2704 also makes it a crime to “secrete” or “harbor” a child under the age of 18 “for the purposes of prostitution.”<sup>148</sup> The current code does not specify any culpable mental state for these elements of D.C. Code § 22-2704, and there is no relevant D.C. Court of Appeals (DCCA) case law. In contrast, the revised sex trafficking of a minor or adult incapable of consenting statute specifies that the actor must knowingly recruit, entice, harbor, transport, provide, obtain, or maintain by any means, another person. This change improves the clarity and consistency of the revised statutes.

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<sup>144</sup> D.C. Code § 22-1834 (b).

<sup>145</sup> Council of the District of Columbia Committee on Public Safety and the Judiciary Committee Report on Bill 18-70 “Prohibition Against Human Trafficking Amendment Act of 2010” at 8. March 9, 2010. (“Section 104 Creates the crime of sex trafficking of children. A child is defined as under the age of 18 for commercial sex. The prosecution does not have to prove that coercion was used or that the defendant had actual knowledge of the minor’s age. However, if the defendant did not have an opportunity to observe the victim, the government needs to prove the defendant had actual knowledge of the victim’s age.”).

<sup>146</sup> On the one hand, a reasonable opportunity to observe the complainant does not mean that an actor still could not reasonably mistake the complainant’s age as being significantly older than 17 years old. On the other hand, other circumstances may provide an actor equally strong evidence of the complainant’s age, even though he or she is never seen—e.g. a report from a trusted source as to the complainant apparently being a minor.

<sup>147</sup> D.C. Code § 22-1834. (“It is unlawful for an individual or a business knowingly to recruit, entice, harbor, transport, provide, obtain, or maintain by any means a person who will be caused as a result to engage in a commercial sex act knowing or in reckless disregard of the fact that the person has not attained the age of 18 years.”).

<sup>148</sup> D.C. Code § 22-2704 (a)(2).

Third, the revised sex trafficking of a minor or adult incapable of consenting statute specifies that the actor act “with intent” that the trafficked person will be caused to engage in a commercial sex act. A knowing culpable mental state is required for the current sex trafficking of children offense.<sup>149</sup> However, D.C. Code § 22-2704 requires that the actor secrete or harbor another person “for the purposes of prostitution.” D.C. Code § 22-2704 does not further specify the meaning of “for the purposes” or specify (other) culpable mental states, and there is no relevant DCCA case law. In contrast, the revised sex trafficking of a minor or adult incapable of consenting statute specifies that the actor must act “with intent” that the person will be caused to engage in a commercial sex act. This change improves the clarity and consistency of the revised statutes.

Fourth, the revised sex trafficking of a minor or adult incapable of consenting statute includes a penalty enhancement if the trafficked person was held or provides commercial sex acts for more a total of more than 180 days. The current sex trafficking of children offense contains this penalty enhancement.<sup>150</sup> However, D.C. Code § 22-2704 does not provide for heightened penalties. In contrast, the revised sex trafficking of a minor or adult incapable of consenting statute allows that the offense classification may be increased by one class if the trafficked person is held or caused to engage in commercial sex act for more than 180 days. This change improves the proportionality and consistency of the revised statutes.

Fifth, the revised statute criminalizes trafficking of an adult incapable of consenting to commercial sex acts. The current sex trafficking of a minor offense only applies to complainants under the age of 18.<sup>151</sup> Trafficking of an adult is criminalized under the trafficking in labor or commercial sex acts statute.<sup>152</sup> However, that statute requires intent that the complainant will be caused to engage in a commercial sex act by means of “coercion” or debt bondage. The statute does not explicitly cover trafficking of adults who are unable to appraise the nature of the commercial sex act, or who are unable to communicate their consent to engage in or submit to a commercial sex act. By contrast, the revised statute clarifies that trafficking adults who are incapable of appraising the nature of the commercial sex act or of communicating unwillingness to engage in a commercial sex act is criminalized. This change closes a gap in current law, and improves the proportionality of the revised statute.

*Beyond these five changes to current District law, two other aspects of the revised sex trafficking of a minor or adult incapable of consenting statute may constitute substantive changes to current District law.*

First, the revised sex trafficking of a minor or adult incapable of consenting statute requires that the actor had intent that the complainant would be caused to engage in a commercial sex act *with or for another person*. The current statute does not specify whether the actor must have intent that the complainant engage in a commercial sex act with someone other than the actor, and there is no relevant DCCA case law. To resolve this ambiguity, the revised statute specifies that the actor must have had intent that the

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<sup>149</sup> D.C. Code § 22-1834.

<sup>150</sup> D.C. Code § 22-1834.

<sup>151</sup> D.C. Code § 22-1834.

<sup>152</sup> D.C. Code § 22-1833.



complainant will engage in a commercial sex act with someone other than the actor. This change improves the clarity of the revised statute, and reduces unnecessary overlap.

Second, the revised statute allows for enhanced penalties if the actor recklessly held the complainant or caused the complainant to engage in commercial sex acts for a total of more than 180 days. The D.C. Code sex trafficking of children statute is subject to a penalty enhancement if “the victim is held or provides services for more than 180 days[.]”<sup>153</sup> However, the current statute does not specify any culpable mental state, nor does it clarify whether this 180 day threshold is based on the *total* of the days the complaint engaged in commercial sex acts in addition to the days the complainant was held. There is no relevant DCCA case law. To resolve these ambiguities the revised statute specifies that the enhancement applies if the actor recklessly holds the complainant, or causes the complainant to engage in commercial sex acts for a total number of days exceeds that 180. This change clarifies and may improve the proportionality of the revised statute.

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<sup>153</sup> D.C. Code §22-1837 (a)(2).

**RCC § 22E-1606. Benefiting from Human Trafficking.**

- (a) *First degree.* An actor commits first degree benefiting from human trafficking when that actor:
- (1) Knowingly obtains any financial benefit or property;
  - (2) By participating in a group of 2 or more persons;
  - (3) Reckless as to the fact that the group is engaging in conduct that, in fact: constitutes forced commercial sex under RCC § 22E-1602, trafficking in forced commercial sex under RCC § 22E-1604, or sex trafficking of a minor or adult incapable of consenting under RCC § 22E-1605; and
  - (4) The actor’s participation in the group furthers, in any manner, the conduct that constitutes a human trafficking offense.
- (b) *Second degree.* An actor commits second degree benefiting from human trafficking when that actor:
- (1) Knowingly obtains any financial benefit or property;
  - (2) By participation in a group of 2 or more persons;
  - (3) Reckless as to the fact that the group is engaging in conduct that, in fact: constitutes forced labor or services under RCC § 22E-1601 or trafficking in labor or services under RCC § 22E-1603; and
  - (4) In fact, the actor’s participation in the group furthers, in any manner, the conduct that constitutes a human trafficking offense.
- (c) *Penalties.* Subject to any general penalty enhancements under this title:
- (1) First degree benefitting from human trafficking is a Class [X] crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
  - (2) Second degree benefitting from human trafficking is a Class [X] crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
- (d) *Definitions.* The terms “knowingly” and “reckless” have the meanings specified in RCC § 22E-206; and the terms “actor” and “property” have the meanings specified in RCC § 22E-701.

**COMMENTARY**

***Explanatory Note.** This section establishes the benefiting from human trafficking offense for the Revised Criminal Code (RCC). This offense criminalizes knowingly obtaining any benefit or property by participating in an association of two or more persons, with recklessness that the group is engaged in forced commercial sex, trafficking in forced commercial sex, sex trafficking of a minor or adult incapable of consenting, forced labor, or trafficking labor or services. The offense is divided into two penalty grades, depending on whether the benefit arose from a group’s commission of forced commercial sex, sex trafficking, or sex trafficking of a minor or adult incapable of consenting; or forced labor or trafficking in labor or services. The benefiting from*

*human trafficking offense replaces the benefitting financially from human trafficking statute*<sup>154</sup> *in the current D.C. Code.*

Paragraph (a)(1) specifies that first degree benefitting from human trafficking requires that the actor knowingly obtains any financial benefit or property. The term financial benefit includes services or intangible financial benefits. The term “property” is a defined term,<sup>155</sup> which includes anything of value. The paragraph specifies that a “knowingly” culpable mental state applies, which requires that the actor was practically certain that he or she would obtain a financial benefit or property.

Paragraph (a)(2) specifies that the actor must have obtained the property or financial benefit through participation in a group of two or more persons. The group may be comprised, at a minimum, of the actor and one other person.<sup>156</sup> The group need not have a united purpose and the members need not reach an agreement as would be required for a criminal conspiracy. The members must only be associated in fact. Per the rule of interpretation under RCC § 22E-207, the “knowingly” culpable mental state also applies to this element. The actor must be practically certain both that he or she is participating in a group of two or more persons, and that it is through that group association that he or she obtained the property or financial benefit.

Paragraph (a)(3) specifies that for first degree benefitting from human trafficking, the actor must have been reckless as to the group engaging in conduct that, in fact, constitutes either forced commercial sex under RCC § 22E-1602, trafficking in forced commercial sex under RCC 22E-1604, or sex trafficking of a minor or adult incapable of consenting under RCC § 22E-1605. The “reckless” culpable mental state requirement here means that the actor consciously disregarded a substantial risk that the group was engaged in the conduct that, in fact, constituting forced commercial sex, trafficking in forced commercial sex, or sex trafficking of a minor or adult incapable of consenting. The use of “in fact” indicates that the actor need not have any culpable mental state as to what the specific elements of the predicate crimes are or that they have been satisfied. It is not required that all members of the group, including the actor, actually engaged in conduct constituting either of these offenses.<sup>157</sup>

Paragraph (a)(4) specifies that the actor’s participation in the group furthers, in any manner, the conduct constituting the human trafficking offense. Per the rule of interpretation under RCC § 22E-207, the term “in fact” also applies to this element. Although it is not required that all members of the group actually engaged in conduct constituting a human trafficking offense, the actor’s participation in the group must

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<sup>154</sup> D.C. Code §22-1836.

<sup>155</sup> RCC § 22E-701.

<sup>156</sup> This element may be satisfied in a case involving a single business comprised of two people who are engaged in human trafficking.

<sup>157</sup> For example, if a motel owner receives payment from a customer, with recklessness that the other person is using the hotel room to coerce people into engaging in commercial sex acts, the motel owner could be convicted of benefitting from human trafficking even though the hotel owner did not directly cause any one to engage in commercial sex acts by means of coercive threats or debt bondage. *See, Ricchio v. McLean*, 853 F.3d 553, 556 (1st Cir. 2017) (motel owner was “associated” and obtained benefit when he rented a room to person who used that room to coerce women into performing commercial sex acts); *see generally*, John Cotton Richmond, *Human Trafficking: Understanding the Law and Deconstructing Myths*, 60 St. Louis U. L.J. 1, 9 (2015).

further, in any manner, the conduct that constitutes forced commercial sex, trafficking in forced commercial sex, or sex trafficking of a minor or adult incapable of consenting.<sup>158</sup>

Paragraph (b)(1) specifies that second degree benefitting from human trafficking requires that the actor knowingly obtains any financial benefit or property. The term financial benefit includes services or intangible financial benefits. The term “property” is a defined term,<sup>159</sup> which includes anything of value. The paragraph specifies that a “knowingly” culpable mental state applies, which requires that the actor was practically certain that he or she would obtain a financial benefit or property.

Paragraph (b)(2) specifies that the actor must have obtained the property or financial benefit through participation in a group of two or more persons. The group may be comprised, at a minimum, of the actor and one other person. The group need not have a united purpose and the members need not reach an agreement as would be required for a criminal conspiracy. The members must only be associated in fact. Per the rule of interpretation under RCC § 22E-207, the “knowingly” culpable mental state also applies to this element. The actor must be practically certain both that he or she is participating in a group of two or more persons, and that it is through that group association that he or she obtained the property or financial benefit.

Paragraph (b)(3) specifies that for second degree benefitting from human trafficking, the actor must have been reckless as to the group engaging in conduct that, in fact, constitutes either forced labor or services under RCC 22E-1601 or trafficking in labor or services under RCC 22E-1603. The “reckless” culpable mental state requirement here means that the actor consciously disregarded a substantial risk that the group was engaged in the conduct that, in fact, constituting either forced labor or trafficking in labor or services. The use of “in fact” indicates that the actor need not have any culpable mental state as to what the specific elements of the predicate crimes are or that they have been satisfied. It is not required that all members of the group, including the actor, actually engaged in conduct constituting either of these offenses.<sup>160</sup>

Paragraph (b)(4) specifies that the actor’s participation in the group furthers, in any manner, the conduct constituting the human trafficking offense. Per the rule of interpretation under RCC § 22E-207, the term “in fact” also applies to this element. Although it is not required that all members of the group actually engaged in conduct constituting a human trafficking offense, the actor’s participation in the group must

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<sup>158</sup> For example, if A is on a sports team with B, who engages in sex trafficking, and B uses proceeds of the sex trafficking to pay for uniforms for the team, A is not guilty of benefitting from human trafficking even if he is aware that the uniforms were paid for by human trafficking. *See, United States v. Afyare*, 632 F. App’x 272, 286 (6th Cir. 2016) (unpublished opinion) (holding that the *group* of which the accused is a part must engage in human trafficking).

<sup>159</sup> RCC § 22E-701.

<sup>160</sup> For example, if a building owner receives rent payment from a customer, with recklessness that the other person is using the building to run a sweatshop in which people are coerced into providing labor, the building owner could be convicted of benefitting from human trafficking even though the hotel owner did not directly cause anyone to provide labor by means of coercive threats or debt bondage. *See, Ricchio v. McLean*, 853 F.3d 553, 556 (1st Cir. 2017) (motel owner was “associated” and obtained benefit when he rented a room to person who used that room to coerce women into performing commercial sex acts); *see generally*, John Cotton Richmond, *Human Trafficking: Understanding the Law and Deconstructing Myths*, 60 St. Louis U. L.J. 1, 9 (2015).

further, in any manner, the conduct that constitutes forced labor or trafficking in labor or services.<sup>161</sup>

Subsection (c) specifies the penalties applicable to this offense.

Subsection (d) cross references applicable definitions located elsewhere in the RCC.

***Relation to Current District Law.*** *The revised benefitting from human trafficking offense changes current District law in one main way.*

The revised benefitting from human trafficking offense is divided into two penalty grades depending on whether the group engaged in conduct constituting forced commercial sex, sex trafficking, or sex trafficking of a minor or adult incapable of consenting; or forced labor or trafficking in labor or services. The current benefitting financially from human trafficking offense only has one penalty grade, regardless of the predicate conduct. By contrast, the revised offense distinguishes benefits obtained from forms of human trafficking that involve commercial sex, and those that involve labor or services. Dividing the offense into two penalty grades improves the proportionality of the revised offense. This change improves the proportionality of the revised offense.

*Two changes to the benefitting from human trafficking offense statute are clarificatory in nature and is not intended to substantively change current District law.*

First, the revised statute no longer refers to participation in a “venture,” and instead requires that the actor participated in a group of two or more persons. Omission of the word “venture” is clarificatory in nature and is not intended to change current District law.

Second, the revised statute uses the term “actor” instead of the terms “individual or business,” as used in the current forced labor statute.<sup>162</sup> “Actor” is a defined term<sup>163</sup>, which means “a person accused of any offense.” The term “person” is also a defined term<sup>164</sup>, and includes a “partnership, company, corporation, association, organization[.]” The term “actor” includes both individuals and businesses, and the use of this term is not intended to change current District law.

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<sup>161</sup> For example, if A is on a sports team with B, who engages in forced labor, and B uses proceeds of the forced labor to pay for uniforms for the team, A is not guilty of benefitting from human trafficking even if he is aware that the uniforms were paid for by human trafficking. *See, United States v. Afyare*, 632 F. App’x 272, 286 (6th Cir. 2016) (unpublished opinion) (holding that the *group* of which the accused is a part must engage in human trafficking).

<sup>162</sup> D.C. Code § 22-1832.

<sup>163</sup> RCC § 22E-701.

<sup>164</sup> RCC § 22E-701.

**RCC § 22E-1607. Misuse of Documents in Furtherance of Human Trafficking.**

- (a) *First degree.* An actor commits first degree misuse of documents in furtherance of human trafficking when that actor:
  - (1) Knowingly destroys, conceals, removes, confiscates, or possesses any actual or purported government identification document, including a passport or other immigration document of any person;
  - (2) With intent to restrict the person’s liberty to move or travel in order to maintain performance of a commercial sex act by that person.
- (b) *Second degree.* An actor commits second degree misuse of documents in furtherance of human trafficking when that actor:
  - (1) Knowingly destroys, conceals, removes, confiscates, or possesses any actual or purported government identification document, including a passport or other immigration document of any person;
  - (2) With intent to restrict the person’s liberty to move or travel in order to maintain the labor or services of that person.
- (c) *Penalties.* Subject to any general penalty enhancements under this title;
  - (1) First degree misuse of documents in furtherance of human trafficking is a Class [X] crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
  - (2) Second degree misuse of documents in furtherance of human trafficking is a Class [X] crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
- (a) *Definitions.* The terms “intent” and “knowingly” have the meanings specified in RCC § 22E-206; the terms “actor,” “commercial sex act,” “labor,” “possess” and “service” have the meanings specified in RCC § 22E-701.

**COMMENTARY**

***Explanatory Note.** This section establishes the misuse of documents in furtherance of human trafficking offense (“misuse of documents”) for the Revised Criminal Code (RCC). This offense requires that the actor knowingly destroys, conceals, removes, confiscates, or possesses any actual or purported government identification document of another person, with intent to restrict the person’s liberty to move or travel in order to maintain the labor, services, or performance of a commercial sex act by that person. The misuse of documents in furtherance of human trafficking offense replaces the unlawful conduct with respect to documents in furtherance of human trafficking statute<sup>1</sup> in the current D.C. Code.*

Subsection (a) specifies the elements of first degree misuse of documents. Paragraph (a)(1) specifies that first degree misuse of documents requires that the actor knowingly destroys, conceals, removes, confiscates, or possesses any actual or purported government identification document of another person, including a passport or other

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<sup>1</sup> D.C. Code §22-1835.

immigration document. The terms “destroys,” “conceals,” “removes,” “confiscates,” and “actual or purported government identification document” are intended to have the same meaning as under current law. “Possess” is a defined term per RCC § 22E-701 meaning “holds or carries on one’s person; or has the ability and desire to exercise control over.” The paragraph specifies that a “knowingly” culpable mental state applies, which requires that the actor was practically certain both that an actual or purported document was involved, and that he or she would destroy, conceal, remove, confiscate, or possesses the document.

Paragraph (a)(2) specifies that misuse of documents requires that the actor acted “with intent to” restrict the person’s liberty to move or travel in order to maintain performance of a commercial sex act by that person. “Intent” is a defined term in RCC § 22E-206 that here means the actor was practically certain that he or she would restrict the person’s liberty to move or travel. Per RCC § 22E-205, the object of the phrase “with intent to” is not an objective element that requires separate proof—only the actor’s culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that the actor actually succeeded in restricting the person’s liberty to move or travel, only that he or she believed to a practical certainty that he or she would.

Subsection (b) specifies the elements of second degree misuse of documents. Subsection (b) specifies the penalty applicable to this offense. Paragraph (b)(1) specifies that first degree misuse of documents requires that the actor knowingly destroys, conceals, removes, confiscates, or possesses any actual or purported government identification document of another person, including a passport or other immigration document. The terms “destroys,” “conceals,” “removes,” “confiscates,” and “actual or purported government identification document” are intended to have the same meaning as under current law. “Possess” is a defined term per RCC § 22E-701 meaning “holds or carries on one’s person; or has the ability and desire to exercise control over.” The paragraph specifies that a “knowingly” culpable mental state applies, which requires that the actor was practically certain both that an actual or purported document was involved, and that he or she would destroy, conceal, remove, confiscate, or possesses the document.

Paragraph (b)(2) specifies that misuse of documents requires that the actor acted “with intent to” restrict the person’s liberty to move or travel in order to maintain labor or services by that person. “Intent” is a defined term in RCC § 22E-206 that here means the actor was practically certain that he or she would restrict the person’s liberty to move or travel. Per RCC § 22E-205, the object of the phrase “with intent to” is not an objective element that requires separate proof—only the actor’s culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that the actor actually succeeded in restricting the person’s liberty to move or travel, only that he or she believed to a practical certainty that he or she would.

Subsection (c) cross references applicable definitions located elsewhere in the RCC.

*Relation to Current District Law.* The revised misuse of documents offense changes current District law in two main ways.

First, the revised misuse of documents offense is divided into two penalty grades depending on whether the actor misused documents to maintain a person’s labor or services, or commercial sex acts. The current misuse of documents offense only has one

penalty grade, regardless of whether the misuse of documents is related to forced labor or forced commercial sex. By contrast, the revised offense distinguishes misuse of documents in order to maintain a person’s labor or services, or commercial sex acts. Dividing the offense into two penalty grades improves the proportionality of the revised offense. This change improves the proportionality of the revised offense.

Second, the revised misuse of documents offense requires that the actor destroys, conceals, removes, confiscates, or possesses any actual or purported *government* identification document, specifically including passports and immigration documents. The current statute refers broadly to “any actual or purported government identification document, including a passport or other immigration document, or any other actual or purported document.”<sup>2</sup> There is no relevant DCCA case law construing these terms, although legislative history refers to “official papers.”<sup>3</sup> By contrast, the revised offense clarifies that this offense only applies to government-issued identification documents, including immigration documents.<sup>4</sup> Misuse of other documents with intent to restrict someone’s freedom of movement may constitute another crime under the RCC.<sup>5</sup> This change improves the clarity of the revised statute.

*Three aspects of the revised misuse of documents offense may constitute substantive changes to current District law.*

First, the revised misuse of documents offense specifies that the offense requires “knowingly” destroying, concealing, removing, confiscating, or possessing a government identification document. The current statute clearly requires that the destruction, concealing, etc. of a document be done “knowingly,” but the statute is ambiguous whether the “knowingly” mental state applies also to the nature of the document as a form of government identification. D.C. Court of Appeals (DCCA) case law does not address the issue.<sup>6</sup> By contrast, the revised offense clarifies the culpable mental state as to the nature of the document. Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.<sup>7</sup> This change improves the clarity of the revised statute.

Second, the revised misuse of documents offense specifies that the offense requires that that the actor acted “with intent” to restrict the person’s liberty to move or travel in order to maintain the labor, services, or performance of a commercial sex acts by that person. The current statute does not specify any culpable mental state for this element, but merely requires that the actor acted “to prevent or restrict, or attempt to

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<sup>2</sup> D.C. Code §22-1835.

<sup>3</sup> Council of the District of Columbia Committee on Public Safety and the Judiciary Committee Report on Bill 18-70 “Prohibition Against Human Trafficking Amendment Act of 2010” at 8. March 9, 2010.

<sup>4</sup> For example, destroying a person’s employee identification badge issued by a private employer does not constitute misuse of documents.

<sup>5</sup> See, e.g., § 22E-1402. Criminal Restraint (attempted); § 22E-2102 Unauthorized use of property.

<sup>6</sup> Although the statute and DCCA case law do not specify a culpable mental state, the Redbook Jury Instruction states that defendant must have “knowingly” destroyed, concealed, removed, or possessed an identification document. D.C. Crim. Jur. Instr. § 4-513.

<sup>7</sup> See, *Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) (“[O]ur cases have explained that a defendant generally must ‘know the facts that make his conduct fit the definition of the offense,’ even if he does not know that those facts give rise to a crime. (Internal citation omitted)”).



prevent or restrict . . . the person’s liberty to move or travel[.]”<sup>8</sup> Case law does not address the issue. By contrast, the revised offense clarifies that the actor must act with intent to restrict movement. The phrase with intent to restrict means that the person believes to a practical certainty that the complainant would be restricted in their movement, but actual proof of restriction is not required. “With intent” more clearly communicates the mental state requirement and encompasses the conduct indicated by the “attempt to” prong of the current statute. Anytime a person acts with intent to restrict a person’s liberty, that person has also acted with intent to attempt to restrict a person’s liberty. This change improves the clarity and consistency of the revised statute.

Third, the revised statute omits the words “without lawful authority.” The current statute’s covered conduct is, “knowingly to destroy, conceal, . . . document, of any person to prevent or restrict, or attempt to prevent or restrict, *without lawful authority*, the person’s liberty to move or travel...” There is no case law interpreting the phrase “without lawful authority.” In the RCC, if a person actually has the lawful authority to engage in conduct covered by the revised statute, general defenses would apply to this conduct the same as any other conduct that otherwise would appear to be a crime. This change improves the clarity of the revised statute.

*Other changes are clarificatory and are not intended to substantively change current District law.*

First, the revised statute requires that the actor act with intent to restrict a person’s liberty to move or travel. The current statute criminalizes acting with intent to prevent or “restrict . . . the person’s liberty to move or travel[.]” It is unclear what it means to “prevent” a person’s liberty to move or travel. The word “restrict” as used in the revised statute is intended to cover all conduct that would constitute “preventing” a person’s freedom to move or travel.

Second, the revised statute uses the term “actor” instead of the terms “individual or business,” as used in the current forced labor statute.<sup>9</sup> “Actor” is a defined term<sup>10</sup>, which means “a person accused of any offense.” The term “person” is also a defined term<sup>11</sup>, and includes a “partnership, company, corporation, association, organization[.]” The term “actor” includes both individuals and businesses, and the use of this term is not intended to change current District law.

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<sup>8</sup> D.C. Code § 22-1835.

<sup>9</sup> D.C. Code § 22-1832.

<sup>10</sup> RCC § 22E-701.

<sup>11</sup> RCC § 22E-701.

**RCC § 22E-1608. Commercial Sex with a Trafficked Person.**

- (a) *First degree.* An actor commits first degree commercial sex with a trafficked person when that actor:
- (1) Knowingly engages in a commercial sex act;
  - (2) When a coercive threat, express or implied, or debt bondage by another person causes the complainant to submit to or engage in the commercial sex act;
  - (3) Reckless as to the fact that the complainant is under 18 years of age, or, in fact, the complainant is under 12 years of age.
- (b) *Second degree.* An actor commits second degree commercial sex with a trafficked person when that actor:
- (1) Knowingly engages in a commercial sex act;
  - (2) When either:
    - (A) A coercive threat, express or implied, or debt bondage by another person causes the complainant to submit to or engage in the commercial sex act; or
    - (B) The complainant is recruited, enticed, housed, transported, provided, obtained, or maintained for the purpose of causing the person to submit to or engage in the commercial sex act; and:
      - (i) The actor is reckless that the complainant is under 18 years of age;
      - (ii) Incapable of appraising the nature of the commercial sex act or of understanding the right to give or withhold consent to the commercial sex act, either due to a drug, intoxicant, or other substance, or, due to an intellectual, developmental, or mental disability or mental illness when the actor has no similarly serious disability or illness; or
      - (iii) Incapable of communicating unwillingness to engage in the commercial sex act; or
      - (iv) The complainant is, in fact, under 12 years of age.
- (c) *Penalties.* Subject to any general penalty enhancements under this title:
- (1) First degree commercial sex with a trafficked person is a Class [X] crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
  - (2) Second degree commercial sex with a trafficked person is a Class [X] crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
- (d) *Definitions.* The terms “knowingly” and “recklessly” have the meanings specified in RCC § 22E-206; the term “in fact” has the meaning specified in RCC § 22E-206; the terms “actor,” “coercive threat,” “commercial sex act,” “complainant,” and “debt bondage” have the meanings specified in RCC § 22E-701.

## COMMENTARY

***Explanatory Note.** This section establishes the commercial sex with a trafficked person offense for the Revised Criminal Code (RCC). The commercial sex with a trafficked person offense is divided into two penalty gradations. Both grades require that the actor knowingly engage in a commercial sex act, and the penalty grades are distinguished based on the presence of one or more additional circumstances relating to whether the other party to the commercial sex act had been coerced or trafficked, and whether the other party was under the age of 18, or an adult incapable of consenting. There is no analogous offense under current District law. The current D.C. Code does not distinctly criminalize engaging in commercial sex acts with human trafficking victims.<sup>12</sup> To the extent that certain statutory provisions authorizing extended periods of supervised release<sup>13</sup> would apply to the commercial sex with a trafficked person, these provisions are replaced in relevant part by the revised commercial sex with a trafficked person statute.*

Subsection (a) establishes the elements for first degree commercial sex with a trafficked person. Paragraph (a)(1) specifies that the actor must engage in a “commercial sex act,” a defined term.<sup>14</sup> The paragraph specifies that a “knowingly” culpable mental state applies, a defined term<sup>15</sup> which here requires that the actor was practically certain that he or she is engaged in a commercial sex act.

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<sup>12</sup> It is possible that some conduct that constitutes first and second degree commercial sex with a trafficked person in the RCC could be prosecuted under the current D.C. Code as sexual abuse under an accomplice theory. Under this theory, by making a payment, the patron/accomplice would have encouraged the principal to coerce the commercial sex act, with the purpose to encourage the principal to succeed in coercing the commercial sex act.

It also is possible that some conduct that constitutes second degree commercial sex with a trafficked person in the RCC could also be prosecuted under the current D.C. Code as either first or second degree child sexual abuse, or first or second degree sexual abuse of a minor. A patron who engages in a commercial sex act with a person under 16 years of age would be guilty of either first degree child sexual abuse (if a sexual act) or second degree child sexual abuse (if a sexual contact). A patron who engages in a commercial sex act with a person 16 or 17 years of age would be guilty of sexual abuse of a minor, however, only if he or she is in a “significant relationship” (e.g. a teacher, religious leader, or uncle) to the minor. Conduct constituting second degree commercial sex with a trafficked person may also be prosecuted under a variety of other sex offenses (e.g. misdemeanor sexual abuse of a child or minor; sexual abuse of a secondary education student) in the current D.C. Code in some circumstances.

However, no current D.C. Code offenses distinctly account for the fact that a minor who engaged in commercial sex was trafficked, or that a person of any age engaged in commercial sex was trafficked by means of coercive threat or debt bondage.

<sup>13</sup> D.C. Code § 24-403.01(b)(4) (“ In the case of a person sentenced for an offense for which registration is required by the Chapter 40 of Title 22, the court may, in its discretion, impose a longer term of supervised release than that required or authorized by paragraph (2) or (3) of this subsection, of: . . . (A) Not more than 10 years[.]” D.C. Code §22-4001(8) defines “registration offense” to include “Any offense under the District of Columbia Official Code that involved a sexual act or sexual contact without consent or with a minor[.]” To the extent the commercial sex with a trafficked person statute covers sexual acts or contacts without consent, D.C. Code § 22-403.01 would authorize an extended period of supervised release.

<sup>14</sup> RCC § 22E-701

<sup>15</sup> RCC § 22E-206 (b).

Paragraph (a)(2) specifies that first degree commercial sex with a trafficked person requires that a coercive threat,<sup>16</sup> express or implied, or debt bondage, both defined terms,<sup>17</sup> was used to cause the other person to engage in the commercial sex act with the actor. The paragraph specifies that a “knowingly” culpable mental state applies, a defined term<sup>18</sup> which here requires that the actor was practically certain that a coercive threat or debt bondage was used to cause the other person to engage in the commercial sex act.

Paragraph (a)(3) specifies that first degree commercial sex with a trafficked person requires that the actor was reckless as to whether the other person was under the age of 18, or, in fact, the complainant was under 12 years of age. “Recklessness,” a defined term,<sup>19</sup> here requires that the actor consciously disregarded a substantial risk that that was clearly blameworthy that the other person was under the age of 18. “In fact” is a defined term that here means no culpable mental state need be proven if the complainant is under 12 years of age.

Subsection (b) establishes the elements for second degree commercial sex with a trafficked person. Paragraph (b)(1) specifies that the actor must engage in a commercial sex act. The paragraph specifies that a “knowingly” culpable mental state applies, a defined term<sup>20</sup> which here requires that the actor was practically certain that he or she is engaged in a commercial sex act.

Paragraph (b)(2) specifies that two forms of second degree commercial sex with a trafficked person. Subparagraph (b)(2)(A) requires that an express or implied “coercive threat,” or “debt bondage,” both defined terms<sup>21</sup>, was used to cause the other person to engage in the commercial sex act with the actor. The paragraph specifies that a “knowingly” culpable mental state applies, a defined term<sup>22</sup> which here requires that the actor was practically certain that a coercive threat or debt bondage was used to cause the other person to engage in the commercial sex act. Subparagraph (b)(2)(B) requires that the other person had been recruited, enticed, housed, transported, provided, obtained, or maintained for the purpose of causing the person to submit to or engage in the commercial sex act. The paragraph specifies that a “knowingly” culpable mental state applies, a defined term<sup>23</sup> which here requires that the actor was practically certain that the other person had been recruited, enticed, housed, transported, provided, obtained, or maintained for the purpose of causing the person to submit to or engage in the commercial sex act. Subparagraph (b)(2)(B) also requires that the actor was reckless that

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<sup>16</sup> A coercive threat may come in the form of a verbal or written communication, however gestures or other conduct may also suffice. In addition, the statute specifies that the coercive threat need not be explicit. Communications and conduct that are implicitly threatening given the circumstances may satisfy this element. For example, if a person consistently beats people who refuse to comply with his demands, this pattern of conduct may constitute a coercive threat when that person makes similar demands of others. In addition, ongoing infliction of harm may constitute a coercive threat, if it communicates that harm will continue in the future.

<sup>17</sup> RCC § 22E-701.

<sup>18</sup> RCC § 22E-206 (b).

<sup>19</sup> RCC § 22E-206 (d).

<sup>20</sup> RCC § 22E-206 (b).

<sup>21</sup> RCC § 22E-701.

<sup>22</sup> RCC § 22E-206 (b).

<sup>23</sup> RCC § 22E-206.

the complainant falls under one of the categories specified in sub-subparagraphs (b)(2)(B)(i)-(iii). Sub-subparagraph (b)(2)(B)(i) requires that the complainant is under the age of 18. Sub-subparagraph (b)(2)(B)(ii) requires that the complainant is incapable of appraising the nature of the commercial sex act or of understanding the right to give or withhold consent to the commercial sex act, either due to a drug, intoxicant, or other substance, or, due to an intellectual, developmental, or mental disability or mental illness when the actor has no similarly serious disability or illness. Sub-subparagraph (b)(2)(B)(iii) requires that the complainant was incapable of communicating unwillingness to engage in the commercial sex act. In addition, sub-subparagraph (b)(2)(B)(iv) requires that the complainant was, in fact, under the age of 12. This sub-subparagraph uses the term “in fact,” which specifies that no culpable mental state is required as to the complainant being under the age of 12.

***Relation to Current District Law.*** *The commercial sex with a trafficked person offense changes current District law by criminalizing the knowingly engaging in a commercial sex act with a victim of trafficking in forced commercial sex, forced commercial sex, or sex trafficking of a minor or adult incapable of consenting.*

The RCC statute distinctly criminalizes and punishes as a form of human trafficking knowingly engaging in a commercial sex act with a trafficked person. Under the current D.C. Code, engaging in a commercial sex act with another person, with knowledge that the other person has been coerced into engaging in the commercial sex act, or was trafficked for the purposes of engaging in commercial sex acts, is not distinctly criminalized. In situations where the complainant is under 16 years of age or an adult incapable of consenting, an actor engaging in such conduct may be liable under various sexual abuse charges under Chapter 30 of Title 22.<sup>24</sup> Under current D.C. Code § 22-2701, such conduct may be prosecuted as solicitation of prostitution and subject to a maximum 90 days imprisonment for a first offense. In contrast, the revised statute distinctly treats such conduct as a type of human trafficking offense and provides a correspondingly more serious penalty. This change the proportionality of the revised statutes.

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<sup>24</sup> If A engages in a commercial sex act with B, knowing that a third party coerced B into engage in the commercial sex act, A is not guilty of a sexual assault offense. However, B may be guilty of a sexual assault offense.

**RCC § 22E-1609. Forfeiture.**

- (a) In imposing sentence on any person convicted of a violation of this chapter, the court may order, in addition to any sentence imposed, that the person shall forfeit to the District of Columbia:
  - (1) Any interest in any property, real or personal, that was used or intended to be used to commit or to facilitate the commission of the violation; and
  - (2) Any property, real or personal, constituting or derived from any proceeds that the person obtained, directly or indirectly, as a result of the violation.
- (b) The following shall be subject to forfeiture to the District of Columbia and no property right shall exist in them:
  - (1) Any property, real or personal, that was used or intended to be used to commit or to facilitate the commission of any violation of this chapter.
  - (2) Any property, real or personal, which constitutes or is derived from proceeds traceable to any violation of this chapter.

**COMMENTARY**

***Explanatory Note.** This section establishes forfeiture rules for property involved in violations of offenses under this chapter. In addition to any penalties authorized by statutes in this chapter, a court may order any actor convicted of an offense under this chapter to forfeit property used or intended to be used to commit or facilitate commission of an offense under this chapter, or any property obtained as a result of commission of an offense under this chapter. The revised statute replaces the current forfeiture statute applicable to human trafficking offenses.<sup>1</sup>*

***Relation to Current District Law.** The revised forfeiture statute makes changes current District law in one main way.*

The revised statute provides judicial discretion in determining whether and to what extent to require forfeiture. The current statute states that “the court shall order...” forfeiture. There is no DCCA case law on point, although generally the DCCA has recognized constitutional restrictions on asset forfeitures that are excessive.<sup>2</sup> By contrast, the revised statute states that “the court may order...” forfeiture. Providing judicial discretion allows the court to determine a proportionate forfeiture, conscientious of constitutional and sub-constitutional considerations of what would be an excessive loss.

*One change is clarificatory and is not intended to substantively change current District law.*

The revised statute uses the term “actor” instead of the terms “individual or business,” as used in the current forced labor statute.<sup>3</sup> “Actor” is a defined term<sup>4</sup>, which

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<sup>1</sup> D.C. Code § 22-1838.

<sup>2</sup> Any forfeiture must be proportional under the excessive fines clause of the U.S. Constitution. *One 1995 Toyota Pick-Up Truck v. District of Columbia*, 718 A.2d 558, 560-61 (D.C. 1998).

<sup>3</sup> D.C. Code § 22-1832.

<sup>4</sup> RCC § 22E-701.

means “a person accused of any offense.” The term “person” is also a defined term<sup>5</sup>, and includes a “partnership, company, corporation, association, organization[.]” The term “actor” includes both individuals and businesses, and the use of this term is not intended to change current District law.

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<sup>5</sup> RCC § 22E-701.

### **RCC § 22E-1610. Reputation or Opinion Evidence.**

In a criminal case in which a person is accused of forced commercial sex under RCC § 22E-1602; trafficking in forced commercial sex under RCC § 22E-1604; sex trafficking of a minor or adult incapable of consenting under RCC § 22E-1605; or benefitting from human trafficking under RCC § 22E-1606; reputation or opinion evidence of the past sexual behavior of the alleged victim is not admissible. Evidence of an alleged victim's past sexual behavior other than reputation or opinion evidence also is not admissible, unless such evidence other than reputation or opinion evidence is admitted in accordance with RCC § 22E-1311 (b) and is constitutionally required to be admitted.

#### **COMMENTARY**

***Explanatory Note.** This section establishes evidentiary rules that prohibits the use of reputation or opinion evidence of past sexual behavior of an alleged victim in prosecutions for forced commercial sex, as prohibited by RCC § 22E-1602, trafficking in forced commercial sex, as prohibited by RCC § 22E-1604; sex trafficking of a minor or adult incapable of consenting, as prohibited by § 22E-1605; benefitting from human trafficking, as prohibited by § 22E-1606; and commercial sex with a trafficked person, as prohibited by RCC § 22E-1608. This section is nearly identical to current D.C. Code § 22-1839, but has been amended to apply to prosecutions of forced commercial sex and commercial sex with a trafficked person, which are not currently criminalized under the human trafficking chapter.*

***Relation to Current District Law.** The revised reputation or opinion evidence statute changes current District law in one main way.*

The revised reputation or opinion evidence statute bars evidence of past sexual behavior of an alleged victim in prosecutions for forced commercial sex, as prohibited under RCC § 22E-1602 and commercial sex with a trafficked person, as prohibited under RCC § 22E-1608. Under current law, coercing a person to engage in a commercial sex act and engaging in a commercial sex act with a trafficked person are not separately criminalized. However, the current reputation or opinion evidence statute applies to prosecutions for “trafficking in commercial sex,” “sex trafficking of children,” and “benefitting financially from human trafficking[.]”<sup>1</sup> By contrast, the revised reputation or opinion evidence statute clarifies that it also applies to prosecutions of the RCC’s forced commercial sex and commercial sex with a trafficked person offenses. It would be inconsistent to bar reputation or opinion evidence of an alleged victim’s past sexual behavior in prosecutions for other offenses, but allow them in a prosecution for forced commercial sex or commercial sex with a trafficked person. This change improves the consistency and proportionality of the revised statute.

*One aspect of the revised reputation or opinion evidence statute may constitute a substantive change to current District law.*

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<sup>1</sup> D.C. Code § 22-1839.



The revised statute states that when a “person” is accused of an offense listed in the statute, reputation or opinion evidence of the past sexual behavior of the alleged victim is not admissible. The RCC defines “person” to include businesses and other legal persons.<sup>2</sup> The current statute only refers to a person being accused of an offense, but that term is not defined.<sup>3</sup> It is unclear whether the current statute applies in cases in which a *business* is accused of an offense listed in the statute, and there is no relevant D.C. Court of Appeals case law on point. By contrast, the revised statute clarifies that the reputation or opinion evidence rules apply when a business is accused of offenses listed under the statute. This change improves the clarity and consistency of the revised statute.

*One change to the revised statute is clarificatory in nature and is not intended to substantively change District law.*

The current statute cross references statutes in the current D.C. Code. The revised statute changes the cross references other statutory provisions to match the revised human trafficking offenses in the RCC. The RCC evidentiary rule applies to RCC §§ 22E-1602, 22E-1604, 22E-1605, and 22E-1608, instead of current D.C. Code §§ 22-1833, 22-1834, and 22-1836. This is a technical change that does not otherwise change the reputation or opinion evidence statute.

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<sup>2</sup> RCC § 22E-701.

<sup>3</sup> Cf. D.C. Code §22-3201 (2A). “Person’ means an individual (whether living or dead), trust, estate, fiduciary, partnership, company, corporation, association, organization, union, government department, agency, or instrumentality, or any other legal entity.

**RCC § 22E-1611. Civil Action.**

- (a) An individual who is a victim of an offense prohibited by RCC §§ 22E-1601, 22E-1602, 22E-1603, 22E-1604, 22E-1605, 22E-1606, 22E-1607, or 22E-1608 may bring a civil action in the Superior Court of the District of Columbia. The court may award actual damages, compensatory damages, punitive damages, injunctive relief, and any other appropriate relief. A prevailing plaintiff shall also be awarded attorney’s fees and costs. Treble damages shall be awarded on proof of actual damages where a defendant’s acts were willful and malicious.
- (b) Any action for recovery of damages arising out of an offense in this chapter may not be brought after 5 years from when the victim knew, or reasonably should have known, of any act constituting an offense in this chapter, or if the offense occurred while the victim was less than 35 years of age, the date that the victim turns 40 years of age, whichever is later.
- (c) If a person entitled to sue is imprisoned, insane, or similarly incapacitated at the time the cause of action accrues, so that it is impossible or impracticable for him or her to bring an action, then the time of the incapacity is not part of the time limited for the commencement of the action.
- (d) A defendant is estopped to assert a defense of the statute of limitations when the expiration of the statute is due to conduct by the defendant inducing the plaintiff to delay the filing of the action.

**COMMENTARY**

*Explanatory Note.* This section authorizes victims of offenses under RCC § 22E-1601, § 22E-1602, § 22E-1603, § 22E-1604, § 22E-1605, § 22E-1606, § 22E-1607, or § 22E-1608 to bring a civil action in D.C. Superior Court for damages and injunctive relief. This section is nearly identical to current D.C. Code § 22-1840. This section is nearly identical to current D.C. Code § 22-1804, but has been amended to authorize victims of all trafficking offenses included in the RCC to bring a civil action, and to change the statute of limitations.

This section authorizes a victim of any offense under RCC §§ 22E-1601, 22E-1602, 22E-1603, 22E-1604, 22E-1605, 22E-1606, 22E-1607, or 22E-1608 to bring a civil action against any person who may be charged as a perpetrator of that offense. It is not required that the defendant in the civil action has actually been charged or convicted of that offense. This language shall not be construed to limit civil liability for other entities that may be held vicariously liable, even if they did not directly engage in conduct constituting an offense under this chapter.<sup>1</sup>

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<sup>1</sup> See, *Boykin v. District of Columbia*, 484 A.2d 560, 561–62 (D.C. 1984) (“Under the doctrine of *respondeat superior*, an employer may be held liable for the acts of his employees committed within the scope of their employment.”) (citing *Penn Central Transportation Co. v. Reddick*, 398 A.2d 27, 29 (D.C.1979)).

*Relation to Current District Law.* The revised civil action statute changes current District law in two main ways.

First, the revised civil action authorizes victims of commercial sex with a trafficked person as defined under RCC § 22E-1608 to bring a civil action. There is no analogous offense under current law, and accordingly the current civil action statute does not authorize victims of this offense to bring a civil action. By contrast, the revised civil action statute allows victims of commercial sex with a trafficked person to bring civil actions. It would be inconsistent to authorize civil actions for violations of other human trafficking offenses, but not the victims of commercial sex with a trafficked person offense. This change improves the consistency of the revised statute.

Second, the revised civil action statute changes the statute of limitations for bringing civil actions under this section. The current statute says that the statute of limitations shall not begin to run until the plaintiff knew, or reasonably should have known, of any act constituting a human trafficking offense, or if the plaintiff is a minor, until the plaintiff reaches the age of majority, whichever is later. By contrast, the revised civil statute extends the time within which a victim can bring a civil action if the offense occurred when the victim was under the age of 35, and generally allows civil suits to be brought within 5 years of when the victim knew, or should have known, of the offense. This revision expands the period in which victims of trafficking offenses may bring civil actions in accordance with changes under the Sexual Abuse Statute of Limitations Elimination Amendment Act of 2017. This change improves the proportionality and consistency of the revised statute.

*In addition to these two changes, two other revisions may constitute substantive changes to current District law.*

The revised civil action authorizes victims of forced commercial sex as defined under RCC § 22E-1602 to bring a civil action. The current code does not explicitly criminalize forced commercial sex, and it is unclear whether the use of coercion or debt bondage to compel a person to engage in a commercial sex act constitutes forced labor or services under the current statute. Therefore, it is unclear whether the current civil action statute provides a civil cause of action if a person uses coercive threats or debt bondage to compel a person to engage in a commercial sex act. It would be inconsistent to authorize civil actions for violations of other human trafficking offenses, but not the victims of the forced commercial sex offense. This change improves the consistency of the revised criminal code.

Secondly, the revised civil action statute specifies that a victim of a trafficking offense may bring a civil action against any person who may be charged as a perpetrator of that offense. The current statute does not specify against whom civil actions may be brought, and there is no relevant DCCA case law. This revision clarifies that victims of an offense under this chapter may bring a civil action against a person who may be charged as a perpetrator of that offense.

*In addition, one change to the revised statute is clarificatory in nature and is not intended to substantively change District law.*

The revised statute changes cross references to other statutory provisions to match the revised human trafficking offenses in the RCC. The current statute cross references

statutes in the current D.C. Code. The revised statute authorizes victims of offenses defined under RCC §§ 22E-1601, 22E-1602, 22E-1603, 22E-1604, 22E-1605, 22E-1606, 22E-1607, and 22E-1608. This is a technical change that does not otherwise change the civil action statute.

**RCC § 22E-1612. Limitation on Liabilities and Sentencing for RCC Chapter 16 Offenses.**

- (a) *Accomplice Liability for Victims of Trafficking.* A person shall not be charged as an accomplice to the commission of an offense under this chapter if, prior to commission of the offense, the person was himself or herself a victim of an offense under this chapter by the principal within 3 years prior to the conduct by the principal that constitutes the offense.
- (b) *Conspiracy Liability for Victims of Trafficking.* A person shall not be charged with conspiracy to commit an offense under this chapter if, prior to the conspiracy, the person was himself or herself a victim of an offense under this chapter by a party to the conspiracy within 3 years prior to the formation of the conspiracy.

**COMMENTARY**

*Explanatory Note.* The Limitations on Liability and Sentencing for RCC Chapter 16 Offenses (“limitations on liability statute”) provides two limitations on liability to offenses under this chapter. First, the limitations on liability statute bars charging a person as an accomplice to a Chapter 16 offense, if the principal had previously committed a Chapter 16 offense against that person within 3 years of the conduct by the principal constituting the offense. Second, the limitations on liability statute bars charging a person with conspiracy to commit a Chapter 16 offense if another party to the conspiracy had previously committed a Chapter 16 offense against that person within 3 years of the formation of the conspiracy.

Subsection (a) bars charging a person as an accomplice to a Chapter 16 offense if the principal had previously committed a Chapter 16 offense against that person. This subsection only bars accomplice liability, and victims of trafficking offenses may still be charged and convicted as principals.

Subsection (b) bars charging a person with conspiracy to commit a Chapter 16 offense if any party to the conspiracy had previously committed a Chapter 16 offense against that person. This subsection only bars charges of conspiracy to commit a Chapter 16 offense, and victims of trafficking offenses may still be charged and convicted with actually committing or attempting to commit a Chapter 16 offense.<sup>233</sup>

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<sup>233</sup> Subsections (b) and (c) recognize that in many instances, victims of human trafficking offenses are highly vulnerable and may be co-opted by perpetrators into assisting in committing further trafficking offenses. Although these victims may not necessarily be able to satisfy a common law duress defense, they often have diminished culpability, and imposing accomplice or conspiracy liability may be disproportionately severe. These subsections seek to balance protections for vulnerable victims of human trafficking offenses who are co-opted by perpetrators, while still permitting criminal liability for persons who commit trafficking offenses as principals. Other jurisdictions have enacted provisions limiting liability for victims of trafficking offenses. E.g., N.M. Stat. Ann. § 30-52-1 (“In a prosecution pursuant to this section, a human trafficking victim shall not be charged with accessory to the crime of human trafficking.”). In addition, the Reporter’s Notes accompanying the American Law Institute’s draft for sexual assault and related offense for the Model Penal Code notes that some human trafficking victim’s advocates say that “enforcement practices often traumatize victims and expose them to even greater hardship and danger.” Council Draft No. 8 (Dec. 17, 2018). The note cites to 22 U.S.C. § 7101(b)(19) which states that “Victims of severe forms of trafficking should not be inappropriately incarcerated, fined, or otherwise penalized solely for unlawful acts committed as a direct result of being trafficked[.]”

***Relation to Current District Law.*** *The limitations on liability statute changes current District law in two main ways.*

First, the RCC's limitation on liability statute changes current law by barring charging a person as an accomplice to a Chapter 16 offense if prior to that offense, the principal committed a Chapter 16 offense against that person within 3 years prior to the conduct by the principal constituting the offense. Under current law, there are no restrictions on accomplice liability for victims of trafficking offenses. By contrast, this revision prevents criminal liability for victims of offenses under this chapter who subsequently aid or assist principals in committing additional offenses under this chapter. This subsection only bars accomplice liability, and victims of trafficking offenses may still be charged and convicted as principals. This change recognizes the vulnerability many victims of human trafficking have to further manipulation that may fall short of a general defense of duress. This revision improves the proportionality of the revised statute.

Second, the RCC's limitation on liabilities statute changes current law by barring charging a person with conspiracy to commit an offense under Chapter 16 if within 3 years prior to the formation of the conspiracy, a party to the conspiracy had committed a Chapter 16 offense against that person. Under current law, there are no restrictions on conspiracy liability for victims of trafficking offenses. By contrast, this revision prevents criminal liability for victims of offenses under this chapter who subsequently conspire with parties that previously committed a trafficking offense against that person. This subsection only bars charges of conspiracy to commit a Chapter 16 offense, and victims of trafficking offenses may still be charged and convicted with actually committing or attempting to commit a Chapter 16 offense. This change recognizes the vulnerability many victims of human trafficking have to further manipulation that may fall short of a general defense of duress. This revision improves the proportionality of the revised statute.

**RCC § 22E-1613. Civil Forfeiture.**

- (a) *Property subject to forfeiture.* The following are subject to civil forfeiture:
- (1) In fact, all conveyances, including aircraft, vehicles or vessels, which are possessed with intent to be used, or are, in fact, used to facilitate the commission of an offense under Chapter 16 of the RCC; and
  - (2) In fact, all money, coins, and currency which are possessed with intent to be used, or are, in fact, used, to facilitate the commission of an offense under Chapter 16 of the RCC.
- (b) *Requirements for forfeiture.* All seizures and forfeitures under this section shall be pursuant to the standards and procedures set forth in D.C. Law 20-278.
- (c) *Definitions.* The term “intent” has the meaning specified in RCC § 22E-206; the term “in fact” has the meaning specified in RCC § 22E-207; and the term “possess” has the meaning specified in RCC § 22E-701.

**COMMENTARY**

*Explanatory Note.* This section establishes civil asset forfeiture rules for conveyances and money that are intended to be used, or are used, to commit RCC human trafficking offenses. The RCC replaces all prostitution offenses that involve non-consensual commercial sex acts with human trafficking offenses. The civil forfeiture statute in part replaces the current forfeiture statute applicable to prostitution and related offenses,<sup>234</sup> and all seizures and forfeitures under this section shall be pursuant to D.C. Law 20-278. This statute both changes current law by allowing asset forfeiture as to all human trafficking offenses, and preserves current District law by ensuring that offenses involving non-consensual prostitution are still subject to forfeiture.

Subsection (a) establishes the types of property that are subject to civil forfeiture under the revised statute. Paragraph (a)(1) applies to any property that is, in fact, a conveyance, including aircraft, vehicles, or vessels. “In fact” is a defined term in RCC § 22E-207 that indicates there is no culpable mental state for a given element. Here, “in fact” means that there is no culpable mental state required for the fact that the property is a conveyance. There are two alternative bases for forfeiture of a conveyance in paragraph (a)(1). The first requires that the conveyance is possessed with intent to facilitate commission of an offense under Chapter 16 of the RCC. “Possess” is defined in RCC § 22E-701 as either to “hold or carry on one’s person” or to “have the ability and desire to exercise control over.” “Intent” is a defined term in RCC § 22E-206 that here means a person was practically certain that a conveyance would be used to facilitate commission of an RCC human trafficking offense. Per RCC § 22E-205, the object of the phrase “with intent to” is not an objective element that requires separate proof—only the person’s culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that the conveyance was used to facilitate commission of an RCC human trafficking offense, just that a person believed to a practical certainty<sup>235</sup>

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<sup>234</sup> D.C. Code § 22-2723.

<sup>235</sup> This issue is discussed in detail later in the commentary to this revised statute.

The alternative basis for forfeiture of a conveyance in paragraph (a)(1) is a conveyance which is, “in fact,” used to facilitate the commission of an RCC human trafficking offense. “In fact” is a defined term in RCC § 22E-207 that indicates there is no culpable mental state for a given element. Here, “in fact” means that there is no culpable mental state required for the fact that the conveyance was used to facilitate the commission of an RCC human trafficking offense. Applying strict liability does not change the mental state requirements for forfeiture in D.C. Law 20-278.<sup>236</sup>

Paragraph (a)(2) applies to any property that is, “in fact,” money, coins, and currency. “In fact” is a defined term in RCC § 22E-207 that indicates there is no culpable mental state for a given element. Here, “in fact” means that there is no culpable mental state required for the fact that the property is money, coins, or currency. There are two alternative bases for forfeiture of money, coins, and currency in paragraph (a)(2). The first requires that the money, coins, or currency are possessed with intent to facilitate commission of an offense under Chapter 16 of the RCC. “Possess” is defined in RCC § 22E-701 as either to “hold or carry on one’s person” or to “have the ability and desire to exercise control over.” The culpable mental state requirement of “intent” and the strict liability requirements of “in fact” are the same in paragraph (a)(2) as they are in paragraph (a)(1).

The alternative basis for forfeiture of money, coins, or currency in paragraph (a)(2) is if it is, “in fact,” used to facilitate the commission of an RCC human trafficking offense. “In fact” is a defined term in RCC § 22E-207 that indicates there is no culpable mental state for a given element. Here, “in fact” means that there is no culpable mental state required for the fact that the money, coins or currency were used to facilitate the commission of an RCC human trafficking offense. Applying strict liability does not change the mental state requirements for forfeiture in D.C. Law 20-278.<sup>237</sup>

Paragraph (b) establishes that the seizures and forfeitures under this section shall be pursuant to the standards and procedures set forth in D.C. Law 20-278.

Subsection (c) cross-references applicable definitions located elsewhere in the RCC.

***Relation to Current District Law.*** *The revised forfeiture statute changes current District law in two main ways.*

First, the revised human trafficking civil forfeiture statute specifies that human trafficking offenses are subject to civil asset forfeiture. The current D.C. Code generally specifies that alleged violations of a “forfeitable offense” can give rise to civil asset forfeiture.<sup>238</sup> Human trafficking offenses are not included in the definition of “forfeitable offense,” and alleged violations of human trafficking offenses are not explicitly subject to civil forfeiture. However, the definition of “forfeitable offense” does include prostitution offenses, including prostitution

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<sup>236</sup> See, e.g., D.C. Code § 41-302(b) (“No property shall be subject to forfeiture by reason of an act or omission committed or omitted without the actual knowledge and consent of the owner, unless the owner was willfully blind to the knowledge of the act or omission.”).

<sup>237</sup> See, e.g., D.C. Code § 41-302(b) (“No property shall be subject to forfeiture by reason of an act or omission committed or omitted without the actual knowledge and consent of the owner, unless the owner was willfully blind to the knowledge of the act or omission.”).

<sup>238</sup> D.C. Code § 41-301.



offenses involving non-consensual conduct,<sup>239</sup> that can give rise to forfeiture under D.C. Code § 22-2723. In contrast, the revised forfeiture statute changes law by clarifying that all human trafficking offenses are subject to civil asset forfeiture. This change improves the proportionality and consistency of the revised statutes.

Second, the revised human trafficking forfeiture provision applies to money, coins, and currency which are used, or intended to be used, “to facilitate the commission” of an RCC human trafficking offense. The current D.C. Code prostitution forfeiture statute, which applies in part to prostitution offenses involving non-consensual conduct,<sup>240</sup> applies to conveyances that are used, or intended to be used, “to facilitate a violation” of the current D.C. Code prostitution statutes<sup>241</sup> and to currency that is used, or intended to be used, “in violation” of the current D.C. Code prostitution statutes.<sup>242</sup> “In violation” appears to be narrower than “to facilitate the commission,” but there is no D.C. Court of Appeals (DCCA) case law on this issue. In contrast, the revised forfeiture provision applies to currency that is used, or possessed with intent to be used, “to facilitate the commission” of the RCC human trafficking offenses, which is consistent with the scope of conveyances subject to forfeiture. It is inconsistent to include in forfeiture conveyances that are used, or possessed with intent to be used, “to facilitate the commission” of a trafficking offense, but to limit forfeiture of currency to currency that is used, or possessed with intent to be used “in violation” of a trafficking offense. This change improves the clarity, consistency, and proportionality of the revised statute.

*Beyond these two substantive changes to current District law, two other aspects of the revised forfeiture statute may constitute substantive changes to current District law.*

First, the RCC definition of “intent to” applies to the revised forfeiture provision. The current D.C. Code prostitution forfeiture provision applies to conveyances and money that are “intended for use” in a prostitution offense.<sup>243</sup> The meaning of “intended to” is unclear and there is no DCCA case law on this issue.<sup>244</sup> Resolving this ambiguity, the revised human trafficking

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<sup>239</sup> Current Chapter 27 of the D.C. Code, which defines prostitution-related offenses, includes several offenses that criminalize nonconsensual commercial sex acts. For example, D.C. Code § 22-2706 makes it a crime to “[use] threats or duress, to detain any individual against such individual’s will, for the purpose of prostitution or a sexual act or sexual contact[.]” Compelling a person to engage in or submit to nonconsensual commercial sex acts is criminalized as a human trafficking offense under Chapter 16 of the RCC, not as a prostitution-related offense.

<sup>240</sup> Current Chapter 27 of the D.C. Code, which defines prostitution-related offenses, includes several offenses that criminalize nonconsensual commercial sex acts. For example, D.C. Code § 22-2706 makes it a crime to “[use] threats or duress, to detain any individual against such individual’s will, for the purpose of prostitution or a sexual act or sexual contact[.]” Compelling a person to engage in or submit to nonconsensual commercial sex acts is criminalized as a human trafficking offense under Chapter 16 of the RCC, not as a prostitution-related offense.

<sup>241</sup> D.C. Code Ann. § 22-2723(a)(1) (“(a) The following are subject to forfeiture: (1) All conveyances, including aircraft, vehicles or vessels, which are used, or intended for use, to transport, or in any manner to facilitate a violation of a prostitution-related offense.”).

<sup>242</sup> D.C. Code Ann. § 22-2723(a)(2) (“(a) The following are subject to forfeiture: . . . (2) All money, coins, and currency which are used, or intended for use, in violation of a prostitution-related offense.”).

<sup>243</sup> D.C. Code § 22-2723(a)(1), (a)(2).

<sup>244</sup> The words “intended to” as used in the current prostitution forfeiture statute may refer to what was commonly known as “specific intent.” However, even if this is the case, current District case law is unclear as to whether “specific intent” may be satisfied by mere knowledge, or if conscious desire is required. Compare, *Logan v. United States*, 483 A.2d 664, 671 (D.C. 1984) (“[a] specific intent to kill exists when a person acts with the purpose . . . of

forfeiture provision applies the RCC definition of “intent” in RCC § 22E-206. “Intent” is a defined term in RCC § 22E-206 that here means the actor was practically certain that the property would be used in a prostitution offense.<sup>245</sup> Applying the RCC definition of “intent” does not change the mental state requirements for forfeiture in D.C. Law 20-278.<sup>246</sup> This change improves the clarity, consistency, and proportionality of the revised statutes.

Second, the RCC establishes that strict liability is a distinct basis for the forfeiture of property. The current D.C. Code prostitution forfeiture provision applies to conveyances and money that are “are used” in a prostitution offense.<sup>247</sup> It is unclear whether “are used” applies strict liability. There is no DCCA case law on this issue. Resolving this ambiguity, the revised human trafficking forfeiture provision, by use of the phrase “in fact,” clarifies that strict liability is a distinct basis for the forfeiture of property. Applying strict liability does not change the mental state requirements for forfeiture in D.C. Law 20-278.<sup>248</sup> This change improves the clarity, consistency, and proportionality of the revised statutes.

*The remaining changes are clarificatory and are not intended to substantively change current District law.*

First, the revised forfeiture provision deletes the language “to transport.” The current D.C. Code prostitution forfeiture provision includes “[a]ll conveyances, including aircraft, vehicles, or vessels, which are used, or intended for use, to transport, or in any manner to facilitate a violation of a prostitution-related offense.” The term “conveyances” sufficiently communicates an object designed to transport. The verb “to transport” is unnecessary and deleting it improves the clarity of the revised statutes.

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causing the death of another,”) with *Peoples v. United States*, 640 A.2d 1047, 1055-56 (D.C. 1994) (proof that the appellant, who set fire to a building “knew” people inside a would suffer injuries sufficient to infer that the appellant “had the requisite specific intent to support his convictions of malicious disfigurement”).

<sup>245</sup> Relying on the RCC definition of “intent” may produce an additional change in current District law. Under the RCC, the “intent” mental state may be satisfied by knowledge of a circumstance or result. The RCC also provides that knowledge of a circumstance may be imputed if a person is reckless as to whether the circumstance exists, and with the purpose of avoiding criminal liability, avoids confirming or fails to investigate whether the circumstance exists. Applied to this forfeiture provision, if an owner does *not* know that property is to be used to violate the trafficking in forced commercial sex offense, but was reckless as to this fact, and avoided investigating whether this circumstance exists in order to avoid criminal liability, the imputation rule may allow a fact finder to impute knowledge to the owner. It is unclear under current District law whether a similar rule of imputation would apply. Current D.C. Code § 41-306 states that “[n]o property shall be subject to forfeiture by reason of an act or omission committed or omitted without the actual knowledge and consent of the owner, unless the owner was willfully blind to the knowledge of the act or omission.” However, this provision applies when an actual *act or omission* is the basis for forfeiture. It is unclear whether an owner’s willful blindness as to *intended* uses of property still authorizes civil forfeiture. If this provision does apply even when property has not yet been used, the term “willfully blind” is undefined, and it is unclear how it differs from the deliberate ignorance provision under the RCC.

<sup>246</sup> See, e.g., D.C. Code § 41-302(b) (“No property shall be subject to forfeiture by reason of an act or omission committed or omitted without the actual knowledge and consent of the owner, unless the owner was willfully blind to the knowledge of the act or omission.”).

<sup>247</sup> D.C. Code § 22-2723(a)(1), (a)(2).

<sup>248</sup> See, e.g., D.C. Code § 41-302(b) (“No property shall be subject to forfeiture by reason of an act or omission committed or omitted without the actual knowledge and consent of the owner, unless the owner was willfully blind to the knowledge of the act or omission.”).

Second, the revised forfeiture provision deletes the language “in any manner.” The current D.C. Code prostitution forfeiture provision includes “[a]ll conveyances, including aircraft, vehicles, or vessels, which are used, or intended for use, to transport, or in any manner to facilitate a violation of a prostitution-related offense.” “To facilitate” is sufficiently broad to encompass all methods of facilitation, particularly since the revised statute, as is discussed above, no longer specifies “to transport.” Deleting “in any manner” improves the clarity of the revised statutes.

Third, the revised forfeiture provision deletes the term “property.” The current D.C. Code prostitution forfeiture provision states that “All seizures and forfeitures of property under this section shall be pursuant to the standards and procedures set forth in D.C. Law 20-278.”<sup>249</sup> The term “property” is unnecessary because paragraphs (a)(1) and (a)(2) of the revised provision and of the current forfeiture provision,<sup>250</sup> limit the provision to types of property—vehicles and money. This change improves the clarity of the revised statutes.

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<sup>249</sup> D.C. Code § 22-2723(b).

<sup>250</sup> D.C. Code § 22-2723(a)(1), (a)(2).