**STATE OF HAWAI'I**
# OFFICE OF THE PUBLIC DEFENDER

LATE

**Testimony of the Office of the Public Defender,**
**State of Hawai'i to the Senate Committee on Judiciary**

February 24, 2020

H.B. No. 1745: RELATING TO VIOLATION OF PRIVACY

Chair Lee, Vice Chair San Buenaventura, and Members of the Committee:

The Office of the Public Defender respectfully opposes H.B. No. 1745. This measure would prohibit defendants originally charged with the offenses of Violation of Privacy in the First Degree and certain sections of Violation of Privacy in the Second Degree.

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

> (1) When a defendant voluntarily pleads guilty or nolo contendere, prior to commencement of trial, to a felony, misdemeanor, or petty misdemeanor; (2) It appears to the Court that the defendant is not likely to engage in a criminal course of conduct; and
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> * * * *
>
> (3) The ends of justice and the welfare of society do not require that the defendant shall presently suffer the penalty imposed by law, the court, without accepting the plea of nolo contendere or entering a judgment of guilt and with the consent of the defendant and after considering the recommendations, if any, of the prosecutor, may defer further proceedings.

If this measure passes, defendants originally charged with these charges under §711- 1110.9 and various subsections in §711-1111 (misdemeanor) would be prohibited from requesting a deferral of their charges. As stated in HRS Chapter 853, the trial court, after considering the merits of the case, and hearing from the prosecutor, may or may not grant a defendant's motion to defer the proceedings. In order for the trial court to defer the proceedings, it must find that the defendant is not likely to re-offend or engage in a (further) course of criminal conduct, and that the ends of justice and welfare of society do not require the defendant receive a criminal conviction.

Because of this high standard, not all requests by defendants to defer their criminal proceedings are granted by the trial courts. Defendants must still be deemed worthy of a deferral. Criminal history, seriousness of the offense, history of substance abuse, lack of employment, and previous criminal behavior (even if uncharged) are common reasons cited to by prosecutors and judges for

a denial of a defendant's motion to defer the acceptance of his or her guilty or no contest plea. A remorseful first-time offender

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

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

Finally, the Office of the Public Defender is unaware of any significant case statistics that indicate that the courts are inordinately granting deferrals in these kinds of cases.

We strongly oppose this measure and thank you for the opportunity to present testimony to this committee.

DEPARTMENT OF THE PROSECUTING ATTORNEY

**CITY AND COUNTY OF HONOLULU**

ALII PLACE
1060 RICHARDS STREET • HONOLULU, HAWAII 96813
PHONE: (808) 768-7400 • FAX: (808) 768-7515

DWIGHT K. NADAMOTO
ACTING PROSECUTING ATTORNEY

LYNN B.K. COSTALES
ACTING FIRST DEPUTY
PROSECUTING ATTORNEY

**THE HONORABLE CHRIS LEE CHAIR**
**HOUSE COMMITTEE ON JUDICIARY**
**Thirtieth State Legislature**
**Regular Session of 2020**
**State of Hawai`i**

February 24, 2020

**RE: H.B. 1745; RELATING TO VIOLATION OF PRIVACY.**

Chair Lee, Vice Chair San Buenaventura, and members of the House Committee on Judiciary, the Department of the Prosecuting Attorney of the City and County of Honolulu ("Department") submits the following testimony in strong support of H.B. 1745. This bill is part of the Department's 2020 legislative package.

The purpose of H.B. 1745 is to exclude certain types of Violation of Privacy from being eligible for deferred pleas. Generally speaking, deferred pleas allow someone to "put off" entering an official plea for a specific length of time—commonly known as the deferral period—during which time they have to meet certain terms and conditions set by the court (e.g. remain arrest-free and conviction-free, etc); the length of the deferral period varies, based on the severity of the offense. If the defendant abides by all terms and conditions of their deferral, through the end of their deferral period, then the case will be dismissed and no conviction will ever appear on the person's record (for that particular offense). This is essentially an opportunity for someone to show the court that they have "learned their lesson"—even without a formal conviction—and will not reoffend; each person is typically allowed only one deferred plea in their lifetime. Depending on the individual, a deferral could be used to keep a person's criminal record totally clean, or it could be used to keep a felony off of their record, or for other reasons.

Section 853-4, Hawaii Revised Statutes ("HRS"), explains the process and parameters of getting a deferral, and also lists specific offenses for which deferral is not allowed (e.g. abuse of family or household member, solicitation of prostitution, all class A felonies, etc). If enacted, H.B. 1745 would add Violation of privacy in the first degree (HRS §711-1110.9) and certain portions of Violation of privacy in the second degree (HRS §711-1111(d)(e)(f)(g) and (h)) to that list, thus prohibiting deferral of these offenses.

Please keep in mind, these particular offenses are much more than simple "peeping Tom"-type violations of privacy, and generally involve affirmative steps by the offender—sometimes using audiovisual devices or instrumentation—to observe, record, amplify and/or broadcast other people's intimate activities, private communications, or intimate areas of the body, without consent from those depicted, under circumstances in which there would be a reasonable expectation of privacy. Given the very serious nature of these offenses, the Department does not believe they should be eligible for deferral; perpetrators should not be afforded the privilege of keeping these types of offenses off their record.

For all of the foregoing reasons, the Department of the Prosecuting Attorney of the City and County of Honolulu strongly supports the passage of H.B. 1745. Thank you for this opportunity to testify.

POLICE DEPARTMENT

CITY AND COUNTY OF HONOLULU

801 SOUTH BERETANIA STREET · HONOLULU, HAWAII 96813
TELEPHONE: (808) 529-3111 · INTERNET: www.honolulupd.org

KIRK CALDWELL
MAYOR

SUSAN BALLARD
CHIEF

JOHN D. McCARTHY
CLYDE K. HO
DEPUTY CHIEFS

RP-KK
OUR REFERENCE

February 24, 2020

LATE

The Honorable Chris Lee, Chair
and Members
Committee on Judiciary
House of Representatives
Hawaii State Capitol
415 South Beretania Street, Room 325
Honolulu, Hawaii 96813

Dear Chair Lee and Members:

SUBJECT: House Bill No. 1745, Relating to Violation of Privacy

I am Randall Platt, Captain of the Criminal Investigation Division of the Honolulu Police Department (HPD), City and County of Honolulu.

The HPD supports House Bill No. 1745, Relating to Violation of Privacy.

The unauthorized, surreptitious recording of a person in a state of undress or participating in a private sexual act is a criminal violation of a person's right to privacy. The release or threat of release of such recordings or images can cause irreparable personal, professional, and financial harm. Excluding violation of privacy in the first degree and certain paragraphs of violation of privacy in the second degree from qualifying for deferred acceptance of guilt or nolo contendere pleas holds perpetrators accountable for their actions and provides a deterrent for a repeat offense.

The HPD urges you to support House Bill No. 1745, Relating to Violation of Privacy.

Thank you for the opportunity to testify.

APPROVED:

Susan Ballard

Susan Ballard
Chief of Police

Sincerely,

Randall Platt

Randall Platt, Captain
Criminal Investigation Division

# HB 1745, RELATING TO VIOLATION OF PRIVACY

FEBRUARY 24, 2020 · HOUSE JUDICIARY COMMITTEE · CHAIR SEN. CHRIS LEE

**POSITION:** Support.

**RATIONALE:** IMUAlliance supports HB 1745, relating to violation of privacy, which excludes violation of privacy in the first degree, and certain paragraphs of violation of privacy in the second degree, from qualifying for deferred acceptance of guilty plea or nolo contendere plea.

IMUAlliance is one of the state's largest victim service providers for survivors of sex trafficking. Over the past 10 years, we have provided comprehensive direct intervention (victim rescue) services to 150 victims, successfully emancipating them from slavery and assisting in their restoration, while providing a range of targeted services to over 1,000 victims and individuals at risk of sexual exploitation. Each of the victims we have assisted has suffered from complex and overlapping trauma, including post-traumatic stress disorder, depression and anxiety, dissociation, parasuicidal behavior, and substance abuse. Trafficking-related trauma can lead to a complete loss of identity. A victim we cared for in 2016, for example, had become so heavily trauma bonded to her pimp that while under his grasp, she couldn't remember her own name. Yet, sadly, many of the victims with whom we work are misidentified as so-called "voluntary prostitutes" and are subsequently arrested and incarcerated, with no financial resources from which to pay for their release.

Sex trafficking is a profoundly violent crime. The average age of entry into commercial sexual exploitation in Hawai'i may be as low as 14-years-old, with 60 percent of trafficked children being

Kris Coffield, Executive Director · (808) 679-7454 · kris@imuaalliance.org

under the age of 16. Based on regular outreach and monitoring, we estimate that approximately 150 high-risk sex trafficking establishments operate in Hawai'i. In a recent report conducted by the State Commission on the Status of Women, researchers from Arizona State University found that 1 in every 11 adult males living in our state buys sex online. When visitors are also counted, that number worsens to 1 in every 7 men walking the streets of our island home and a daily online sex buyer market of 18,614 for O'ahu and a total sex buyer population for the island of 74,362, including both tourists and residents.

ASU's findings are grim, but not surprising to local organizations that provide services to survivors of sex trafficking. IMUAlliance, for example, has trained volunteers to perform outreach to victims in high-risk locations, like strip clubs, massage parlors, and hostess bars. More than 80 percent of runaway youth report being approached for sexual exploitation while on the run, over 30 percent of whom are targeted within the first 48 hours of leaving home. With regard to mental health, sex trafficking victims are twice as likely to suffer from PTSD as a soldier in a war zone. Greater than 80 percent of victims report being repeatedly raped and 95 percent report being physically assaulted, numbers that are underreported, according to the United States Department of State and numerous trauma specialists, because of the inability of many victims to recognize sexual violence. As one underage survivor told IMUAlliance prior to being rescued, "I can't be raped. Only good girls can be raped. I'm a bad girl. If I *want* to be raped, I have to *earn* it."

Accordingly, we support measures to advance our state's ability to crack down on sexual slavery, including this measure's exclusion of violation of privacy statutes from deferred acceptance of guilty plea or nolo contendere plea qualification. **Many of our victims are subjected to so-called "revenge porn," or the nonconsensual disclosure of images and/or videos of themselves engaged in a sex act or in the nude as a means of shaming them into sexual servitude.** In 2014, Hawai'i passed Act 116, which criminalizes revenge porn under HRS §711-1110.9, violation of privacy in the first degree. Following the enactment of our state's revenge porn ban, though, we became extremely disheartened to learn that, as of late 2016, the harshest sentences being delivered for revenge porn offenses in the islands are one day in jail, plus probation, with some perpetrators never facing serious sanction because they were allowed to defer their guilty or no contest pleas, with these pleas being expunged after a year without arrest or conviction.

Following the lead of the Cyber Civil Rights Initiative, **we believe that revenge porn is a form of sexual assault** and that efforts to threaten, humiliate, and intimidate people, especially young women, through such means is an abhorrent violation of privacy. It is appropriately graded as a class C felony. To strengthen our state's efforts to curb sexual violence, we contend that **plea deferrals should be prohibited in these cases, just as they are sexual assault in the first, second, and third degrees, as well as numerous other sexual offenses.**