

**Testimony of the Office of the Public Defender,
State of Hawaii to the House Committee on
Judiciary**

February 1, 2018

H.B. No. 2134: RELATING TO VIOLATION OF PRIVACY

Chair Nishimoto and Members of the Committee:

We oppose passage of H.B. No. 2134 which creates the new offenses of Violation of Privacy of a Minor and Threatening to Violate Privacy. The current offenses of Violation of Privacy in the First and Second Degrees (H.R.S. §§ 711-1110.9 and 711-1111) already cover situations where a minor is victimized. The main change that H.B. No. 2134 makes is that it raises the penalty for Violation of Privacy of a Minor to a Class B felony. Currently, Violation of Privacy in the First Degree, which contains the same elements as the proposed Violation of Privacy of a Minor is a Class C felony. We believe that classification of this offense as a Class C felony is appropriate. While this type of conduct is serious, it should not be equated with the physical and psychological effects of the sexual assault offenses.

Moreover, H.B. No. 2134 does not contain the exceptions which currently exist in Violation of Privacy in the First Degree relating to images or videos made when the person was voluntarily nude in public or made pursuant to a voluntary commercial transaction. Therefore, a person who captures an image of a little child running around at the beach without clothing or who films a documentary involving a child in a state of undress could conceivably be prosecuted under H.B. No. 2134 without any criminal intent.

It is anticipated that most of the conduct which would fall under H.B. No. 2134 is the practice among teenagers known as “sexting” whereby young persons send nude pictures and other sexual communications to each other through their cellular phones. Presumably, that is the reason that the bill contains a clause on lines 15 through 17 on page 2 allowing the sentencing court to consider the age of the person convicted relative to the age of the person whose privacy is violated. This clause is far too vague to be effective and it doesn’t solve the problem whereby a young person would be burdened with a serious felony adjudication

H.B. No. 2134 also creates the misdemeanor offense of Threatening to Violate Privacy. Presumably this offense is to cover the situation where someone threatens to disclose an image or video taken with the consent of the subject of the video or image. Most cases involving such a threat would expose the person making the threat to criminal liability under extortion statutes (H.R.S. §§ 707-764 through 707-767). Therefore, the need for this offense is questionable.

Given the many issues surrounding the provisions of this bill, we oppose passage. Thank you for the opportunity to provide testimony in this matter.

POLICE DEPARTMENT
CITY AND COUNTY OF HONOLULU

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OUR REFERENCE

WO-KK

February 1, 2018

The Honorable Scott Y. Nishimoto, Chair
and Members
Committee on Judiciary
House of Representatives
Hawaii State Capitol
415 South Beretania Street, Room 325
Honolulu, Hawaii 96813

Dear Chair Nishimoto and Members:

SUBJECT: House Bill No. 2134, Relating to Violation of Privacy

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

In this day and age, electronic devices are able to surreptitiously take photographs or record video. They are also readily accessible to just about anyone in the general public. This availability in combination with the easy accessibility and wide distribution base of social media creates a situation, which can be easily exploited by persons with the intention of causing harm to their victims.

The violation of one's privacy or the threat of using material obtained through the violation of one's privacy has become an all too common occurrence in today's society and necessitated the creation of violation of privacy laws. Hawaii law has consistently recognized that minors are a particularly vulnerable segment of our population and are deserved of additional protection under Hawaii law. The creation of a violation of privacy of a minor statute and the companion threatening to violate the privacy statute would be an expected and natural expansion of the privacy laws. It would also assist in addressing the current trends of this type of predatory behavior.

The Honorable Scott Y. Nishimoto, Chair
and Members
February 1, 2018
Page 2

The HPD urges you to support House Bill No. 2134, Relating to Violation of Privacy.

Thank you for the opportunity to testify.

Sincerely,



Walter Ozeki, Captain
Criminal Investigation Division

APPROVED:



Susan Ballard
Chief of Police

HB-2134

Submitted on: 1/31/2018 11:25:52 AM

Testimony for JUD on 2/1/2018 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Councilmember Yuki Lei Sugimura	Maui County Council	Support	No

Comments:

DEPARTMENT OF THE PROSECUTING ATTORNEY
CITY AND COUNTY OF HONOLULU

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CHASID M. SAPOLU
FIRST DEPUTY PROSECUTING ATTORNEY

THE HONORABLE SCOTT Y. NISHIMOTO, CHAIR
HOUSE COMMITTEE ON JUDICIARY
Twenty-Ninth State Legislature
Regular Session of 2018
State of Hawai'i

February 1, 2018

RE: H.B. 2134; RELATING TO VIOLATION OF PRIVACY.

Chair Nishimoto, 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 regarding H.B. 2134, providing comments and a possible alternative approach.

Based on our reading of H.B. 2134, it appears that the intent of this bill is to add a higher penalty for committing Violation of Privacy in the First Degree if the victim is a minor, and to make it illegal for someone to threaten to disclose the types of materials specified in Section 711-1110.9(b)—part of Violation of Privacy in the First Degree—where Section 711-1110.9(b) currently prohibits only the disclosure itself. To address the first concern in a more efficient manner, the Department would suggest amending the penalties for Section 711-1110.9 as follows:

- (2) Violation of privacy in the first degree is a:
- (i) Class B felony if the depicted person is a minor under the age of eighteen;
 - or
 - (ii) ~~Class~~ Class C felony if the depicted person is eighteen years of age or older.

In addition to any penalties the court may impose, the court may order the destruction of any recording made in violation of this section. When sentencing a person convicted of this offense, the court shall consider the age of the person convicted relative to the age of the person whose privacy was violated.

While the proposal to create a new offense for “Threatening to violate privacy” attempts to address a problem that certainly exists and is known to the Department, the proposed language may be considered deficient—and perhaps unconstitutional—without a specific malicious intent or other state of mind requirement. Moreover, the proposed language does not address consent, public activity, or other factors, which could lead to the statute being interpreted as overly broad or ambiguous. Finally, victims who are threatened with the disclosure of nude or sexual conduct images or videos seem to suffer from a similar sense of fear, anxiety and shame that is felt by victims whose images or videos have already been disclosed; and such threats can go on for years—or forever—without the intervention of law enforcement. In that sense, threats of this nature are essentially on-par with the actual disclosure of such images or videos, and—in our experience—threats are also a much more pervasive problem than actual disclosure.

That said, if the Legislature wishes to prohibit this type of conduct, we believe it would be more effective to amend Section 711-1110.9(b), as follows:

- b) The person knowingly discloses or threatens to disclose an image or video of another identifiable person either in the nude, as defined in section 712-1210, or engaging in sexual conduct, as defined in section 712-1210, without the consent of the depicted person, with intent to harm substantially the depicted person with respect to that person's health, safety, business, calling, career, financial condition, reputation, or personal relationships; provided that:
 - (i) This paragraph shall not apply to images or videos of the depicted person made:
 - (A) When the person was voluntarily nude in public or voluntarily engaging in sexual conduct in public; or
 - (B) Pursuant to a voluntary commercial transaction; and
 - (ii) Nothing in this paragraph shall be construed to impose liability on a provider of "electronic communication service" or "remote computing service" as those terms are defined in section 803-41, for an image or video disclosed through the electronic communication service or remote computing service by another person.

If the foregoing language is used, we believe it could apply equally whether the threat is expressed directly to the depicted person, or to someone else (e.g. the depicted person’s spouse or parent), though it may be advisable to state that in the legislative committee reports, if that is the desired effect. We also note that criminalizing a threat to act, in addition to the act itself, within the same statute, would not be unprecedented, as existing statutes already do this (e.g. Section 708-841, Robbery in the second degree).

Thank you for the opportunity to testify on this matter.



46-063 Emepela Pl. #U101 Kaneohe, HI 96744 · (808) 679-7454 · Kris Coffield · Co-founder/Executive Director

TESTIMONY FOR HOUSE BILL 2134, RELATING TO VIOLATION OF PRIVACY

House Committee on Judiciary
Hon. Scott Nishimoto, Chair
Hon. Joy A. San Buenaventura, Vice Chair

Thursday, February 1, 2018, 2:00 PM
State Capitol, Conference Room 325

Honorable Chair Nishimoto and committee members:

I am Kris Coffield, representing IMUAlliance, a nonpartisan political advocacy organization that currently boasts over 400 members. On behalf of our members, we offer this testimony in strong support of House Bill 2134, relating to violation of privacy.

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 services to 130 victims, successfully emancipating them from slavery and assisting in their restoration, while providing a range of targeted services to over 1,000 victims in total. 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.

Sex trafficking is a profoundly violent crime. The average age of entry into commercial sexual exploitation is 13-years-old, with 60 percent of trafficked children being under the age of 16. Approximately 150 high-risk sex trafficking establishments operate in Hawai'i. An estimated 1,500-2,500 women and children are victimized by sex traffickers in our state annually. Over 120,000 advertisements for Hawai'i-based prostitution are posted online each year, a number that is rapidly increasing as technology continues to outpace the law. 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.”

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. Since the enactment of our state’s revenge porn ban, though, we have become 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. Moreover, as of late October in 2016, only two of nine revenge porn cases had resulted in any jail time, despite the crime being graded as a class C felony. Following the lead of the Cyber Civil Rights Initiative, we believe that revenge porn is tantamount to sexual assault and that efforts to threaten, humiliate, and intimidate people, especially young women, through such means is an abhorrent violation of privacy, and one we are committed to providing greater awareness of and outreach for in the coming year. Accordingly, we support this bill’s creation of the crime of “violation of privacy of a minor,” which applies our state’s violation of privacy provisions to children who have experienced the degradation wrought by revenge porn and grades such offenses as a class B felony, consistent with our state’s emphasis on punishing child predators more severely than those who target adults. We also support the creation of the offense of “threatening to violate privacy,” which will allow those who have suffered intimidation because of the threat of being publicly humiliated through the release of sexually explicit images or videos to receive justice and which may serve as a lesser offense for prosecutors to use in cases in which a victim is concerned about retraumatizing themselves by revealing sexually explicit materials in a court of law.

Slavery has no place in paradise. Mahalo for the opportunity to testify in support of this bill.

Sincerely,
Kris Coffield
Executive Director
IMUAlliance



HOUSE COMMITTEE ON JUDICIARY

TESTIMONY—HB 2134, Relating to Violation of Privacy

THURSDAY, FEBRUARY 1, 2018

Jeanné Kapela, UNITE Hawaii Executive Director

POSITION: STRONG SUPPORT

Chair Nishimoto and committee members,

Hawai'i is home to over 150 high-risk sex trafficking establishments, with the average age a victim is first exploited being only 13-years-old. We are also a target for “cybertrafficking,” with over 110,000 ads for local prostitution posted online each year. Yet, the numbers fail to fully capture the human toll of the commercial sex trade, a tragedy we witness each day in the eyes of the survivors we serve.

UNITE is an educational nonprofit devoted to ending sex trafficking in Hawai'i. Through outreach and awareness in local schools, we provide students with the skills necessary to prevent exploitation by building healthy relationships and learning communities. Our program, “It Ends With Us,” explains how trafficking works in the 21st Century, preparing students to recognize threatening situations and respond to potential abuse. To date, we have provided anti-trafficking education to thousands of keiki in our state’s public school system. Working with UNITE’s strategic partner, IMUAlliance, we have also helped to emancipate sex trafficking victims from local brothels in the Ala Moana area. For both victims who self-identify at the schools we visit and those for whom we’ve provided direct intervention services, a lack of information about how to get help is a common concern.

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, especially victims who are trafficked through the internet and whose images are used to advertise their exploitation. We believe that revenge porn is sexual assault and that efforts to threaten, humiliate, and intimidate people, especially young women, through such means are an abhorrent violation of privacy. Accordingly, we support this bill, which applies our state's violation of privacy provisions to children and allows those who have suffered intimidation because of the threat of being publicly humiliated through the release of sexually explicit images or videos to receive justice.

Thank you for the opportunity to testify in support of this bill.

HB-2134

Submitted on: 1/30/2018 3:17:06 PM

Testimony for JUD on 2/1/2018 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Joy Marshall		Support	No

Comments:

HB-2134

Submitted on: 1/30/2018 5:07:02 PM

Testimony for JUD on 2/1/2018 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Karin Nomura		Support	No

Comments:

As someone who has had a constant battle with a neighbor who's had parties of "you can hear her from here" while I'm trying to bathe, with "guests" or "we live here" participants gathered over comments of "what is she washing now", stepping out to shouts of "that's her" or "take a picture", etc. (all adults) – to which I've called police, notified, and above over...had a TRO, with most recently a Cease and Desist, I as an adult have issues over what I'm told is something the police can do nothing about. Late night commentary or even some during the day of not being "pretty enough" or other items as well. I can't imagine how a child or minor would feel having their privacy invaded daily like mine has.

TESTIMONY OF NICOLE A. VELASCO,
PRIVATE CITIZEN

TO THE HOUSE COMMITTEE ON JUDICIARY

THE TWENTY-NINTH LEGISLATURE
REGULAR SESSION OF 2018

Thursday, February 1, 2018
2:00 P.M., Room 325
Hawaii State Capitol

Testimony on H.B. No. 2134, RELATING TO VIOLATION OF PRIVACY

Dear Chair Nishimoto, Vice Chair San Buenaventura, and Members of the Committee:

I am Nicole A. Velasco, a private citizen, writing in SUPPORT of H.B. No. 2134 that adds two new sections to Chapter 711, Hawaii Revised Statutes to establish threatening to violate privacy as a misdemeanor offense, to expand the offense of violation of privacy in the first degree to include disclosure of revenge pornography, and to establish violation of privacy of a minor, including disclosure of revenge pornography, as a felony offense.

While these sections are new, the heinous act of violation of privacy is not new in Hawaii at all. I applaud the Women's Legislative Caucus and the introducers of this measure for prioritizing the protection of our keiki, and for strengthening existing law to increase the likelihood that violators are held accountable.

Having had my own privacy violated without any justice, I stand firm on the importance of these proposed legal controls. May the successful passage of this measure be a part of our larger message that we as a collective will not stand for the mistreatment and abuse of our people.

H.B. No. 2134 is one of the many safeguards we must put in place to ensure the protection, safety, and health of our community.

Thank you for your consideration and this opportunity to testify.

LATE

HB-2134

Submitted on: 1/31/2018 4:08:04 PM

Testimony for JUD on 2/1/2018 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
TODD IACOVELLI	PRIVATE CITIZEN	Support	No

Comments:

TESTIMONY OF TODD IACOVELLI

PRIVATE CITIZEN

TO THE HOUSE COMMITTEE ON JUDICIARY

THE TWENTY-NINTH LEGISLATURE

REGULAR SESSION OF 2018

Thursday, February 1, 2018

2:00 P.M., Room 325

Hawaii State Capitol

Testimony on H.B. No. 2134, RELATING TO VIOLATION OF PRIVACY

Dear Chair Nishimoto, Vice Chair San Buenaventura, and Members of the Committee:

I am Todd Iacovelli, a private citizen, writing in SUPPORT of H.B. No. 2134 that adds two new sections to Chapter 711, Hawaii Revised Statutes to establish threatening to violate

privacy as a misdemeanor offense, to expand the offense of violation of privacy in the first

degree to include disclosure of revenge pornography, and to establish violation of privacy of a

minor, including disclosure of revenge pornography, as a felony offense.

While these sections are new, the heinous act of violation of privacy is not new in Hawaii

at all. I applaud the Women's Legislative Caucus and the introducers of this measure for prioritizing the protection of our keiki, and for strengthening existing law to increase the likelihood that violators are held accountable.

I personally have a dear friend whose privacy was violated. With this type of measure, there would be a very clear support in place for her and individuals who go through similar situations in the future. This is an important and incredibly meaningful step to protect our citizens at their most vulnerable. The clear language in HB2134 is an excellent step in the right direction to protect rights of people who need it.

H.B. No. 2134 is one of the many safeguards we must put in place to ensure the protection, safety, and health of our community.

Thank you for your consideration and this opportunity to testify.

LATE

HB-2134

Submitted on: 2/1/2018 10:54:27 AM

Testimony for JUD on 2/1/2018 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Dara Carlin, M.A.	Domestic Violence Survivor Advocate	Support	No

Comments: