



**TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
TWENTY-SIXTH LEGISLATURE, 2012**

ON THE FOLLOWING MEASURE:

S.B. NO. 2222, S.D. 2, RELATING TO SEXUAL IMAGES PRODUCED BY MINORS.

BEFORE THE:

HOUSE COMMITTEE ON JUDICIARY

DATE: Tuesday, March 27, 2012

TIME: 2:00 p.m.

LOCATION: State Capitol, Room 325

TESTIFIER(S): David M. Louie, Attorney General, or
Lance M. Goto, Deputy Attorney General

Chair Keith-Agaran and Members of the Committee:

The Department of the Attorney General strongly supports this bill.

The purpose of this bill is to address the problem of "sexting," which involves minors taking nude pictures and videos of themselves or other minors, and transmitting the nude images to others by use of a cell phone or other form of electronic communication. This bill:

(1) prohibits adults from soliciting minors to electronically transmit nude images of minors;
(2) prohibits minors from electronically transmitting nude images of themselves or other minors, or soliciting other minors to do so; (3) prohibits minors and adults from possessing a nude image transmitted by a minor; and (4) makes it an affirmative defense that the recipient made reasonable efforts to destroy the transmitted nude image.

The electronic transmission of youth-produced sexual pictures and videos, frequently referred to as "sexting," is a growing problem with our children, especially because the images, once transmitted electronically, can be shared with many people almost instantaneously. Once transmitted, the original transmitter has very limited ability to control or prevent further dissemination. Often, the images are intended for the minor's "significant other." Sometimes, the images are being transmitted to an adult who has convinced the minor to make the images and send them to the adult. But regardless of the reason the images were created, or to whom they were originally sent, the images frequently get disseminated to others, especially after the relationship has deteriorated, or a cell phone is lost, misplaced, stolen, or improperly accessed. The images may be used as a commodity for exchange. The threatened dissemination of such

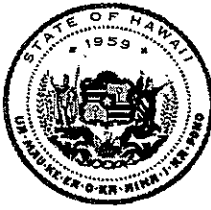
images may also be used as leverage against the subject to make the subject engage in certain conduct.

In this age of electronic connectivity, the images can instantaneously be shared with many people and can cause great embarrassment and mental or emotional harm to the subjects of the images. The unwanted dissemination has resulted in suicides in other states.

Our current State laws do not specifically prohibit "sexting" conduct. While our laws prohibit the dissemination of child pornography, the nude images transmitted through "sexting" behavior often do not qualify as pornography.

This bill is intended to address concerns of parents and school officials and make it clear to minors that the dissemination of nude images of themselves and other minors is harmful and inappropriate behavior that will not be tolerated. The bill will assist parents and school officials in addressing the problem with minors. It will also be a tool for law enforcement agencies to use to try to stop the harmful and inappropriate behavior.

We respectfully request that the committee pass this bill.



Office of the Public Defender State of Hawaii



Timothy Ho, Chief Deputy Public Defender
Testimony of the Office of the Public Defender,
State of Hawaii to the House Committee on Judiciary

March 27, 2012, 2:00 p.m.

RE: S.B 2222, SD 2: Relating To Sexual Images Produced By Minors

Chair Keith-Agaran and Members of the Committee:

This measure would criminalize the act of sending nude images by minors of themselves to another person via electronic communication, as well as the possession of said indecent material by another person. It also prohibits the solicitation of nude images of a minor by an adult.

The Office of the Public Defender opposes S.B. 2222, SD 2.

While we agree that minors are particularly vulnerable to exploitation and harassment by others using the Internet and other electronic means of communication, we do not believe this measure to be the solution to the problem.

If a minor is taken advantage of by an adult and enticed to send a nude photo of them to that adult, that adult should be prosecuted and punished. The minor, however, would also be subject to prosecution under this bill. The minor, in this instance, should be treated like a victim, not a criminal. In other instances, a boyfriend or girlfriend may be innocently sending racy photos to one another. In either circumstance, we do not believe that the minor's act should be criminalized.

Subsection (2) of this measure criminalizes the possession of a nude picture or video of a minor sent by that minor via electronic communication. We have several concerns about subsection (2).

First, the nude photo sent by a minor to another minor may be inadvertently forwarded to an adult's email account, either by accident, or as part of an automatic forwarding system, like Facebook, where a person can post a picture of another by "tagging" that person, whose image will be forwarded to Facebook "friends" and/or friends of "friends." If the adult does not check their email account regularly, or logs onto their Facebook account infrequently, they may "possess" a nude picture of a minor sent by a minor without their knowledge. How do they then explain why they did not take reasonable steps to destroy or delete the photos soon after it was received?

Second, a seventeen-year-old boy and his eighteen-year-old girlfriend may exchange nude pictures with each other by electronic means. Under this measure, the boy would be prosecuted as a law violator in the family court, and the girl would face prosecution as an adult for a class C felony.

Finally, if a minor takes a picture of themselves with a cell phone, e-mails it to his internet account, downloads the picture to his computer, prints the photo, places it in an envelope and hands it to his girlfriend, he has not committed a crime.

Again, we believe that if the intent of this measure is to prevent exploitation of minors by adults, this measure should directly address the problem, rather than criminalizing the victims.

We oppose S.B. 2222, SD2. Thank you for the opportunity to comment on this bill.

Testimony for SB2222 on 3/27/2012 2:00:00 PM

Testimony for SB2222 on 3/27/2012 2:00:00 PM

mailinglist@capitol.hawaii.gov [mailinglist@capitol.hawaii.gov]

Sent: Monday, March 26, 2012 4:10 PM

To: JUDtestimony

Cc: richard.minatoya@mauicounty.gov

Testimony for JUD 3/27/2012 2:00:00 PM SB2222

Conference room: 325

Testifier position: Support

Testifier will be present: Yes

Submitted by: Richard K. Minatoya

Organization: Dept. of the Prosecuting Attorney, County of Maui

E-mail: richard.minatoya@mauicounty.gov

Submitted on: 3/26/2012

Comments:

We support passage of this bill and join in the Attorney General's testimony.



Committee: Committee on Judiciary
Hearing Date/Time: Tuesday, March 27, 2012, 2:00 p.m.
Place: Room 325
Re: Testimony of the ACLU of Hawaii in Strong Opposition to S.B. 2222, SD2,
Relating to Sexual Images Produced by Minors

Dear Chair Keith-Agaran and Members of the Committee on Judiciary:

The American Civil Liberties Union of Hawaii writes in strong opposition to S.B. 2222, SD2 which seeks to make "sexting" by minors a misdemeanor offense.

This bill may also be unconstitutional because it may criminalize expression protected by the First Amendment. ACLU of Pennsylvania recently won a sexting suit where the DA had tried to charge teens with a felony for taking pictures of themselves and sending them to male students via their cell phones.¹

The purpose of child pornography laws is to protect children, not criminalize them for poor judgment. Criminalizing our youth serves only to stigmatize them, make it harder for them to become productive adults and potentially harm their lives permanently. We should all look beyond the courtroom to classrooms and living rooms to help stop sexting. Parents and educators should create open and honest dialogue with respect to these issues and teens should be counseled on how to respectfully use technology in order to protect themselves and others. Victims can and should use civil courts to pursue damages against those who distribute their images without their permission.

One cannot understate the severity of these penalties when applied to the very minors the law was intended to protect from exploitation. Because child pornography laws were not intended to address sexting, the legal consequences for teens engaging in sexting are truly bizarre. Devoted partners sharing an intimate photograph face the same punishment as a bully who maliciously sends a naked picture of an ex to the entire school. Both the consenting teen couple and the bully are treated the same under the law. Further, harassment *victims* in underage sexting cases are penalized just as harshly as the perpetrator. Take, for example, the scenario where a minor sends a nude picture to his or her partner and the partner later forwards the image to friends and

¹ *Miller v. Skumanick*, 605 F. Supp.2d 634 (2009). Available at: <http://www.aclupa.org/downloads/MillerTROorder33009.pdf>.

American Civil Liberties Union of Hawaii
P.O. Box 3410
Honolulu, Hawaii 96801
T: 808.522.5900
F: 808.522.5909
E: office@acluhawaii.org
www.acluhawaii.org

Hon. Rep. Keith-Agaran, Chair, JUD Committee
and Members Thereof

March 27, 2012

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classmates after the couple breaks up. The second sender is clearly the bad actor, but the law treats everyone involved as criminals. In fact, the friends and classmates who received the picture are felons too, even if they never asked for the picture to be sent to them.

To make matters worse, prosecutors actually have been enforcing these draconian laws against sexting teenagers. In Florida, a 16-year-old girl and her 17-year-old boyfriend were both convicted under child pornography laws after taking intimate nude photos of themselves. In Washington, prosecutors initially charged 13 and 14-year-olds with felony distribution of child pornography after a sexting incident in a middle school. The charges were later downgraded to misdemeanors. Regardless, these cases are happening every day around the country, and kids really are being convicted as felony sex offenders for taking intimate pictures of themselves.

We know teens *are* sexting, regardless of whether they *should* be doing so. While we don't have to acquiesce to such behavior, criminal penalties are not the solution. Education about the consequences of one's actions and shifting social norms are the keys to curbing the tide, not criminalization. Moreover, with nearly one in four teenagers admitting to sexting, would any parent want to play the odds in believing that their child would never do such a thing? What if being wrong means jail time for your child?

Consensual sexting should not be a crime for teens or adults. The frightening reality, however, is that our current child pornography laws coupled with modern technology have the potential to create a sex offender registry populated with the children it was intended to protect and a generation of teenagers who will reach the age of majority already convicted as child sex offenders. This is not what child pornography laws were meant for, and the time has come to address the issue rationally and reasonably, before it is too late. For all these concerns, we respectfully ask this Committee to hold this measure.

The mission of the ACLU of Hawaii is to protect the fundamental freedoms enshrined in the U.S. and State Constitutions. The ACLU of Hawaii fulfills this through legislative, litigation, and public education programs statewide. The ACLU of Hawaii is a non-partisan and private non-profit organization that provides its services at no cost to the public and does not accept government funds. The ACLU of Hawaii has been serving Hawaii for over 40 years.

Sincerely,
Laurie A. Temple
Staff Attorney

American Civil Liberties Union of Hawai'i
P.O. Box 3410
Honolulu, Hawai'i 96801
T: 808.522.5900
F: 808.522.5909
E: office@acluhawaii.org
www.acluhawaii.org

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mailinglist@capitol.hawaii.gov [mailinglist@capitol.hawaii.gov]

Sent: Monday, March 26, 2012 11:15 AM

To: JUDtestimony

Cc: breaking-the-silence@hotmail.com

Testimony for JUD 3/27/2012 2:00:00 PM SB2222

Conference room: 325

Testifier position: Support

Testifier will be present: No

Submitted by: Dara Carlin, M.A.

Organization: Individual

E-mail: breaking-the-silence@hotmail.com

Submitted on: 3/26/2012

Comments: