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

STEVEN S. ALM
PROSECUTING ATTORNEY

THOMAS J. BRADY
FIRST DEPUTY
PROSECUTING ATTORNEY

THE HONORABLE MARK M. NAKASHIMA, CHAIR
HOUSE COMMITTEE ON JUDICARY & HAWAIIAN AFFAIRS
Thirty-first State Legislature
Regular Session of 2022
State of Hawai`i

February 8, 2022

RE: H.B. 2197; RELATING TO GAMBLING.

Chair Nakashima, Vice-Chair Matayoshi and members of the House Committee on Judiciary & Hawaiian Affairs, the Department of the Prosecuting Attorney of the City and County of Honolulu ("Department") submits the following testimony in support of H.B. 2197.

The purpose of this bill is to increase penalties for Promoting Gambling in the First and Second degrees (sections 712-1221 and 712-1222 of the Hawaii Revised Statutes ("HRS")), to class B and C felonies, respectively. It would also amend the state of mind for both offenses to criminal negligence.

The Department strongly agrees that illegal gambling poses a serious risk to public safety and welfare, and is particularly concerned about establishments that chronically house illegal gambling activity. As indicated in Section 1 of H.B. 2197, such enterprises have already been shown to attract and foster violence, illicit drugs, sex trafficking, and other dangerous activity. While there is no way to predict with any certainty the way courts or juries will decide cases, the Department believes that the amendments proposed in H.B. 2197 would help to deter—and more effectively hold offenders accountable for—any future activity.

Currently, law enforcement efforts typically result in the arrest and prosecution of only low-level participants, such as the cashiers or security guards on-premises, because it is exceedingly difficult, if not practically impossible, to hold property owners criminally liable for anything that occurs on their property. Even if repeated violations occur at the same property, it is highly unlikely that property owners (or even mid- to upper-level organizers) could ever be held to a *reckless* state of mind, in terms of their knowledge of the activities, beyond a reasonable doubt, as they are almost never physically on premises and/or witness the activity. Notably, HRS §712-1221 and HRS §712-1222 currently have an even higher state of mind

requirement than recklessness (i.e. "knowing"). Lowering the state of mind to negligence could potentially lead to convicting higher-level participants associated with these types of enterprises.

With regards to the low-level workers who are routinely charged under HRS §712-1222, Promoting Gambling in the Second Degree, increasing that offense to a class C felony may assist in deterring their participation in the first place, particularly if the sentencing requirements prohibit suspension, probation, and deferral (pursuant to HRS §853-4(a)(5)). These low-level workers generally have very little criminal record, and they almost never have prior convictions for gambling-related offenses. Many qualify for deferred acceptance of no contest or guilty plea—which the court commonly grants in these types of cases—meaning that the case is basically dismissed after one year, if defendants meet all terms and conditions of their deferral. Even those who plead no contest or guilty to Promoting Gambling in the Second Degree currently have very little penalty, as they are typically sentenced to "credit for time served" or placed on probation for one year, with no additional jail sentence. Thereafter, very few if any of these defendants (who are given deferrals for or convicted of Promoting Gambling in the Second Degree) have ever been arrested for a subsequent gambling-related offense. If the Legislature were to make this offense non-probationable and non-deferrable, as proposed in H.B. 2197, it is hoped that many would-be gambling house workers may be deterred from ever risking their first offense.

In recent years, the Department has received increasing complaints about illegal gambling establishments in commercial and residential neighborhoods, and the dangers presented by these establishments are featured on the front page of the newspaper all too often, or the subject of reports such as the one published by the Hawaii State Commission on the Status of Women in 2021. Given the dire circumstances created by illegal gambling houses throughout Oahu, the Department has utilized and will continue to utilize whatever tools it is given by the Legislature and the rule of law, to prosecute those who would establish and maintain these unscrupulous enterprises in our communities.

For all of the foregoing reasons, the Department of the Prosecuting Attorney of the City and County of Honolulu supports passage of H.B. 2197. Thank for you the opportunity to testify on this matter.

STATE OF HAWAIʻI

OFFICE OF THE PUBLIC DEFENDER

**Testimony of the Office of the Public Defender,
State of Hawaiʻi to the House Committee
on Judiciary & Hawaiian Affairs**

February 8, 2022

H.B. No. 2197: RELATING TO GAMBLING

Chair Nakashima, Vice Chair Matayoshi, and Members of the Committee:

The Office of the Public Defender respectfully opposes H.B. No. 2197 which elevates Promoting Gambling in the 2nd Degree (HRS 712-1222) to a non-probationable and mandatory prison class "C" felony and Promoting Gambling in the 1st Degree (HRS 712-1221) to a non-probationable and mandatory prison class "B" felony. This measure also amends the requisite state of mind from "knowingly" to "negligently."

Increasing Penalties and Mandatory Imprisonment

Perhaps, the most troubling aspect of this measure is to make the offenses of Promoting Gambling in the 1st and 2nd degrees non-probationable. HRS § 712-1220 defines "advance gambling activity" as follows:

> A person "advances gambling activity" if he engages in conduct that materially aids any form of gambling activity. Conduct of this nature includes but is not limited to conduct directed toward the creation or establishment of the particular game, contest, scheme, device, or activity involved, toward the acquisition or maintenance of premises, paraphernalia, equipment, or apparatus therefor, toward the solicitation or inducement of persons to participate therein, toward the actual conduct of the playing phases thereof, toward the arrangement of any of its financial or recording phases, or toward any other phase of its operation. A person advances gambling activity if, having substantial proprietary control or other authoritative control over premises being used with his knowledge for purposes of gambling activity, he permits that activity to occur or continue or makes no effort to prevent its occurrence or continuation. ***A person advances gambling activity if he plays or participates in any form of gambling activity.***

(Emphasis added). Under this measure, a person who simply plays or participates in any form of gambling will not only be charged with a Class "C" felony but will also be subject to mandatory prison time, as HRS § 712-1222 states, "A person commits the offense of promoting gambling in the second degree if the person

[~~knowingly~~] negligently ***advances*** or profits from gambling activity." (Emphasis added). This means that not only the property owner, or the "house", or the lowly worker at the gaming house is subject to mandatory imprisonment, but also the player or the participant. A player not just includes the individual who visits an illegal gaming house or game room; this would also include the unsuspecting bingo player at a church or the individual who bets on professional and college football, more commonly known as "6-5" betting. Who doesn't know a friend, co-worker, or relative who illegally bets on sporting events? Would they deserve to be sentenced to 5 years in prison? Clearly, penalizing the casual gambler to not only a Class "C" felony but also to mandatory imprisonment is cruel, harsh, and excessive.

Negligent State of Mind

Justice Oliver Wendell Holmes, Sr. made famous the quotation: "Even a dog knows the difference between being kicked and being stumbled over." Justice Holmes was merely demonstrating the difference between conduct that ***hurts on purpose*** and conduct that ***hurts by accident***, i.e., intentional and knowing conduct versus conduct that is only negligent. We can be certain that there is a significant distinction between acting "knowingly" and acting "negligently," and it is dangerous to conflate the two.

HRS 706-620 specifically enumerates offenses where a convicted defendant ***shall not receive probation*** and the court ***must impose an open term of imprisonment***. These offenses include first and second degree murder; all class "A" felonies except for certain sexual offenses and manslaughter; repeat felony offenders; felony firearm offenses; offenses involving death or serious/substantial injury upon a child, elder person, or handicapped person; and cruelty to animals which involve ten (10) or more pet animals. None of these offenses involve "negligent" conduct. To include Promoting Gambling in the 1st or 2nd Degrees in this list would be incongruous and illogical.

Additional Duty of Care for Property Owners who Lease Property

Most landlords, especially owners of residential property, simply do not know what activity occurs in their rental unit(s) behind closed doors. A tenant, unbeknownst to a landlord, can be conducting illegal activities, such as promoting prostitution, selling illegal drugs, setting up a methamphetamine lab, or running an illegal gaming operation. These illegal activities are not publicized by the tenant; there are no signs displayed or advertisement. Are we to mandate that every residential and

commercial landowner periodically inspect each rental unit for illegal activity? This measure will put an enormous burden on the property owner, requiring the property owner to be proactive and exercise due care and diligence in choosing renters of their property. It will require property owners to scrutinize each and every renter as to what purpose the property will be used.

To meet their on-going obligation to exercise due care and diligence under this measure, ***all landlords -- residential and commercial, private and government*** -- will be expected to routinely inspect their properties to discern what their property is ***truly being used for***. Surprise visits or inspections, however, are prohibited. Pursuant to the Residential Landlord-Tenant Code, specifically HRS § 521-53(b), a landlord may not simply enter the unit to inspect but must "give the tenant at least two days' notice of the landlord's intent to enter and shall enter only during reasonable hours."

The due care and diligence issue becomes more confusing and tenuous as property owners employ property management companies to handle the leasing, maintenance, and the legal side of their rental properties. Will the property owner be held liable for something that should have or could have been discovered by the landlord/property management company? Will the information possessed by the landlord/property management company be automatically imbued to the property owner?

Thank you for the opportunity to comment on H.B. No. 2197.