



**TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
KA 'OIHANA O KA LOIO KUHINA
THIRTY-SECOND LEGISLATURE, 2024**

ON THE FOLLOWING MEASURE:

S.B. NO. 3037, S.D. 1, RELATING TO PROMOTING PORNOGRAPHY FOR MINORS.

BEFORE THE:

HOUSE COMMITTEE ON JUDICIARY AND HAWAIIAN AFFAIRS

DATE: Wednesday, March 13, 2024 **TIME:** 2:00 p.m.

LOCATION: State Capitol, Room 325 and Videoconference

TESTIFIER(S): Anne E. Lopez, Attorney General, or
Albert Cook, Deputy Attorney General

Chair Tarnas and Members of the Committee:

The Department of the Attorney General (Department) supports this bill.

The purpose of this bill is to enable prosecution of those who disseminate pornographic materials to an undercover law enforcement officer who represents himself or herself to be a minor in an undercover operation by amending section 712-1215(1), Hawaii Revised Statutes (HRS).

The Hawaii Internet Crimes Against Children Task Force (ICAC), run by the Department, in collaboration with various federal and county law enforcement agencies, regularly conducts undercover operations where undercover law enforcement officers pose as minors on the internet to identify, locate, arrest, and prosecute offenders who solicit minors to engage in sexual activities.

During these undercover operations, offenders often send pornographic materials via the internet to officers whom they believe to be minors. The existing offense of promoting pornography for minors only allows for prosecution if the pornographic material is sent to an actual minor. It does not consider the scenario in which an undercover law enforcement officer is posing as a minor. Therefore, under the current wording of section 712-1215, HRS, if the undercover law enforcement officer identifies an offender who is promoting pornography to the officer, whom the offender falsely believes is a minor, that conduct is not currently covered by section 712-1215, HRS.

This bill will enhance law enforcement's efforts to combat crimes against children by allowing prosecution of those who disseminate pornographic materials to undercover law enforcement officers who pose as minors.

The Department respectfully requests the passage

JON N. IKENAGA
STATE PUBLIC DEFENDER

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**Testimony of the Office of the Public Defender, State of Hawai'i, to the
House Committees on Judiciary and Hawaiian Affairs and Agriculture
and Food Systems**

March 13, 2024

S.B. 3037, S.D.1 Relating to Promoting Pornography For Minors

**Chairs: David A. Tarnas, and Cedric Asuega Gates Vice Chairs: Gregg Takayama
and Kirstin Kahaloha and Members of the Committees:**

The Office of the Public Defender respectfully opposes S.B. 3037 S.D. 1. This bill seeks to add sub-section (b) to HRS section 712-1215 (2), by allowing law enforcement officers to go undercover, represent themselves as minors, and arrest and prosecute those that provide pornographic materials for minors to the undercover officer. The OPD recognizes that the dissemination of materials that are pornographic for minors is highly problematic, however we feel that allowing undercover operations in this regard could be more problematic.

Currently, law enforcement officers are allowed to use undercover operations in the investigation of offenses stemming from HRS sections 707-756 and 707-757 (Electronic Enticement of a Child). It has been the experience of the OPD, that said undercover operations invite a great deal of litigation, because they straddle the line between legitimate undercover operations, and what the defense considers to be entrapment. The OPD is concerned that undercover operations related to HRS section 712-1215 would invite the same amount of litigation. These types of undercover operations cast a wide net, and can utilize enticements to get individuals to commit the offense. Since the defense of entrapment is relative to the facts and circumstances of each individual case, said cases must be litigated to ensure that the arrest and prosecution has not crossed the line between good police

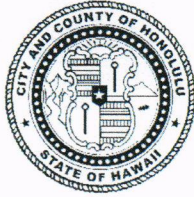
work and illegality. In these cases, it is not just the pre-disposed that get caught up in the police net, but also those that are improperly enticed to commit said offense. Not all individuals who might commit this offense are predatory sex offenders, or are hoping to coerce or entice a minor into sex trafficking, but they will be treated as such by any undercover operation.

For these reasons we respectfully oppose S.B. 3037, S.D. 1

Thank you for the opportunity to comment on this bill.

POLICE DEPARTMENT
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HOPE LUNA NUI MĀKA'I

OUR REFERENCE ML-HR

March 13, 2024

The Honorable David A. Tarnas, Chair
and Members
Committee on Judiciary
and Hawaiian Affairs
The Honorable Cedric Asuega Gates, Chair
and Members
Committee on Agriculture
and Food Systems
House of Representatives
415 South Beretania Street, Room 325
Honolulu, Hawaii 96813

Dear Chairs Tarnas and Gates and Members:

SUBJECT: Senate Bill No. 3037, S.D.1, Relating to Promoting Pornography for Minors

I am Mike Lambert, Major of the Narcotics/Vice Division of the Honolulu Police Department (HPD), City and County of Honolulu.


The HPD supports Senate Bill No. 3037, S.D.1, Relating to Promoting Pornography for Minors.

Child pornography is an atrocious crime that subjects children to trauma which may lead to destructive behavior. The negative effects of being a victim of child pornography affect not only the victim's mental and emotional well-being but also their relationships, self-worth, and trust in others. The HPD supports all legislation that increases the ability of law enforcement to apprehend sexual predators and hold them accountable for their actions.

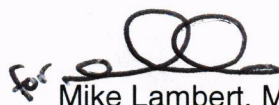
The HPD urges you to support Senate Bill No. 3037, S.D.1, Relating to Promoting Pornography for Minors. Thank you for the opportunity to testify.

APPROVED:

Sincerely,



Arthur J. Logan
Chief of Police



Mike Lambert, Major
Narcotics/Vice Division

**DEPARTMENT OF THE PROSECUTING ATTORNEY
KA 'OIHANA O KA LOIO HO'OPI'I
CITY AND COUNTY OF HONOLULU**

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**THE HONORABLE DAVID TARNAS, CHAIR
HOUSE COMMITTEE ON JUDICIARY AND HAWAIIAN AFFAIRS
Thirty-Second State Legislature
Regular Session of 2024
State of Hawai'i**

March 13, 2024

RE: S.B. 3037 SD 1; RELATING TO OFFENSES AGAINST PUBLIC HEALTH AND MORALS.

Chair Tarnas, Vice Chair Takayama, and members of the House Committee on Judiciary and Hawaiian Affairs, the Department of the Prosecuting Attorney of the City and County of Honolulu ("Department") **supports** passage of S.B. 3037 SD 1, and respectfully offers a proposed amendment to strengthen the bill's intent.

This bill amends H.R.S. Section 712-1215, which prohibits disseminating pornography to a minor. During undercover operations to detect child predators, law enforcement officers may sometimes pose as minors. This bill enables prosecution of offenders who transmit pornography to an undercover officer, believing the officer was actually a child.

The Department offers one proposed revision to this bill. Under standard rules of statutory construction, an identified state of mind usually distributes to every element of an offense.¹ Applying the "knowing" state of mind to each element of the proposed offense would strictly require the prosecution to prove that the defendant knew the undercover officer was, in fact, a law enforcement officer.

¹ H.R.S. § 702-207 (West, Westlaw through Act 1 of the 2024 Regular Session) ("When the definition of an offense specifies the state of mind sufficient for the commission of that offense, without distinguishing among the elements thereof, the specified state of mind shall apply to all elements of the offense, *unless a contrary purpose plainly appears.*")(emphasis added).

Of course, this interpretation immediately undermines the plain legislative intent, as clarified in both the Senate standing committee report² and the preamble of this bill. The Intermediate Court of Appeals has rejected similar arguments in challenges to the statute prohibiting electronic enticement of a child.³ We would expect the same analysis here, since judges have a duty to avoid absurd constructions of the law.

But courts sometimes stop at the statutory text if its language seem plain enough, declining to consult legislative history or parallel provisions.⁴ To avoid this problem, the Committee might consider including a strict liability provision with respect to the officer's status as a law enforcement officer. A proposed amendment could read under subsection (1)(b) of this offense:

(b) Knowing its character and content, the person disseminates material that is pornographic for minors to a law enforcement officer who represents that officer's self as a minor. A person shall be strictly liable with respect to the attendant circumstance of the officer's status as a law enforcement officer.

At minimum, this clarification would prevent unnecessary litigation and strengthen the protections afforded by this bill.

Thank you for the opportunity to testify.

² Sen. Stand. Comm. Rep. No. 2763, available at

https://www.capitol.hawaii.gov/sessions/session2024/CommReports/SB3037_SD1_SSCR2763_.htm

³ See *State v. Nicholson*, 120 Hawai'i 480, 484-485, 485 n.3, 210 P.3d 3, 7-8, 8 n.3 (App. 2009) (arguing both that the prosecution needed to prove communication with an actual child and that Nicholson's mistake-of-fact negated his criminal intent). See also *State v. McKnight*, 131 Hawai'i 379, 388-89, 319 P.3d 298, 307-308 (2013) (construing elements of electronic enticement statute).

⁴ *State v. Demello*, 136 Hawai'i 193, 197, 361 P.3d 420, 424 (2015). See also *State v. Obrero*, 151 Hawai'i 472, 479, 517 P.3d 755, 762 (2022) (declining to consult parallel laws where plain language of the statute was deemed sufficiently clear).

SB-3037-SD-1

Submitted on: 3/9/2024 11:55:44 AM

Testimony for JHA on 3/13/2024 2:00:00 PM

Submitted By	Organization	Testifier Position	Testify
Jacqueline S. Ambrose	Individual	Support	Written Testimony Only

Comments:

Aloha,

YES to Allowing the prosecution of persons who provide pornographic materials to undercover law enforcement officers who represent themselves as minors for purposes of undercover operations

SB-3037-SD-1

Submitted on: 3/9/2024 11:56:56 AM

Testimony for JHA on 3/13/2024 2:00:00 PM

Submitted By	Organization	Testifier Position	Testify
Dara Carlin, M.A.	Individual	Support	Written Testimony Only

Comments:

Stand in Support

SB-3037-SD-1

Submitted on: 3/12/2024 7:46:50 AM

Testimony for JHA on 3/13/2024 2:00:00 PM

Submitted By	Organization	Testifier Position	Testify
Glen Kagamida	Individual	Support	Written Testimony Only

Comments:

SUPPORT. MORE, SIMILAR BILLS NEEDED.

MAHALO!