

Testimony on behalf of the
Office of the Public Defender, State of Hawai'i
to the House Committee on Judiciary

February 11, 2008

RE: H.B. 3040: Relating To Public Safety.

Representative Waters and Members of the Committee:

H.B. 3020 seeks to create some new offenses, provide for mandatory prison terms for some existing offenses, broaden the application of other current offenses and, finally, provides for even more draconian living conditions for convicted sex offenders.

We believe this bill is ill-advised and cannot support it in its current form.

The bill creates a new 3rd degree offense for Electronic Enticement of a Child and makes it a misdemeanor offense. Currently, our 1st and 2nd degree offenses punish electronic communication, done intentionally or knowingly, with someone who is or is believed to be under the age of 18, for the purpose of committing certain specified offenses: the 1st degree offense covers murder, class "A" felonies and offenses defined in HRS § 846E-1 (the statute covering the registration of sex offenders and other covered offenders); the 2nd degree offense covers any other felonies. Both current laws also require that the offender agree to meet with the minor, or person believed to be a minor, and intentionally or knowingly travel to the agreed upon meeting place at the agreed upon time.

The proposed 3rd degree offense in this bill would apply to all offenses listed under § 846E-1 and would delete the requirements that the offender agree to meet the minor, or person pretending to be a minor, and travel to the meeting place. We believe this proposed law is vague and overbroad. It would punish pure communication without any other required act (such as eliciting an agreement to meet or traveling to an agreed upon meeting place). When one considers that the person doing the communicating could actually be someone under the age of 18 or a young adult, who has no intention of acting upon the electronic communication, it is clear how this law could go overboard in its application.

We note that we would also object to the deletion in Section 7 of the required travel element in the 2nd degree offense. When dealing with internet communication which is often more in the realm of imagination than reality for one or both persons involved, it is necessary that serious offenses such as these require actual conduct, such as travel, to complete the offense.

The other new offense proposed in Section 2, Indecent Electronic Display to a Child, essentially punishes "lewd and lascivious" conduct (such as masturbation) over the internet as a class C felony. Ironically, such behavior in person, which would seem to be far more distressing to a minor, is currently a misdemeanor or petty misdemeanor under HRS §§ 707-733 (1)(b) and 707-734. If this new offense is to be created, it should not be more serious than our existing statutes.

Section 4 would add to the offense of Promoting Child Abuse in the 2nd Degree by including the possession of 10 or more images of any form of child pornography but requires that only one of the pictures be of the enumerated categories, which all would agree are particularly disturbing. This is unreasonable, especially in light of the fact that the new law would also punish this offense with a mandatory minimum 10 year prison term, of which five years would have to be served before being eligible for parole.

Section 5 proposes a mandatory sentence of one year imprisonment as a condition of probation if a person guilty of the 3rd degree offense receives a sentence of probation.

It is disturbing that proponents of this legislation want to mandate incarceration and remove any discretion from the court in these situations. Such enactments fail to recognize the role of the courts in determining appropriate sentences for each case that comes before the judge.

For that same reason, we oppose the proposal in Section 6 that would provide for a mandatory 10 year prison term upon conviction for Electronic Enticement of a Child in the 1st Degree. The current law provides for the possibility of probation, if appropriate, but does mandate one year in jail as a condition of that probation. Also currently, the court may impose a 10 year prison term when the court determines that to be the appropriate sentence. That discretion should remain with the courts.

Regarding the proposed changes to HRS § 846E, we believe that most of these would drive more offenders underground, burden already overtaxed law enforcement resources and, ultimately, provide no greater protection for the community.

These proposed changes include making available to the public where a covered offender parks his car, his cellphone number, the route(s) that he drives in the course of his employment, a list of his arrests (i.e. crimes for which he was NOT convicted), and, if he is homeless, a description of the location where he is sleeping at night.

It is becoming clear both in Hawaii and throughout the mainland that these offenders are already largely unable to find places to live if they do not already

own their own home and to find employment. The additional public notification listed above will render it all but impossible for these people to live in Hawaii and abide by this law. That creates the real possibility that the offenders, without the resources to relocate outside our state, will simply go underground, stop registering and no longer be subject to supervision. Such a result not only fails to protect the public, it places our community at greater risk.

Studies have shown that the lowest cases of recidivism occur when the offender is subject to treatment and monitoring. This is pointedly borne out by the statistics compiled by Dr. Barry Coyne who is in charge of Sex Offender Treatment within our Department of Public Safety. In addition to Hawai'i's statistics, Dr. Coyne provided a previous task force with the results of studies in other jurisdictions. At that time, only one state so far had specifically studied the effect of a notification law on sex offender recidivism. Washington, the first state to require community notification for sex offenders (in 1990), found no difference in recidivism between those men with notification and those without. Dr. Coyne did not suggest that these results were the authoritative conclusion on this issue but did note that no one has demonstrated a measurable positive connection between public notification and reduced recidivism.

What has been demonstrated is the direct positive connection between treatment and monitoring and reduced recidivism. It stands to reason that laws that cause offenders to be unable to reasonably live in our communities (i.e. to rent homes or get jobs) create the real risk of sending offenders underground, away from monitoring and toward a greater risk of reoffending. It is imperative that our laws strike the necessary balance between an appropriate level of monitoring and public notification.

Finally, the proposed 3 tier system would create an even harsher offender registration law than we already have with the same risk noted above. Currently, there is a large group of offenders who for whom lifetime registration is mandated. For others, class A offenders may seek relief from registration after 25 years, class B offenders after 15 years and class C offenders after 10 years. In the strange 3 tier system proposed in this bill, certain class C offenders would be subject to registration for a minimum 25 years, rather than the current 10 year minimum, and certain class B offenders would be subject to registration for a minimum 25 years, rather than the current 15 year minimum. We see no satisfactory explanation for these changes.

These are just some of the significant reasons that we cannot support this legislation.

Thank you for the opportunity to comment on this bill.

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LATE TESTIMONY

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THE HONORABLE TOMMY WATERS, CHAIR
THE HONORABLE BLAKE K. OSHIRO, VICE-CHAIR
COMMITTEE ON JUDICIARY

HOUSE OF REPRESENTATIVES
THE TWENTY-FOURTH LEGISLATURE
REGULAR SESSION OF 2008
STATE OF HAWAII

TESTIMONY OF BENJAMIN M. ACOB,
PROSECUTING ATTORNEY FOR THE COUNTY OF MAUI,
IN SUPPORT OF HOUSE BILL NO. 3040
RELATING TO PUBLIC SAFETY

The Honorable Chairpersons and Committee Members:

The Department of the Prosecuting Attorney for the County of Maui strongly supports H.B. 3040 Relating to Public Safety.

Perhaps there can be no class of individuals more vulnerable than our children. Each day we see and hear in the media countless numbers of online predators utilizing the internet to target and prey upon innocent and unsuspecting children. Unfortunately, these predators abuse modern day technology to covertly invade what we consider our most secure place, our home. Sadly, however, we have also seen numerous real life cases end in unimaginable tragedy.

This Bill seeks to provide law enforcement officials the much needed tools to effectively protect our children and at the same time combat the harsh realities of modern day life. Specifically, this Bill proposes the following:

1. Updates Hawaii's sex offender registry laws in an effort to effectuate partial compliance with federal law;

2. Creates the new offense of Electronic Enticement of a Child in the Third Degree, a misdemeanor;
3. Creates the offense of Indecent Electronic Display to a Child, a class C felony;
4. Amends Promoting Child Abuse in the Second Degree to include possession of particularly violent or egregious child pornography;
5. Update the repeat offender sentencing statute to include the offenses of Failure to Comply with Covered Offender Registration Requirements and Indecent Electronic Display to a Child, which would trigger mandatory prison without the possibility of parole;

Indeed, all of the above proposed amendments are intended to protect our citizens from these sexual predators. The first proposal provides law enforcement an opportunity to participate in a comprehensive nationwide network of state registries in a concerted effort to effectively share information regarding sex offenders. The second, third and fourth proposals are intended to proscribe predatory behavior which is consistent with child sex offenders. The fifth and final proposal will mandate a court to sentence certain repeat felons to mandatory prison.

In conclusion, our Department strongly supports H.B. 3040. In order to effectively combat sex offenses against our children, our criminal laws must contemplate the capabilities of modern day technology. Thank you for the opportunity to testify.

(H.B. 3040, Relating to Public Safety.)