



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**

January 26, 2012, 2:00 p.m.

RE: H.B. 573: Relating To Obscenity

Chair Keith-Agaran and Members of the Committee:

This measure would criminalize the act of a minor sending indecent material of themselves to another person via electronic communication, as well as the possession of said indecent material by another person.

The Office of the Public Defender opposes H.B. 573.

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 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 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 mails 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 H.B. 573. Thank you for the opportunity to comment on this bill.



Committee: Committee on Judiciary
Hearing Date/Time: Thursday, January 26, 2012, 2:00 p.m.
Place: Room 325
Re: Testimony of the ACLU of Hawaii in Strong Opposition to H.B. 573,
Relating to Obscenity

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

The American Civil Liberties Union of Hawaii writes in strong opposition to H.B. 573, which seeks to make “sexting” by minors a misdemeanor offense.

According to a 2010 poll by AP and MTV, nearly 25% of teens have engaged in sexting. While the ACLU does not condone the practice, the purpose of child pornography laws is to protect children, not criminalize them for poor judgment. Criminalizing them would only serve to stigmatize them, make it harder for them to become productive adults and potentially harm their life permanently. Victims can and should use civil courts to pursue damages against those who distribute their images without their permission.

Besides sweeping more children into the criminal justice system, this bill may also be unconstitutional in that it may criminalize expression protected by the First Amendment. ACLU of Pennsylvania recently won litigation in 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

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. 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-

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

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Rep. Keith-Agaran, Chair, JUD Committee
and Members Thereof
January 26, 2012
Page 2 of 2

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,

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