

HB1750

HD1

DEPARTMENT OF THE PROSECUTING ATTORNEY
CITY AND COUNTY OF HONOLULU

ALII PLACE
1060 RICHARDS STREET • HONOLULU, HAWAII 96813
PHONE: (808) 547-7400 • FAX: (808) 547-7515

KEITH M. KANESHIRO
PROSECUTING ATTORNEY



ARMINA A. CHING
FIRST DEPUTY PROSECUTING ATTORNEY

THE HONORABLE CLAYTON HEE, CHAIR
SENATE COMMITTEE ON JUDICIARY AND LABOR
Twenty-Seventh State Legislature
Regular Session of 2014
State of Hawai`i

March 21, 2014

RE: H.B. 1750, H.D. 1; RELATING TO PUBLIC ORDER.

Chair Hee, Vice-Chair Shimabukuro and members of the Senate Committee on Judiciary and Labor, the Department of the Prosecuting Attorney of the City and County of Honolulu submits the following testimony, supporting the intent of House Bill 1750, H.D. 1, and proposing a S.D. 1, attached for your consideration. While the current language of H.B. 1750, H.D. 1, attempts to address a problem that is certainly known to our Department, we believe a slightly different approach would be more effective in establishing this behavior as a new criminal offense.

Hawai'i's existing offense of Violation of Privacy in the First Degree covers scenarios where the perpetrator installs or uses a device to record another person in a private place in a stage of undress or sexual activity, without the depicted person's consent. It does not, however, cover scenarios where the depicted person initially agrees to the photographs or video—typically in the context of a romantic relationship—only to have one partner distribute those images across the internet after the relationship ends. The latter scenario is a growing problem in Hawai'i and across the U.S.

On October 1, 2013, Governor Jerry Brown (D) of California signed into law new legislation that prohibits a “revenge porn” perpetrator from distributing sexually explicit pictures that were intended to be private. See California SB 255, 2013, Invasion of Privacy. Since then, a number of other states have also begun considering similar legislation.

Given the growing problems stemming from this type of activity, the Department strongly agrees that a new criminal offense should be created to discourage and/or appropriately punish those who would violate someone's privacy in this fashion. The proposed S.D. 1, attached, establishes this offense as a new subsection of Violation of Privacy in the First Degree, **utilizing language from Hawai'i's existing offenses of Violation of Privacy in the First Degree (HRS §711-1110.9), obscenity (HRS §712-1210), and extortion (HRS §707-764), to**

impose meaningful consequences on perpetrators who distribute private images with intent to degrade, humiliate, or cause other harm to the victims.

This type of offense violates the privacy of the person whose private image is spread across the internet, and puts that person at significant risk, in terms of her (or his) safety, career, reputation, physical and mental health, personal relationships, and so forth. An increasing number of websites, such as UGotPosted, host sexually explicit photos of individuals (usually young women) without their permission, accompanied by links to their private information. Typically, these postings are created by angry boyfriends or ex-husbands, and the comments posted by viewers thereafter are overwhelmingly degrading to the victim. Some websites such as UGotPosted even include a link to the victim's Facebook, Twitter, or Tumblr page, along with the victim's full name, age, and location.

In order to allow prosecution of these offenses, and for all of the foregoing reasons, the Department of the Prosecuting Attorney of the City and County of Honolulu supports the passage of H.B. 1750, H.D. 1, using the proposed S.D. 1. Thank you for the opportunity to testify on this matter.

Report Title:

Offenses Against Public Order; Nonconsensual Distribution of Sexual Recordings

Description:

Establishes a criminal offense for disclosing or distributing an image of another identifiable person in a stage of undress or engaging in sexual activity, without the depicted person's consent, and with intent to harm substantially the depicted person.

A BILL FOR AN ACT

RELATING TO PUBLIC ORDER.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

1 SECTION 1. Section 711-1110.9, Hawai'i Revised Statutes,
2 is amended to read as follows:

3 "§711-1110.9 Violation of privacy in the first degree.

4 (1) A person commits the offense of violation of privacy in the
5 first degree if, except in the execution of a public duty or as
6 authorized by law[~~7~~] :

7 (a) the person intentionally or knowingly installs or
8 uses, or both, in any private place, without consent of the
9 person or persons entitled to privacy therein, any device for
10 observing, recording, amplifying, or broadcasting another person
11 in a stage of undress or sexual activity in that place[~~7~~]; or

12 (b) the person knowingly discloses an image or video of
13 another identifiable person in a stage of undress or engaging in
14 sexual activity, without consent of the depicted person, with
15 intent to harm substantially the depicted person with respect to
16 that person's health, safety, business, calling, career,
17 financial condition, reputation, or personal relationships.

____. B. NO.

1 This section shall not apply to images, videos or activity
2 voluntarily disclosed in public or commercial settings.

3 (2) Violation of privacy in the first degree is a class C
4 felony. In addition to any penalties the court may impose, the
5 court may order the destruction of any recording made in
6 violation of this section."

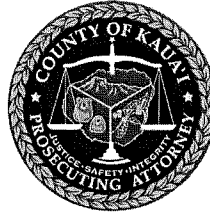
7 SECTION 3. Statutory material to be repealed is bracketed
8 and stricken. New statutory material is underscored.

9 SECTION 4. This Act shall take effect upon approval.

INTRODUCED BY: _____

Justin F. Kollar
Prosecuting Attorney

Kevin K. Takata
First Deputy



Rebecca A. Vogt
Second Deputy

Diana Gausepohl-White, LCSW
Victim/Witness Program Director

OFFICE OF THE PROSECUTING ATTORNEY

County of Kaua'i, State of Hawai'i

3990 Ka'ana Street, Suite 210, Līhu'e, Hawai'i 96766

808-241-1888 ~ FAX 808-241-1758

Victim/Witness Program 808-241-1898 or 800-668-5734

**TESTIMONY IN SUPPORT OF
H.B. NO. 1750 HD1 – RELATING TO PUBLIC ORDER**

Justin F. Kollar, Prosecuting Attorney
County of Kaua'i

Senate Committee on Judiciary and Labor
March 21, 2014, 10:00 a.m., Room 016

Chair Hee, Vice-Chair Shimabukuro and members of the Senate Committee on Judiciary and Labor, the Office of the Prosecuting Attorney of the County of Kauai submits the following testimony, supporting the intent of House Bill 1750, H.D. 1, and concurring with the S.D.1 offered by the City and County of Honolulu Department of the Prosecuting Attorney. While the current language of H.B. 1750, H.D. 1, attempts to address a problem that is certainly known to this Office, we believe a slightly different approach would be more effective in establishing this behavior as a new criminal offense.

Hawai'i's existing offense of Violation of Privacy in the First Degree covers scenarios where the perpetrator installs or uses a device to record another person in a private place in a stage of undress or sexual activity, without the depicted person's consent. It does not, however, cover scenarios where the depicted person initially agrees to the photographs or video—typically in the context of a romantic relationship—only to have one partner distribute those images across the internet after the relationship ends. The latter scenario is a growing problem in Hawai'i and across the U.S.

On October 1, 2013, Governor Jerry Brown (D) of California signed into law new legislation that prohibits a “revenge porn” perpetrator from distributing sexually explicit pictures that were intended to be private. See California SB 255, 2013, Invasion of Privacy. Since then, a number of other states have also begun considering similar legislation.

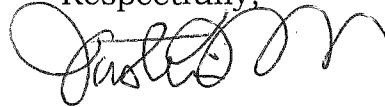
Given the growing problems stemming from this type of activity, the Department strongly agrees that a new criminal offense should be created to

discourage and/or appropriately punish those who would violate someone's privacy in this fashion. The proposed S.D. 1, establishes this offense as a new subsection of Violation of Privacy in the First Degree, **utilizing language from Hawai'i's existing offenses of Violation of Privacy in the First Degree (HRS §711-1110.9), obscenity (HRS §712-1210), and extortion (HRS §707-764)**, to impose meaningful consequences on perpetrators who distribute private images with intent to degrade, humiliate, or cause other harm to the victims.

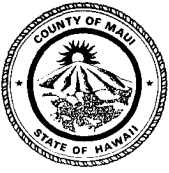
This type of offense violates the privacy of the person whose private image is spread across the internet, and puts that person at significant risk, in terms of her (or his) safety, career, reputation, physical and mental health, personal relationships, and so forth. An increasing number of websites, such as UGotPosted, host sexually explicit photos of individuals (usually young women) without their permission, accompanied by links to their private information. Typically, these postings are created by angry boyfriends or ex-husbands, and the comments posted by viewers thereafter are overwhelmingly degrading to the victim. Some websites such as UGotPosted even include a link to the victim's Facebook, Twitter, or Tumblr page, along with the victim's full name, age, and location.

In order to allow prosecution of these offenses, and for all of the foregoing reasons, the Office of the Prosecuting Attorney of the County of Kauai supports the passage of H.B. 1750, H.D. 1, using the proposed S.D. 1. Thank you for the opportunity to testify on this matter.

Respectfully,

A handwritten signature in black ink, appearing to read "Justin F. Kollar". The signature is fluid and cursive, with a large initial "J" and "K".

Justin F. Kollar
Prosecuting Attorney



ALAN M. ARAKAWA
MAYOR

OUR REFERENCE
YOUR REFERENCE

POLICE DEPARTMENT

COUNTY OF MAUI

55 MAHALANI STREET
WAILUKU, HAWAII 96793
(808) 244-6400
FAX (808) 244-6411



GARY A. YABUTA
CHIEF OF POLICE

CLAYTON N.Y.W. TOM
DEPUTY CHIEF OF POLICE

March 19, 2014

The Honorable Clayton Hee, Chair
And Members of the Committee on Judiciary and Labor
The Senate
State Capitol
Honolulu, HI 96813

RE: House Bill No. 1750, HD1 – Relating to Public Order

Dear Chair Hee and Members of the Committee:

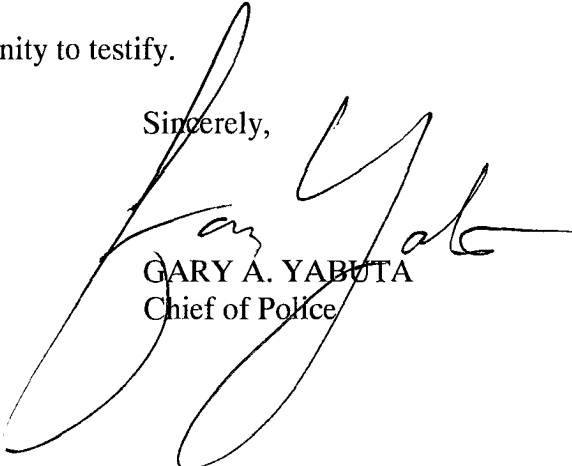
The Maui Police Department supports the passing of HB 1750, HD1, with proposed amendments. House Bill No. 1750, HD1, establishes the criminal offense of unlawful distribution of sexual representation to prohibit the unconsented reproduction, distribution, exhibition, publication, transmission, or other dissemination of a representation of a nude person or of a person engaging in sexual conduct.

The Maui Police Department is also in support of the amendments proposed by the Department of the Prosecuting Attorney of the City and County of Honolulu, which addresses the issue of “revenge porn.” These types of activities can be financially, physically, and emotionally devastating to victims and their families. Offenders should be held accountable for their actions, and the proposed amendments by the Honolulu Department of the Prosecuting Attorney will impose penalties for these selfish and vindictive acts.

The Maui Police Department again supports the passage of HB 1750, HD1, with the noted proposed amendments.

Thank you for the opportunity to testify.

Sincerely,


GARY A. YABUTA
Chief of Police



46-063 Emepela Pl. #U101 Kaneohe, HI 96744 · (808) 679-7454 · Kris Coffield · Co-founder/Legislative Director

TESTIMONY FOR HOUSE BILL 1750, HOUSE DRAFT 1, RELATING TO PUBLIC ORDER

**Senate Committee on Judiciary and Labor
Hon. Clayton Hee, Chair
Hon. Maile S.L. Shimabukuro, Vice Chair**

**Friday, March 21, 2014, 10:00 AM
State Capitol, Conference Room 016**

Honorable Chair Hee and committee members:

I am Kris Coffield, representing IMUAlliance, a nonpartisan political advocacy organization that currently boasts over 175 local members. On behalf of our members, we offer this testimony in support of, with proposed amendments for House Bill 1750, relating to public order.

This bill makes it a misdemeanor offense to nonconsensually distribute photographic, video, or sound representations of someone appearing nude or engaged in a sexual act. California and New Jersey have already enacted laws to make “revenge porn” a criminal offense, while 13 other states have introduced legislation to do so, according to the National Conference of State Legislatures. For better or worse, rapidly accelerating cellular and Internet technology has made it easy to disseminate and access intimate images, videos, and recordings. Unfortunately, after a friendship or romantic relationship ends, individuals will sometimes “get back” at their ex-lovers by publishing intimate or embarrassing items online or transmitting such items to friends, colleagues, employers, or the general public. Such an act can be personally disturbing and professionally compromising, causing the target to suffer emotional distress, familial ostracization, academic challenges, or workplace difficulties, all of which can linger indefinitely, while the victim is left without legal recourse.

Additionally, this bill could apply to pimps and johns who use the threat of releasing intimate representations as a means of coercing victims into sexual servitude. From a factual standpoint, in the case of sex-trafficking, the representations in question—usually photos or videos—are often taken “consensually,” albeit while the victim is suffering from the extreme trauma of exploitation. Currently, victims—who often come from cultures in which shame is a traditional value and potential method of coercion—have little recourse if perpetrators release damaging information about their activities.

In other states, free speech activists, such as the ACLU, have claimed that restricting an individual's ability to transmit lascivious material online, no matter how inflammatory, is unconstitutional. Citing recent U.S. Supreme Court decisions affirming the protection of unsavory speech (overturning laws banning videos that show graphic violence against animals in one case, while upholding the right of Westboro Baptist Church to engage in homophobic protests in another), these groups contend that the First Amendment is a guarantor of rights, not taste. Yet, as UCLA law professor Eugene Volokh has argued, vindictive and non-consensual pornography distribution is more likely to be deemed a form of obscenity, which the Supreme Court has deemed unworthy of First Amendment protection. Moreover, proscribing revenge porn would not impede the ability of someone to share salacious images that serve the public interest. Women who shared nude photos of former New York congressman Anthony Weiner, for example, would be protected by the Court's reasoning in *Syder v. Phelps* (the Westboro case), where the majority distinguished between speech concerning public and private matters, saying that more rigorously protecting the latter does not cloud society's interest in fostering a meaningful exchange of ideas.

That said, we note that the current draft of the bill omits a significant number of potential victims—those who may appear in photos while clad in non-transparent underwear, for example, which could be just as damaging as nude images (see example below, taken from Backpage.com, photo cropped protect the victim's identity). Since the proposed draft includes *means rea* (intentionally or knowingly), adding semi-nude images to the bill would not alter an individual's ability to distribute such images *without* intending personal or professional harm, such as friends posting pictures of each other in swimwear on Facebook or Instagram. To further expand the bill's protections and clarify its target, we encourage you to add a definition of semi-nude to the bill, to read: **“Semi-nude” means a state of dress in which clothing covers no more than the genitals, pubic region, buttocks and areola of the female breast as well as portions of the body covered by supporting straps or devices. but shall not include any portion of the cleavage of the human female breast, exhibited by a dress, blouse, skirt, leotard, bathing suit or other wearing apparel provided the areola is not exposed in whole or in part.”** Additionally, we encourage you to revise page 1, lines 9 to 13 to read: disseminates a representation of a nude **or semi-nude** person, or of a person engaging in sexual conduct; provided that this section shall not apply to any representation of a person made: (a) When the person represented was voluntarily nude, **semi-nude**, or engaging in an act of sexual conduct in public; or..”.

We also want to note our support of the Honolulu Prosecutor's proposal, should the committee decide use it in place of the bill's current contents. The prosecutor's draft would ban revenge porn under first degree violation of privacy, graded as a class C felony. House members raised concerns that the prosecutor's draft unduly expands Hawaii's violation of privacy laws. Such laws traditionally target nonconsensual violations of privacy, such as secret video

recordings of intimate behavior. If the prosecutor's draft is accepted, violation of privacy laws will be expanded to include *non-consensual distribution* of *consensual* activities, since revenge porn is the act of disseminating without permission a consensually recorded sexual image or video. It is our understanding that House lawmakers also felt that the “harm” language contained in the prosecutor's draft—“with intent to harm substantially the depicted person with respect to that person's health, safety, business, calling, career, financial condition, reputation, or personal relationships”—fails to provide a clear line by which cases can be investigated and prosecuted. The prosecutor's current draft would cover anyone appearing in a “state of undress,” however, including semi-nude persons. Owing to both the expansive coverage and high penalties included in the prosecutor's draft, we will eagerly endorse the prosecutor's proposal if the committee moves it forward.

Mahalo for the opportunity to testify in support of this bill.

Sincerely,
Kris Coffield
Legislative Director
IMUAlliance



Photo taken from the “escorts” section of honolulu.backpage.com.

From: mailinglist@capitol.hawaii.gov
To: [JDL Testimony](#)
Cc: breaking-the-silence@hotmail.com
Subject: *Submitted testimony for HB1750 on Mar 21, 2014 10:00AM*
Date: Tuesday, March 18, 2014 10:15:08 AM

HB1750

Submitted on: 3/18/2014

Testimony for JDL on Mar 21, 2014 10:00AM in Conference Room 016

Submitted By	Organization	Testifier Position	Present at Hearing
Dara Carlin, M.A.	Individual	Support	No

Comments:

Please note that testimony submitted less than 24 hours prior to the hearing, improperly identified, or directed to the incorrect office, may not be posted online or distributed to the committee prior to the convening of the public hearing.

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From: mailinglist@capitol.hawaii.gov
To: [JDLTestimony](#)
Cc: richard.minatoya@mauicounty.gov
Subject: Submitted testimony for HB1750 on Mar 21, 2014 10:00AM
Date: Tuesday, March 18, 2014 11:05:51 AM

HB1750

Submitted on: 3/18/2014

Testimony for JDL on Mar 21, 2014 10:00AM in Conference Room 016

Submitted By	Organization	Testifier Position	Present at Hearing
Richard K. Minatoya	Maui Department of the Prosecuting Attorney	Support	No

Comments: The Department of the Prosecuting Attorney, County of Maui, SUPPORTS the passage of HB 1750, and joins in the testimony presented by the Prosecuting Attorneys of the City and County of Honolulu, and the County of Kauai.

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From: mailinglist@capitol.hawaii.gov
To: [JDLTestimony](#)
Cc: kananisouza@yahoo.com
Subject: Submitted testimony for HB1750 on Mar 21, 2014 10:00AM
Date: Wednesday, March 19, 2014 9:59:53 PM

HB1750

Submitted on: 3/19/2014

Testimony for JDL on Mar 21, 2014 10:00AM in Conference Room 016

Submitted By	Organization	Testifier Position	Present at Hearing
Kanani Souza	Individual	Support	No

Comments: I support HB1750, which will establish the criminal offense of unlawful distribution of sexual representation to prohibit the unconsented reproduction, distribution of sexual acts to the public.

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From: mailinglist@capitol.hawaii.gov
To: [JDLTestimony](#)
Cc: smith808143@yahoo.com
Subject: Submitted testimony for HB1750 on Mar 21, 2014 10:00AM
Date: Thursday, March 20, 2014 8:07:21 AM

HB1750

Submitted on: 3/20/2014

Testimony for JDL on Mar 21, 2014 10:00AM in Conference Room 016

Submitted By	Organization	Testifier Position	Present at Hearing
Lisa Smith	Individual	Support	No

Comments: I support this measure, HB1750, HD1, because it will save lives and jobs for so many women who have been in a relationship, break up, and have their former boyfriend post nude photos and/or videos of their ex not only to the public, but also sent to family, friends, and employers of these women. This measure provides a legal way to properly stop these hateful attacks on women and partners of former lovers who are engaged in destroying the lives of their former love, after a break up.

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