

STATE OF HAWAII  
OFFICE OF THE PUBLIC DEFENDER

**Testimony of the Office of the Public Defender,  
State of Hawai'i to the Senate Committee on Judiciary**

March 29, 2022

H.B. No. 2197, HD1: RELATING TO GAMBLING

Chair Rhoads, Vice Chair Keohokalole, and Members of the Committee:

The Office of the Public Defender (OPD) respectfully submits comments regarding H.B. No. 2197, HD1 which seeks to elevate Promoting Gambling in the First Degree and Promoting Gambling in the Second Degree to Class “B” and Class “C” felonies, respectively, and excludes these offenses from qualifying under the deferral statutes, Hawaii Revised Statutes (HRS) § 853-4.

The OPD does not disagree with the intent of this bill; however, Chapter 712, Part III Gambling Offenses should be clarified and corrected before any elevation in grade of offense can occur.

**HRS § 712-1220 definitions should be corrected.**

The definition of “advance gambling activity” appears in HRS § 712-1220<sup>1</sup> and describes conduct that advances gambling activity. However, the very last line of the definition adds, “[A] person advances gambling activity if he plays or participates in any form of gambling activity.” To include simple gambling under activity known as “advancing gambling activity” was certainly not the intention of the legislature. Under this language, the otherwise law-abiding individual making a

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<sup>1</sup> 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.*

“6-5” bet<sup>2</sup> on a sporting event is treated the same as an owner/operator who is actually advancing gambling activity. HRS § 712-1220 incorrectly conflates “advancing gambling activity” and “gambling.”

This means that the simple player or participant in gambling activity could potentially be charged with the same offense (Promoting Gambling) that the property owner or the “house” would be.

### **HRS § 712-1223 Gambling should be corrected.**

HRS § 712-1223 defines misdemeanor gambling as “knowingly advances or participates in any gambling activity.” The statute once again conflates “advancing gambling activity” with “gambling.” Misdemeanor gambling should simply be defined as “participating in any gambling activity.” As it currently stands, if an individual is allegedly “advancing gambling activity,” this individual could theoretically be charged under HRS § 712-1221 Promoting Gambling in the First Degree (“*advances* or profits from gambling activity”), HRS § 712-1222 Promoting Gambling in the Second Degree (“*advances* or profits from gambling activity”); or HRS § 712-1223 Gambling (“*advances* or participates in any gambling activity”). “Advances” should not appear in the simple gambling offense in HRS § 712-1223.

Additionally, the definition of “gambling” also appears in HRS § 712-1220 and is inconsistent with HRS § 712-1223, insofar as the word “advances” does not appear. Gambling in HRS § 712-1220, in pertinent part, is defined as, “A person engages in gambling if he stakes or risks something of value upon the outcome of a contest of chance or a future contingent event not under his control or influence, upon an agreement or understanding that he or someone else will receive something of value in the event of a certain outcome...” Furthermore, the definition of gambling, as it appears in HRS § 712-1220, is consistent with the definition of “player” as a “person who engages in gambling solely as a contestant or bettor.”

### **Promoting Gambling 1st and 2nd Degree should not be excluded from a deferral in HRS § 853-4.**

The OPD is generally opposed to any measure that strips sentencing judges of discretion and the ability to consider a broad range of options at sentencing. Pursuant to HRS § 853-1 a judge has the discretion to grant a defendant a deferred acceptance of his or her no contest or guilty plea. The exercise of discretion in sentencing is one

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<sup>2</sup> “6-5” game is when a losing better would have to pay \$6 on every \$5 wager.

of the primary responsibilities endowed upon judges. Excluding the gambling offenses from the deferral statute would unnecessarily limit the judge's discretion.

Judges are subjected to a rigorous vetting process. A process that involves a roughly 40+ page judicial application, the Judicial Selection Committee interviewing and selecting, the Hawai'i State Bar Association interviewing and recommending, selection by either the Governor or the Chief Justice, and Senate confirmation. Judges are selected for their integrity, diligence, legal knowledge and ability, professional experience, judicial temperament, financial responsibility, public service, and their ability to fulfill the responsibilities and duties of the position. Judges should retain the power and authority to treat and consider each case on an individual basis. Judges should have the discretion to weigh mitigating factors as well as aggravating factors and to sentence the defendants that come before them accordingly. They are in a much better position to review a person's history, character, remorse, rehabilitative efforts, or lack thereof, family support etc.

Thank you for the opportunity to comment on this measure.

DEPARTMENT OF THE PROSECUTING ATTORNEY  
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**THE HONORABLE KARL RHOADS, CHAIR**  
**SENATE COMMITTEE ON JUDICIARY**  
Thirty-first State Legislature  
Regular Session of 2022  
State of Hawai'i

March 29, 2022

**RE: H.B. 2197, H.D. 1; RELATING TO GAMBLING.**

Chair Rhoads, Vice-Chair Keohokalole and members of the Senate Committee on Judiciary, the Department of the Prosecuting Attorney of the City and County of Honolulu ("Department") submits the following testimony in support of H.B. 2197, H.D. 1, with a suggested amendment.

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 prohibit deferred acceptance of guilty or no contest plea, for both offenses.

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, H.D. 1, such enterprises have already been shown to attract and foster violence, illicit drugs, sex trafficking, and other dangerous activity. H.B. 2197, H.D. 1 will help to deter—and more effectively hold offenders accountable for—illicit gambling activity. **That said, the Department respectfully suggests that the state of mind for these offenses be amended to (criminal) negligence, as in the original version of H.B. 2197, in an effort to reasonably hold property owners responsible, when their property is repeatedly used as an illegal gambling establishment.**

Currently, law enforcement operations 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. At the same time, truly innocent property owners—such as an elderly person who is currently in a nursing home, ignorant of the fact that their adult children are using their property as an illegal gambling establishment—could not be prosecuted under these laws, because that would not rise to the level of negligence.

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, if HRS §853-4(a)(5) is also amended to prohibit deferral. Based on the Department’s experience, the current sentencing provisions for this offense are not a significant deterrent, as these low-level workers typically qualify for deferred acceptance of guilty or no contest 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.

While the Department believes that it would be more effective for offenders to be denied probation or suspension of sentence, as originally written in H.B. 2197, increasing this offense to a felony—for which there is no opportunity for deferral— may be enough of a deterrent for workers, to significantly hinder and/or discourage these establishments. Notably, even those who do 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, with no additional jail sentence.

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, H.D. 1, with the suggested amendment regarding “negligence.” Thank for you the opportunity to testify on this matter.

**LATE**



Hawai'i

Committee: Senate Committee on Judiciary  
Hearing Date/Time: Tuesday, March 29, 2022 at 9:30am  
Place: Conference Room 016 and Via Videoconference

**Testimony of the ACLU of Hawai'i in opposition to HB2197, HD1 Relating to Gambling**

Dear Chair Rhoads, Vice Chair Keohokalole and members of the Committee:

The American Civil Liberties Union of Hawai'i ("ACLU of Hawai'i") submits this testimony in opposition to HB 2197 HD1 which amends the offenses of promoting gambling in the first and second degree to a class B felony and class C felony. This proposed measure also excluded the offenses of promoting gambling in the first and second degree from qualifying for a deferred acceptance of a guilty plea or nolo contendere plea.

This measure is a draconian step backwards. **There are already laws criminalizing the conduct targeted by this bill, and there is no proof cited that increasing the promotion of gambling to a Class B and Class C felony and enhanced penalties will have a deterrent effect.**

Under this measure, a person who simply plays or participates in any form of gambling will be charged with a Class C felony and subjected to a **mandatory prison time**. **HB 2197 HD1 is an expensive change that will increase overcrowding in our jails and prisons, with no demonstrated benefit to public safety.** For decades, Hawai'i has experienced severe overcrowding in our jails and prisons, resulting in inhumane conditions of confinement. Taxpayers bear the costs of incarceration – paying \$219 to incarcerate an adult per day or nearly \$80,000 a year to place people in jails and prisons where people use drugs, and experience extortion and violence, and a fraction receive comprehensive health care and rehabilitation opportunities.

**This bill is ill-conceived because it would exclude the offenses of promoting gambling in the first and second degree from qualifying for a deferred acceptance of a guilty plea or nolo contendere plea.** Under the proposed measure, a person who have never been entangled with the criminal legal system could be convicted of a Class B or C felony for promoting gambling, and would **NOT** have the opportunity to qualify for a DANC or DAG.

**Currently, in Hawai'i, 560,800 people have a criminal legal record.** That is 1 in 2, or over 50% of people are saddled with records that could block their access to jobs, housing, education, starting a business, or participating fully in social and civic community life. In the digital era, with nearly 9 in 10 employers, 4 in 5 landlords, and 3 in 5 colleges<sup>1</sup> now using background checks, any record—no matter how old or minor—can put employment, housing, education, and other basics permanently out of reach.

By increasing the offenses of promoting gambling to a Class B or Class C felony, and excluding these offenses as eligible for deferral under this measure, Hawai'i will move further away from data-

<sup>1</sup> <https://www.americanprogress.org/article/news-can-use-research-roundup-re-entry-advocates/>

driven criminal legal reforms – and subject more people to the collateral consequences of a criminal record.

- For example, a criminal record reduces a job seeker’s chance of getting a callback or job offer by nearly 50 percent.<sup>2</sup>
- Formerly incarcerated people are **nearly 7 times more likely** than the general public to experience homelessness.<sup>3</sup>

Hawai‘i’s families will continue to bear the human and financial cost of incarceration until we implement meaningful, community-based solutions and alternatives to incarceration. Many groups, including the ACLU of Hawai‘i,<sup>4</sup> have proposed pathways for divestment from incarceration and reinvestment in our communities. This measure only takes us further from the progress our state so desperately needs.

For these reasons, ACLU of Hawai‘i respectfully requests that the Committee defer this measure. Thank you for the opportunity to submit testimony in opposition to **HB2197 HD1**.

Sincerely,

Carrie Ann Shirota  
Policy Director  
ACLU of Hawai‘i

*The mission of the ACLU of Hawai‘i is to protect the fundamental freedoms enshrined in the U.S. and State Constitutions. The ACLU of Hawai‘i fulfills this through legislative, litigation, and public education programs statewide. The ACLU of Hawai‘i is a non-partisan and private non-profit organization that provides its services at no cost to the public and does not accept government funds. The ACLU of Hawai‘i has been serving Hawai‘i for over 50 years.*

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<sup>2</sup> <https://scholar.harvard.edu/pager/publications/sequencing-disadvantage-barriers-employment-facing-young-black-and-white-men>

<sup>3</sup> <https://www.prisonpolicy.org/reports/housing.html>

<sup>4</sup> In 2019, the American Civil Liberties Union, in partnership with the ACLU of Hawai‘i and Urban Institute, released the Blueprint for Smart Justice Hawai‘i. This report resulted from a two-year research project dedicated to identifying key reforms in Hawai‘i that would cut the state’s incarcerated population in half and reduce racial disparities in Hawai‘i’s corrections system. The report is available at <https://50stateblueprint.aclu.org/assets/reports/SJ-Blueprint-HI.pdf> and may serve as a resource as the Legislature considers future reforms.

**HB-2197-HD-1**

Submitted on: 3/24/2022 2:17:20 PM

Testimony for JDC on 3/29/2022 9:30:00 AM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Testify</b>
Gerard Silva	Individual	Oppose	Written Testimony Only

Comments:

We have Worest Crimes like Child Trafficing that you do not Go afture that is why there are so many missing Kids. The real Crimes like Money laudering and Pay for Play jobs Sex Trafficing are not a priority Becaues the Legislators and the Government Employees are involed . Go afture the Real Crooks!!



**LATE**

**HB-2197-HD-1**

Submitted on: 3/28/2022 12:55:13 PM

Testimony for JDC on 3/29/2022 9:30:00 AM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Testify</b>
Peter Koulogeorge	Individual	Oppose	Written Testimony Only

Comments:

Dear Chair Rhodes and Vice Chair Keohokalole,

I am writing in opposition to HB2197 HD1 primarily due to my concern that an increasingly punitive response to addictive - and situationally destructive - behaviors will have a serious and prolonged negative impact. I am sure the members of this committee are interested in preventing the damaging effects of gambling addiction in our communities, and I share that interest. However, punitive laws have been tried again and again to dissuade individuals from partaking in gambling and similar behaviors, and yet these problems persist. Worst still, we create a whole new set of challenges for folks who have to manage the consequences of further criminalization for behaviors that are only going to stop when the individual has the resources and motivation to do so. Threatening punishment won't get us anywhere, and I hope that you can understand that. This is not an evidence based bill and I urge you to strike it down and instead pursue more productive means of supporting folks in our communities who struggle with addiction.

Thank you for considering my testimony,

Peter Koulogeorge