

STATE OF HAWAI‘I
OFFICE OF THE PUBLIC DEFENDER

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

February 17, 2022

S.B. No. 2660: RELATING TO PROSTITUTION

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

The Office of the Public Defender respectfully provides commentary on S.B. No. 2660, which attempts to expand Hawai‘i Revised Statutes (HRS) § 712-1209.6 to include the individual “who has a nolo contendere plea accepted by the court under section 853-2” and the individual who receives a deferral of the nolo contendere plea under section 853-2 as defendants who may file a motion to have their conviction vacated after three years without any additional convictions.

While the notion of increasing the number of individuals who will be able to preserve a clean criminal record pursuant to HRS § 712-1209.6 is virtuous and worthwhile, this measure conflates those individuals who have been convicted of enumerated offenses under HRS § 712-1200¹ with persons who receive a deferral of their “nolo contendere” plea under HRS § 853-1. Additionally, this measure attempts to distinguish individuals who are convicted of enumerated offenses from individuals whose “nolo contendere plea” is accepted by the court under section 853-2.

Conviction Versus Deferral

Subsection (2) of HRS § 712-1209.6 requires the courts to have a hearing on a motion to vacate conviction in order to review the defendant’s record over the three years since the date of conviction. This measure adds the date of “the deferral of the nolo contendere plea under section 853-1” to include not only those who received a conviction for enumerated offense, but also those whose “nolo contendere” plea was deferred.

A deferral of a “nolo contendere” plea granted to a defendant pursuant to HRS § 853-1 means that the “nolo contendere” plea was **NOT** accepted by the court but was

¹ HRS § 712-1209.6 allows for a defendant convicted of prostitution under HRS § 712-1200; loitering for the purpose of engaging in or advancing prostitution under § 712-1206(2); street prostitution and commercial sexual exploitation in designated areas under § 712-1207(1)(a) or (2)(a); or a lesser offense when originally charged with a violation of §§ 712-1200, 712-1206(2), or 712-1207(1)(a) or (2)(a) to file a motion to vacate the conviction if the defendant is not subsequently convicted of any offense under the Hawai‘i Penal Code within 3 years of the original conviction.

deferred for a period of time.² At the conclusion of this deferral period, if the defendant has complied with all terms and conditions of his/her deferral, the defendant is discharged and the charges against the defendant are dismissed. HRS § 853-1 (d) provides that dismissal of the charge(s) “shall be without adjudication of guilt, shall eliminate any civil admission of guilt, and is ***not a conviction.***” Because acceptance of the plea is deferred for a period of time, if the defendant successfully completes his/her deferral period, the plea is ***never*** received by the court, ***never*** accepted by the court, and ultimately dismissed before any plea is entered. The defendant does not suffer a criminal conviction, and, after a year from the date of dismissal, the defendant may have his/her arrest records expunged pursuant to HRS § 831-3.2.

This is in stark contrast to the defendant who, in fact, is convicted when the court accepts his/her “guilty” or “nolo contendere” plea and then finds him/her guilty and proceeds to sentence him/her. These are the individuals who benefit from HRS § 712-1209.6 whereas individuals who receive a deferral, benefit from the protections provided in HRS § 853-1, and are never convicted. It should be noted that HRS § 712-1209.6 does not have an expungement provision and even if a subsequent motion to vacate conviction is granted, an arrest record may still appear on the defendant’s record.

A Distinction Without A Difference

When a motion for a deferral of a “no contest” or “guilty” plea is made before the court pursuant to HRS §853-1, the court may grant the motion or deny the motion pursuant to HRS § 853-1. If the court denies the motion (and a subsequent motion to withdraw the plea is denied), the court will proceed to ***accept the “no contest” or “guilty” plea*** and sentence the defendant like any other defendant. In this situation, the defendant, but for the benefits provided by HRS § 712-1209.6, would suffer the brand of a criminal record for the rest of his/her life. There is no material difference between the person convicted and the person whose “nolo contendere” plea was accepted by the court under HRS § 853-2. Both of these individuals, in the eyes of the law, are considered “convicted.”

Thank you for the opportunity to comment on this measure.

² HRS § 853-1(b) provides, in pertinent part: “The court may defer the proceedings for a period of time as the court shall direct but in no case to exceed the maximum sentence allowable; provided that, if the defendant has entered a plea of guilty or nolo contendere to a petty misdemeanor, the court may defer the proceedings for a period not to exceed one year.”



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February 17, 2022
COMMITTEE ON JUDICIARY
Senator Karl Rhoads, Chair
Senator Jarrett Keohokalole, Vice Chair

Hearing Date: February 17, 2022, 9:30 a.m.
Via Videoconference

**Testimony and Proposed Amendments in Support of Senate Bill 2660
Relating to Prostitution**

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

The Legal Clinic (“TLC”) submits this testimony in support of SB 2660, which would amend Hawaii Revised Statutes (“HRS”) section 712-1209.6 to allow defendants who entered deferred acceptance of nolo contendere (“DANC”) and deferred acceptance of guilty (“DAG”) pleas, successfully complied with the terms of the court, and whose pleas were ultimately dismissed by the court to vacate the plea. We also suggest the following amendments to the bill:

- Page 1, lls. 4-5. Replace “or who has a nolo contendere plea accepted by the court under section 853-2” with “or who had a nolo contendere or guilty plea deferred and dismissed by the court under section 853-1”
- Page 1, lls. 10-22. Replace “or who has a nolo contendere plea accepted by the court under section 853-2” with “or who had a nolo contendere or guilty plea deferred and dismissed by the court under section 853-1”
- Page 1, ll. 14. Add “or the plea that was entered but not accepted” after “conviction”
- Page 2, lls. 1-2. Replace “provided that the nolo contendere plea is ultimately accepted by the court under section 853-2” with “provided that the charge is ultimately dismissed by the court under section 853-1”
- Page 2, lls. 7-8. Add “or guilty” after “contendere”
- Page 2, ll. 10. Replace “or acceptance of a nolo contendere plea under section 853-2” with “or deferral of a nolo contendere or guilty plea under section 853-1”

These minor amendments will allow HRS § 712-1209.6 help the full scope of the population it was created to help: prostitutes/sex workers, *including* immigrant prostitutes/sex workers.

I. Background

TLC provides pro-bono legal services to low-income immigrants in Hawaii, including removal (formerly known as “deportation”) defense in immigration court. One way an immigrant is put into immigration court is by being convicted of a crime within the United States. Convictions of certain crimes, like prostitution, make immigrants removable. This means that after an immigrant has served their sentence imposed by the criminal court, they then present their case to the immigration court as to why they should not be removed from the United States. Consequently, our role in defending immigrants in immigration court often requires an analysis of the immigrant’s underlying criminal court case. Our defense



strategy can involve applying for post-conviction relief, including vacatur like HRS § 712-1209.6. If we are successful in obtaining post-conviction relief, it is possible for us to terminate the immigration court case and prevent our client from getting removed.

II. Issue

Hawaii is fortunate to have HRS § 712-1209.6, which allows defendants convicted of prostitution to file a motion to vacate the conviction if the defendant is not subsequently convicted of any other crime within three years after the original conviction. For TLC, this means that if our client is convicted of prostitution in Hawaii and placed into immigration court for that conviction, if they do not reoffend within three years, we can apply for this vacatur and our client will not be removed from the United States.

However, HRS § 712-1209.6 fails to address defendants charged with prostitution who, instead of going to trial or entering a traditional guilty or nolo contendere plea, entered a deferred acceptance of nolo contendere plea (“DANC”) or deferred acceptance of a guilty (“DAG”) plea.

Under HRS § 853-1, when a defendant pleads guilty or nolo contendere prior to trial, the court may defer proceedings for up to a year. The court shall impose a fee and may impose further terms and conditions, like community service, during this period. Upon the defendant’s completion of the period and compliance with the court’s terms, the court shall dismiss the charge against the defendant without an adjudication of guilt or conviction. The defendant may then apply for an expungement. In sum, in the criminal context, if a defendant enters a DANC or DAG plea, complies with the terms of the court, the court dismisses the charge, and the defendant applies for an expungement, there is, in theory, no criminal conviction.

However, immigration law differs greatly from criminal law in this respect. Under immigration law, a conviction is defined as: (1) a plea of guilty or nolo contendere, and (2) the judge has ordered some form of punishment, penalty, or restraint on the immigrant’s liberty.¹ When a defendant enters a DANC or DAG plea, they plead guilty or nolo contendere, and the judge then orders them to pay a fine and fulfill other conditions, like community service. A fine and community service are considered a forms of punishment or penalties. Therefore, in the immigration context, a DANC or DAG plea, even if complied with, dismissed, and properly expunged, is still considered a conviction. As a result, we see clients who received DANCs/DAGs, had their plea dismissed and expunged, but were still arrested by U.S. Immigration and Customs Enforcement (“ICE”) and put into removal proceedings for their conviction. And because DANC and DAG plea recipients were not included in the original language of HRS § 712-1209.6, these clients are not able to apply for a vacatur, and face almost certain removal from the United States.

III. Solution and Effects

We are asking that HRS § 712-1209.6 be amended to include defendants who entered DANCs or DAGs, successfully complied with the terms of the court, and whose pleas were then dismissed by the court. Amending HRS § 712-1209.6 with our proposed language

¹ Immigration and Nationality Act (“INA”) § 101(a)(48)(A).



allows such defendants to also apply for this vacatur and potentially avoid adverse immigration consequences as a result of their DANC/DAG plea.

We are proposing this amendment because immigrant defendants who enter DANC/DAG pleas for prostitution, or any other removable offense, are subjected to legal defects in their criminal proceedings. The nature of the DANC/DAG scheme – in which, upon fulfilling certain minimal conditions, their entered pleas are not accepted, their cases dismissed, and their records expunged – misleads immigrant defendants into thinking successful completion of this process will result in no future legal detriment. Not so. Even though their plea was dismissed, record expunged, and there is no conviction in the criminal context, there still exists a conviction in the immigration context. If immigrant defendants knew that entering a DANC/DAG plea could cause them to be removed from the United States, it is likely that at least some of them would not opt for such a plea and instead would choose to take their case to trial, especially if they were actually innocent. This amendment to the HRS § 712-1209.6 vacatur could give immigrant defendants an opportunity to avoid the adverse immigration consequences of their DANC and DAG pleas, which stem from the legal defects in their criminal proceedings.

Thank you for allowing us to testify on this measure.

Sincerely,

Kara L. Teng, Esq.
Esther S. Yoo, Esq.
Staff Attorneys
The Legal Clinic

SB-2660

Submitted on: 2/13/2022 8:33:14 PM

Testimony for JDC on 2/17/2022 9:30:00 AM

Submitted By	Organization	Testifier Position	Remote Testimony Requested
Gerard Silva	Individual	Oppose	No

Comments:

They have to Be Charged and put away or the people are going to Deman the Death penalty!

We are Tired of these crooks geting away with out being Locked up.

SB-2660

Submitted on: 2/14/2022 11:41:54 AM

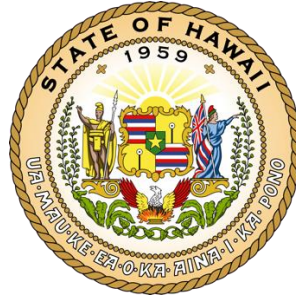
Testimony for JDC on 2/17/2022 9:30:00 AM

Submitted By	Organization	Testifier Position	Remote Testimony Requested
Dara Carlin, M.A.	Individual	Support	No

Comments:

Stand in Support.

LATE



‘O kēia ‘ōlelo hō’ike no ke
Komikina Kūlana Olakino o Nā Wāhine

Testimony on behalf of the
Hawai‘i State Commission on the Status of Women

In Support of S.B. 2660

Dear Chair Rhoads, Vice Chair Keohokalole, and Honorable Members:

The Hawai‘i State Commission on the Status of Women **supports S.B. 2660**, which would allow defendants who entered deferred acceptance of nolo contendere (“DANC”) and deferred acceptance of guilty (“DAG”) pleas, successfully complied with the terms of the court, and whose pleas were ultimately dismissed by the court to vacate the plea. The Commission also supports friendly amendments proposed by The Legal Clinic.

S.B. 2660 tackles the challenging terrain of immigration law and fills the gap for defendants charged with prostitution who, instead of going to trial or entering a traditional guilty or nolo contendere plea, entered a DANC or DAG.

This is a real problem that needs solving. The Commission is aware of cases where immigrant women have faced serious consequences as a result of this gap in the law.

Accordingly, we ask that the Committee protect immigrant women and pass S.B. 2660.

Sincerely,

Khara Jabola-Carolus, Executive Director

LATE

SB-2660

Submitted on: 2/16/2022 10:12:14 PM

Testimony for JDC on 2/17/2022 9:30:00 AM

Submitted By	Organization	Testifier Position	Remote Testimony Requested
Carrie Ann Shirota	Testifying for ACLU of Hawai'i	Support	No

Comments:

Aloha Chair, Vice Chair and Committee Members:

The ACLU of Hawai'i supports SB2660 that allows people who enter deferred acceptance of nolo contendere pleas to have their conviction vacated if conditions are met. This bill also amends the statute to specify that the three-year period begins after the original deferral of the nolo contendere plea.

We respectfully request an amendment to include Deferred Acceptance of Guilty (DAG) pleas in addition to Deferred Acceptance of No Contest (DANC) pleas.

Thank you for the opportunity to testimony in support of this measure. Please pass SB 2660.