

STATE OF HAWAI‘I
OFFICE OF THE PUBLIC DEFENDER

Testimony of the Office of the Public Defender,
State of Hawai‘i to the House Committee
on Human Services

February 7, 2023

H.B. No. 1437: RELATING TO CRIME

Chair John M. Mizuno, Vice Chair Terez Amato, and Members of the Committee:

The Office of the Public Defender (“OPD”) opposes in part, and supports in part, H.B. No. 1437, which amends the sex trafficking laws by: (1) setting a mandatory fine of no less than \$200,000 but no more than \$500,000 for any person convicted of sex trafficking; (2) establishing a “definite term of imprisonment of up to 20 years without the possibility of suspended sentence, probation, or parole; (3) providing that consent to sexual conduct is not a defense; (4) reducing criminal liability from a petty misdemeanor to a violation for minors charged with prostitution under HRS 712-1207(1)(a); (5) affording protection to anyone who reports that another person is a victim of sex trafficking from criminal liability for an offense involving sex trafficking or prostitution; and (6) defining “sexual conduct”.

Drafting Concerns

At the outset, we believe this measure includes a significant drafting error on page 1, lines 7 to 10:

... shall be sentenced to a *definite* term of imprisonment not exceeding twenty years, to be *determined by the court*, without the possibility of suspension of sentence, probation, or parole.

First, the measure uses the term “definite” to describe the term of imprisonment. Presuming the intent of this measure is to impose a mandatory term of twenty years of imprisonment, the correct term should be “mandatory” or “mandatory minimum” term of imprisonment as used in HRS § 706-606.5. Furthermore, the phrase “not exceeding” is unnecessary. The maximum prison term for a class “A” felony offense is twenty years under HRS § 706-659. Thus, a person sentenced under this proposed amendment cannot be sentenced to more than twenty years of imprisonment by law.

Second, the phrase, “determined by the court,” may be interpreted that a judge is authorized to set a prison term from one year to twenty years.

“Definite” or “Mandatory Minimum” Term of Imprisonment

The OPD strongly opposes the imposition of a *definite* (or “mandatory minimum”) twenty-year prison term for persons convicted of the crime of sex trafficking. As it currently stands, the crime of sex trafficking is a class “A” felony offense which means that any person convicted of sex trafficking must be sentenced to prison. Under HRS § 706-659, any person convicted of a class “A” felony “shall be sentenced to an *indeterminate* term of imprisonment of twenty years without the possibility of suspension of sentence or probation.

An indeterminate term of incarceration means that once the person is sentenced to prison, the Hawai‘i Paroling Authority will fix a minimum sentence which sets forth the minimum amount of prison time a person must serve before they become eligible for release on parole. With this proposed amendment, any and all persons convicted of sex trafficking will be subject to serving the full twenty-year term of imprisonment, with no opportunity to seek release until the sentence is served in its entirety.

The OPD has long been an opponent of mandatory sentencing laws. Mandatory sentencing laws paint with a broad brush; they ignore salient differences between cases or offenders, rendering low-level, nonviolent offenders indistinguishable from serious, violent offenders in terms of punishment. All cases are treated the same in regard to sentencing, despite an individual’s actual role in the crime.

For example, many persons in the sex trafficking industry were victims of sex trafficking themselves. In such cases, a person may have been exploited and coerced into prostitution, and over time, that person could remain in the industry due to the fact that they lack education and job skills to support themselves (outside of the industry). That person would be guilty under the current sex trafficking laws if by remaining in the industry, they profited from a prostitution or sex trafficking operation. A kitchen cook, booking agent, web-page manager, or anyone employed in some fashion not involving violence, coercion, or direct exploitation of minors would be punished identically as would the kingpin, or pimp. Under this amendment, judges and the Hawaii Paroling Authority would be precluded from considering personal involvement and other mitigating factors that could arise in a sex trafficking case. They would be without discretion to fashion an appropriate sentence or determine eligibility for release, even if the situation called for it.

Negative effects of mandatory sentencing on the courts

The mandatory minimum sentence in this proposed bill will negatively impact the court's ability to administer justice and manage court backlog and congestion. Criminal courts are, by nature, tasked with managing very heavy caseloads. Due to the severity of punishment under this mandatory sentencing scheme, absent any meaningful plea offer by the prosecution, offenders will have no choice but to roll the dice and take their chances by demanding jury trials. This law will have the effect of creating major drain on the court system.

Negative impact on our prisons and jails

Not only will there be a negative impact on the trial courts, but our prisons would also be impacted. Prior to deciding on passing this amendment, the legislature must consider that our prisons will quickly become more overcrowded. Our jails and prisons are filled above both design and operational capacity. A significant portion of Hawai'i's prison population are incarcerated in a contracted private, for-profit prison in Arizona; they are exiled thousands of miles away from their families, friends, and crucial support networks. According to a recent study by the Prison Policy Initiative, in 2018, Hawai'i had an incarceration rate of 487 per 100,000 people.¹ Although Hawai'i ranked 37th among the 50 states, if every state was an independent nation, Hawai'i would have the 43rd highest incarceration rate in the world.² Only three foreign countries have a higher incarceration rate than Hawai'i.³ Thus, Hawai'i locks up a higher percentage of its people than many wealthy democracies do.⁴ With the recent nationwide review of criminal justice policies, it is concerning that the trend in the State of Hawai'i is to increase criminal penalties involving mandatory prison terms.

¹ Prison Policy Initiative, "States of Incarceration: The Global Context." See <https://www.prisonpolicy.org/global/2018.html>

² Id.

³ Prison Policy Initiative, "Hawaii profile." See <https://www.prisonpolicy.org/profiles/HI.html>

⁴ Id.

Mandatory \$200,000 to \$500,000 fine

In addition to a mandatory minimum sentence of twenty years in prison, this bill seeks to impose a mandatory fine of at least \$200,000 to \$500,000 on each offender. The OPD strongly opposes the imposition of such a high and exorbitant fine for many reasons.

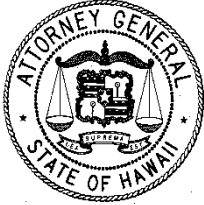
First, Article I, Section 12 of the Hawai‘i Constitution states, “Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted.” By imposing a *mandatory* fine of \$200,000 without regard to the financial circumstances of the defendant, this provision would violate Article I, Section 12 of the Hawai‘i Constitution. *See also* Eighth Amendment to the United States Constitution. Second, the imposition of this fine is excessive. It goes without saying, that if a person is going to be in prison, they will not have the ability to pay a fine in the hundreds of thousands of dollars. Third, the fines proposed in this bill are arbitrary and stand to be imposed without any evidence showing that the fine will serve either a correctional or deterrent function (other than the fine being excessive). Fourth, for all practical purposes, a defendant sentenced to a mandatory term of twenty years will never come close to paying the entire amount of the fine, as he/she will certainly lack the financial ability to pay the fine.

Reducing criminal liability and affording protection to victims of sex trafficking

The OPD supports the amendments that would reduce criminal liability from a petty misdemeanor to a violation for minors charged with prostitution under HRS § 712-1207(1)(a). We further support the portion of the bill that affords protection from criminal liability for an offense involving sex trafficking or prostitution to anyone who reports that another person is a victim of sex trafficking.

It is no secret that human trafficking is a form of modern-day slavery in which victims are subjected to force, fraud, or coercion for the purpose of commercial sex, debt bondage, or involuntary labor. Victims of human trafficking can be young children, teenagers, men, and women. These victims should be protected under the law rather than prosecuted under the same laws that are designed to end sex trafficking. Victims should be encouraged to come forward and report sex trafficking crimes without fear of being prosecuted and re-victimized.

Thank you for the opportunity to comment on H.B. No. 1437



**TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
KA 'OIHANA O KA LOIO KUHINA
THIRTY-SECOND LEGISLATURE, 2023**

ON THE FOLLOWING MEASURE:
H.B. NO. 1437, RELATING TO CRIME.

BEFORE THE:
HOUSE COMMITTEE ON HUMAN SERVICES

DATE: Tuesday, February 07, 2023 **TIME:** 8:30 a.m.

LOCATION: State Capitol, Room 329

TESTIFIER(S): Anne E. Lopez, Attorney General, or
Leigh M. Okimoto, Deputy Attorney General

Chair Mizuno and Members of the Committee:

The Department of the Attorney General (Department) provides the following comments.

As to the criminal offense of sex trafficking, this bill seeks to: (1) set a “definite” term of imprisonment (mandatory minimum), (2) set a mandatory fine of \$200,000 to \$500,000, and (3) eliminate the defense of consent to sexual conduct. As to the criminal offense of street prostitution in certain designated areas under section 712-1207, Hawaii Revised Statutes (HRS), this bill seeks to (1) change the grade of the offense to a violation from a petty misdemeanor if the offender is a minor, and (2) provide a mechanism for offenders who are minors to be taken into custody under the jurisdiction of the family court. As to both offenses, this bill further allows for victims of sex trafficking to avoid criminal liability upon reporting that they have been trafficked.

The Department recommends against any changes to the sex trafficking statute, section 712-1202, HRS, at this time because there has not been sufficient opportunity to assess and collect data regarding the sentencing of offenders since the amendments made by Act 68, Session Laws of Hawaii 2021, became effective. The Department recently used this amended statute for the first time, and it remains untested with regard to punishment of defendants, both in terms of prison terms and fines imposed. Sex trafficking is already an offense subject to a mandatory indeterminate 20-year imprisonment. The focus by this Department and the law enforcement community at

large is to investigate and prosecute sex traffickers for the abatement of sex trafficking. Increasing the fine and imposing a mandatory minimum prison sentence are premature measures that do not further that goal at this juncture. It is also unclear how the elimination of the defense of consent to sexual conduct would assist in the prosecution of sex traffickers.

The Department also has concerns with the sections specifically allowing for any person to avoid criminal liability by reporting that the person has been trafficked. (Page 3, lines 14-16, and page 8, lines 3-5). As it is written, there is no criteria or definition as to what constitutes a reporting. Any person engaging in prostitution, whether being trafficked or not, could avoid any criminal liability by stating that the person is being, or has been, trafficked. While the Department appreciates the intention of protecting trafficking victims, a blanket allowance could bring unintended consequences such as an increase in false reporting, which would take resources away from other investigations and cases. As it stands, prosecutorial discretion protects victims from being prosecuted accordingly, and limiting the ability of prosecutors to charge cases would not be conducive to the larger goal of combatting sex trafficking.

Additionally, as to the offense of street prostitution in certain designated areas, section 712-1207, HRS, the Department is concerned with the proposed additions. The proposed amendments that allow the police to take minors into custody under the jurisdiction of the family court (page 7, line 16, through page 8, line 2) does not appear to be necessary because that is already allowed by section 571-31, HRS. The Department is also concerned that changing the grade of offense from a petty misdemeanor to a violation for offenders who are minors under section 712-1207, in conformance with section 712-1200, may cause unnecessary confusion. The purpose of section 712-1207, HRS, is to mandate geographical restrictions as a probation condition for offenders who commit the offense within certain areas. However, because a violation is not considered a crime within section 701-107, HRS, probation is not an authorized disposition. Therefore, reducing the offense under section 712-1207 to a violation, even as applied to minors, may not be effective.

Accordingly, the Department respectfully recommends deferring the bill and allowing prosecution under the current statute to continue in order to collect more data and information at this point.

Should the committee choose to move forward with this bill, the Department recommends, at a minimum, the changes suggested below:

First, the Department recommends not adding the new section to chapter 706, HRS, proposed in section 1. (Page 1, lines 1-10). Second, the Department recommends not amending section 712-1200(3). (Page 1, line 11, through page 2, line 2). Third, the Department recommends not amending section 712-1202(2), HRS. (Page 2, lines 13-19). Fourth, the Department recommends not adding the proposed subsection (5) to section 712-1202. Fifth, the Department recommends not adding the proposed subsection (9) to section 712-1207.

For the foregoing reasons, the Department respectfully requests the bill be deferred, or at a minimum be amended as set forth above. Thank you for the opportunity to testify.

HB-1437

Submitted on: 2/3/2023 2:40:44 PM

Testimony for HUS on 2/7/2023 8:30:00 AM

Submitted By	Organization	Testifier Position	Testify
Andrew Crossland	Individual	Support	Written Testimony Only

Comments:

I support this Bill.

HB-1437

Submitted on: 2/3/2023 7:46:26 PM

Testimony for HUS on 2/7/2023 8:30:00 AM

Submitted By	Organization	Testifier Position	Testify
Dara Carlin, M.A.	Individual	Support	Written Testimony Only

Comments:

Stand in Support

HB-1437

Submitted on: 2/5/2023 10:52:22 AM

Testimony for HUS on 2/7/2023 8:30:00 AM

Submitted By	Organization	Testifier Position	Testify
Tayler Bellevou	Individual	Support	Written Testimony Only

Comments:

I fully support this bill.

Sex trafficking, especially of minors, is a serious problem in Hawaii.

We need to continue to increase penalties for traffickers, as well as, increase law enforcement to rescue the abused and put away the traffickers.

To be a compassionate nation and aloha state, we must consider all of these individuals to be our Ohana, rescue every one who has been forced into this cruel lifestyle, and immediately and urgently find ways to prevent this abuse. We should also increase resources for the physical and emotional recovery of those rescued!

Mahalo!

HB-1437

Submitted on: 2/6/2023 1:01:09 PM

Testimony for HUS on 2/7/2023 8:30:00 AM

Submitted By	Organization	Testifier Position	Testify
Manahel Al-hozail	Individual	Support	Written Testimony Only

Comments:

I support harsher crimes related to sex trafficking

HB-1437

Submitted on: 2/6/2023 1:03:32 PM

Testimony for HUS on 2/7/2023 8:30:00 AM

Submitted By	Organization	Testifier Position	Testify
Emerson	Individual	Support	Written Testimony Only

Comments:

Protect the keiki, this shouldnt even be a question. Increase the punishment for even officials involved. In August 2021, 63 kids went missing in Big Island. Let that sink in. They say slavery is dead but child trafficking and pedophillia are alive and well. Dont sweep it under the carpet. Everyone is watching.

HB-1437

Submitted on: 2/6/2023 2:18:40 PM

Testimony for HUS on 2/7/2023 8:30:00 AM

Submitted By	Organization	Testifier Position	Testify
Sabrina Sumner	Individual	Support	Remotely Via Zoom

Comments:

I, Sabrina Sumner, citizen of Hawai'i support raising the penalty for sex trafficking. This is a major issue happening to our keikis, women, and men. It needs to be punishable at all cost against the handler(s) and whomever are involved besides the handlers. .

HB-1437

Submitted on: 2/6/2023 10:38:30 PM

Testimony for HUS on 2/7/2023 8:30:00 AM

Submitted By	Organization	Testifier Position	Testify
james pirtle	Individual	Support	Written Testimony Only

Comments:

More penalties against sex trafficking.

HB-1437

Submitted on: 2/6/2023 11:18:53 PM

Testimony for HUS on 2/7/2023 8:30:00 AM

Submitted By	Organization	Testifier Position	Testify
Keikilani Ho	Individual	Support	Written Testimony Only

Comments:

Hawaii should have zero tolerance for sex trafficking. The harshest penalties should apply to this offense.

HB-1437

Submitted on: 2/7/2023 1:27:16 AM

Testimony for HUS on 2/7/2023 8:30:00 AM

Submitted By	Organization	Testifier Position	Testify
jaerick medeiros-garcia	Individual	Support	Written Testimony Only

Comments:

I'm in support of HB1437, need more like it.

HB-1437

Submitted on: 2/7/2023 3:47:13 AM

Testimony for HUS on 2/7/2023 8:30:00 AM

Submitted By	Organization	Testifier Position	Testify
Luis Ma	Individual	Support	Written Testimony Only

Comments:

Support

HB-1437

Submitted on: 2/7/2023 7:47:10 AM

Testimony for HUS on 2/7/2023 8:30:00 AM

Submitted By	Organization	Testifier Position	Testify
Seaula Jr Tupai	Individual	Support	Written Testimony Only

Comments:

Mahalo Chairman Mizuno, Madam Vice Chair Amato and members of the House Committee on Human Services for the opportunity to testify in support of HB1437.