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## A BILL FOR AN ACT

PROPOSING AN AMENDMENT TO ARTICLE XVI OF THE CONSTITUTION OF THE  
STATE OF HAWAII.

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

1           SECTION 1. The legislature finds that it is critically  
2 important to the successful prosecution of criminal cases in  
3 Hawaii that the State has the means to compel the testimony of  
4 witnesses in possession of vital information. Currently, if a  
5 witness asserts a privilege to refuse to testify or provide  
6 evidence on the ground of self-incrimination, the State can  
7 compel that witness's testimony only by providing that witness  
8 complete and permanent "transactional immunity" from any  
9 criminal prosecution ever for or on account of any act,  
10 transaction, or matter concerning which the witness is required  
11 to testify. This severely burdens Hawaii's prosecutors. By  
12 comparison, in prosecutions by the United States and most of  
13 Hawaii's sister states, a witness's testimony can be compelled,  
14 so long as the testimony, and any evidence and information  
15 derived from that testimony, cannot be used against that witness  
16 in any criminal case, except one for perjury, false statement,  
17 failing to comply with the order to testify, or similar

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1 offenses. Such a system, called "use immunity," has been upheld  
2 as complying with the Constitution of the United States by the  
3 United States Supreme Court.

4 Hawaii's legislature enacted a "use immunity" statute, but  
5 the Hawaii Supreme Court struck it down as violating Hawaii's  
6 Constitution. Thus, amending Hawaii's Constitution is the only  
7 option if "use immunity" is to be allowed in Hawaii.

8 The purpose of this amendment is to establish "use  
9 immunity" to compel testimony before the criminal courts and  
10 grand juries of the State of Hawaii. The legislature finds that  
11 "use immunity" appropriately balances the needs of society to  
12 prosecute serious criminal cases, with the rights of  
13 individuals. The legislature finds that the current system,  
14 which conditions compelling testimony on a grant of  
15 "transactional immunity," makes society pay too high a price for  
16 such testimony and severely impedes the ability of prosecutors  
17 to obtain convictions in appropriate cases.

18 This amendment is self-executing. If adopted, judges of  
19 the circuit courts must issue "use immunity" orders compelling  
20 testimony or other evidence, upon application of the attorney  
21 general or the attorney general's designee, but such orders must  
22 also provide that no testimony or other evidence compelled under

1 the order, nor any information directly or indirectly derived  
2 from such testimony or other evidence, may be used against the  
3 witness in any criminal case, except a prosecution for  
4 committing perjury while giving the compelled testimony, for  
5 giving a false statement while giving the compelled testimony,  
6 or for failing to comply with the order to testify.

7 SECTION 2. Article XVI of the Constitution of the State of  
8 Hawaii is amended by adding a new section to be appropriately  
9 designated and to read as follows:

10 **"USE IMMUNITY**

11 **Section .** Whenever a witness refuses, on the basis  
12 of the witness's privilege against self-incrimination, to  
13 testify or provide other evidence to a grand jury or to a court  
14 in a criminal case, upon application of the attorney general or  
15 the attorney general's designee, a judge of the circuit court of  
16 the circuit in which the grand jury or court is located, shall  
17 issue an order to such witness to testify or provide such  
18 evidence, and such order shall also provide that no testimony or  
19 other evidence compelled under the order, nor any information or  
20 evidence directly or indirectly derived from such testimony or  
21 evidence, may be used against the witness in any criminal case,  
22 except a prosecution for committing perjury while giving the

1 compelled testimony, for giving a false statement while giving  
2 the compelled testimony, or for failing to comply with the order  
3 to testify.

4 A witness issued such an order may not refuse to comply  
5 with the order on the basis of the witness's privilege against  
6 self-incrimination, but no testimony or other evidence compelled  
7 under the order, nor any information or evidence directly or  
8 indirectly derived from such testimony or evidence, may be used  
9 against the witness in any criminal case, except a prosecution  
10 for committing perjury while giving the compelled testimony, for  
11 giving a false statement while giving the compelled testimony,  
12 or for failing to comply with the order to testify."

13 SECTION 3. The question to be printed on the ballot shall  
14 be as follows:

15 "Shall the Constitution of the State of Hawaii be amended  
16 to provide that a witness who asserts a privilege against  
17 self-incrimination may be compelled to testify or provide  
18 evidence in a criminal case or before a grand jury, so long  
19 as such testimony, evidence, and any information derived  
20 therefrom cannot be used against that witness in any  
21 criminal case except perjury, false statement, or failing  
22 to comply with the order to testify?"

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1 SECTION 4. New constitutional material is underscored.

2 SECTION 5. This amendment shall take effect upon  
3 compliance with article XVII, section 3, of the Constitution of  
4 the State of Hawaii.

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INTRODUCED BY:

Calvin K. Aoy

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BY REQUEST

JAN 26 2009

**Report Title:**

Constitutional Amendment; Use Immunity

**Description:**

Amends Hawaii's Constitution so a criminal case witness who asserts self-incrimination privilege may be compelled to testify or provide evidence as long as the testimony or evidence cannot later be used against the witness in a criminal case except for perjury, false statement, or failure to comply with the order to testify.

HB 1018

JUSTIFICATION SHEET

DEPARTMENT: Attorney General

TITLE: A BILL FOR AN ACT PROPOSING AN AMENDMENT TO ARTICLE XVI OF THE CONSTITUTION OF THE STATE OF HAWAII.

PURPOSE: Permit a witness claiming the Fifth Amendment to be compelled to testify, but prohibit use of that testimony in any criminal proceeding against a witness, except prosecution for perjury or false statement.

MEANS: Add a new section to article XVI of the State Constitution.

JUSTIFICATION: It is critically important to the successful prosecution of criminal cases in Hawaii that the State has the means to compel the testimony of witnesses in possession of vital information. Currently, if a witness asserts a privilege to refuse to testify or provide evidence on the ground of self-incrimination, the State can compel that witness's testimony only by providing that witness complete and permanent "transactional immunity" from any criminal prosecution ever for or on account of any act, transaction, or matter concerning which the witness is required to testify. This severely burdens Hawaii's prosecutors.

By comparison, in prosecutions by the United States and most of Hawaii's sister states, a witness's testimony can be compelled, so long as the testimony, and any evidence and information derived from that testimony, cannot be used against that witness in any criminal case, except one for perjury, false statement, failing to comply with the order to testify, or similar offenses. Such a system, called "use immunity," has been upheld as complying with the Constitution of

the United States by the United States Supreme Court.

Hawaii's legislature enacted a "use immunity" statute, but the Hawaii Supreme Court struck it down as violating Hawaii's Constitution. Thus, amending Hawaii's Constitution is the only option if "use immunity" is to be allowed in Hawaii.

The purpose of this amendment is to establish "use immunity" to compel testimony before the criminal courts and grand juries of the State of Hawaii. "Use immunity" appropriately balances the needs of society to prosecute serious criminal cases with the rights of individuals. The current system, which conditions compelling testimony on a grant of "transactional immunity," makes society pay too high a price for such testimony and severely impedes the ability of prosecutors to obtain convictions in appropriate cases.

This amendment is self-executing. If adopted, judges of the circuit courts must issue "use immunity" orders compelling testimony or other evidence, upon application of the attorney general or the attorney general's designee, but such orders must also provide that no testimony or other evidence compelled under the order, nor any information directly or indirectly derived from such testimony or other evidence, may be used against the witness in any criminal case, except a prosecution for committing perjury while giving the compelled testimony, for giving a false statement while giving the compelled testimony, or for failing to comply with the order to testify.

Impact on the public: Appropriately balances the needs of society to prosecute serious criminal cases with the rights of individuals.



Impact on the department or other agencies:  
Allows the department and county prosecutors to compel witness testimony without the need to grant "transactional immunity".

GENERAL FUND: None.

OTHER FUNDS: None.

PPBS PROGRAM  
DESIGNATION: None.

OTHER AFFECTED  
AGENCIES: Judiciary, Office of the Public Defender,  
and county prosecutors.

EFFECTIVE DATE: Upon compliance with article XVII, section  
3, of the Constitution of the State of  
Hawaii.