



**TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
TWENTY-SIXTH LEGISLATURE, 2012**

ON THE FOLLOWING MEASURE:

H.B. NO. 1772, RELATING TO VIOLATION OF PRIVACY.

BEFORE THE:

HOUSE COMMITTEE ON JUDICIARY

DATE: Tuesday, February 21, 2012

TIME: 2:00 p.m.

LOCATION: State Capitol, Room 325

TESTIFIER(S): David M. Louie, Attorney General, or
Lance M. Goto, Deputy Attorney General

Chair Keith-Agaran and Members of the Committee:

The Attorney General strongly supports this bill.

The purpose of this bill is to remove an existing conflict between the misdemeanor offense of violation of privacy in the second degree and the class C felony offense of violation of privacy in the first degree. Due to the interaction between these two statutes as currently written, an offender who uses certain specified means to surreptitiously observe another in a stage of undress or sexual activity would have to be charged under the misdemeanor statute, and not the felony.

The purpose of this bill is to correct that conflict.

Section 711-1111(1)(d), Hawaii Revised Statutes, defines one of several types of conduct that constitutes the misdemeanor offense of violation of privacy in the second degree as follows:

A person commits the offense of violation of privacy in the second degree if, except in the execution of a public duty or as authorized by law, the person intentionally... (d) Installs or uses, or both, in any private place, without consent of the person or persons entitled to privacy therein, any means or device for observing, recording, amplifying, or broadcasting sounds or events in that place, **including** another person in a stage of undress or sexual activity....

Section 711-1110.9(1), Hawaii Revised Statutes, defines the class C felony offense of violation of privacy in the first degree as follows:

A person commits the offense of violation of privacy in the first degree if, except in the execution of a public duty or as authorized by law, the person intentionally or knowingly installs or uses, or both, in any private place, without consent of the person or persons

entitled to privacy therein, any device for observing, recording, amplifying, or broadcasting another person in a stage of undress or sexual activity in that place.

Section 711-1111(1)(d), Hawaii Revised Statutes, the misdemeanor provision, was amended in section 48 of Act 230, Session Laws of Hawaii 2006, to include the event of "another person in a stage of undress or sexual activity." Prior to that amendment, the statute had specifically excluded that event.

To clarify any potential conflict with section 711-1110.9, this bill amends section 711-1111(1)(d) to specifically exclude that event.

We respectfully request that the committee pass this bill.

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THE HONORABLE GILBERT S.C. KEITH-AGARAN, CHAIR
HOUSE JUDICIARY COMMITTEE
Twenty-sixth State Legislature
Regular Session of 2012
State of Hawai`i

Tuesday, February 21, 2012

RE: H.B. 1772; RELATING TO VIOLATION OF PRIVACY.

Chair Keith-Agaran, Vice Chair Rhoads, and members of the House Committee on Judiciary, the Department of the Prosecuting Attorney of the City and County of Honolulu submits the following testimony in support of H.B. 1772.

In 1999, the legislature created the offense of privacy in the first degree that included a penalty of class C felony under section 711-1110.9, Hawaii Revised Statutes, where one conducts a surveillance of another person in a stage of undress or sexual activity. The legislature excluded surveillance of another person in a stage of undress or sexual activity for the offense of violation of privacy in the second degree under section 711-1111, Hawaii Revised Statutes, and the penalty for this section is a misdemeanor.

In 2006, the legislature in a criminal omnibus bill, accidentally removed language in the offense of violation of privacy in the second degree under section 711-1111, Hawaii Revised Statutes, that excluded surveillance of another person in a stage of undress or sexual activity, thus making the language the same as the offense of privacy in the first degree under section 711-1110.9, Hawaii Revised Statutes. Since both sections have the same type of language, case law requires us to charge the lesser charge of privacy in the second degree under section 711-1111, Hawaii Revised Statutes when the facts is about a person who surveils another person in a stage of undress or sexual activity because charging the higher offense would violate due process and the equal protection of the laws. In State v. Modica, 58 Haw. 249, 567 P.2d 420 (1977), the Supreme Court of Hawaii noted, "where the same act committed under the same circumstances is punishable either as a felony or as a misdemeanor, under either of two statutory provisions, and the elements of proof essential to either conviction are exactly the same, a conviction under the felony statute would constitute a violation of the defendant's rights to due process and the equal protection of the laws."

The purpose of this bill is to amend the offense of violation of privacy in the second degree under section 711-1111, Hawaii Revised Statutes, to exclude surveillance of another person in a stage of undress or sexual activity because that conduct is already prohibited by the offense of privacy in the first degree under section 711-1110.9, Hawaii Revised Statutes. For these reasons, we strongly support the passage of H.B. 1772. Thank you.