CHAPTER 711
OFFENSES AGAINST PUBLIC ORDER

Section

Note

Urinating or defecating in public (repealed December 31, 2016). L 2004, c 84, §2; L 2008, c 77; L 2010, c 75; L 2014, c 50; L 2015, c 35, §51.

" **§711-1100 Definitions.** In this chapter, unless a different meaning is plainly required, or the definition is otherwise limited by this section:

"Animal" includes every living creature, except a human being.

"Equine animal" means an animal of or belonging to the family Equidae, including horses, ponies, mules, donkeys, asses, burros, and zebras.

"Facsimile" means a document produced by a receiver of signals transmitted over telecommunication lines, after translating the signals, to produce a duplicate of an original document.

"Law enforcement animal" means any dog, horse, or other animal used by law enforcement or corrections agencies and trained to work in areas of tracking, suspect apprehension, victim assistance, crowd control, or drug or explosive detection for law enforcement purposes.

"Necessary sustenance" means care sufficient to preserve the health and well-being of a pet animal, except for emergencies or circumstances beyond the reasonable control of the owner or caretaker of the pet animal, and includes but is not limited to the following requirements:

(1) Food of sufficient quantity and quality to allow for normal growth or maintenance of body weight;

(2) Open or adequate access to water in sufficient quantity and quality to satisfy the animal's needs;

(3) Access to protection from wind, rain, or sun;

(4) An area of confinement that has adequate space necessary for the health of the animal and is kept reasonably clean and free from excess waste or other contaminants that could affect the animal's health; provided that the area of confinement in a primary pet enclosure shall:

(a) Provide access to shelter;

(b) Be constructed of safe materials to protect the pet animal from injury;

(c) Enable the pet animal to be clean, dry, and free from excess waste or other contaminants that could affect the pet animal's health;

(d) Provide the pet animal with a solid surface or resting platform that is large enough for the pet

animal to lie upon in a normal manner, or, in the case of a caged bird, a perch that is large enough for the bird to perch upon in a normal manner;

(e) Provide sufficient space to allow the pet animal, at minimum, to do the following:

(i) Easily stand, sit, lie, turn around, and make all other normal body movements in a comfortable manner for the pet animal, without making physical contact with any other animal in the enclosure; and

(ii) Interact safely with other animals within the enclosure; and

(5) Veterinary care when needed to prevent suffering.

"Obstructs" means renders impassable without unreasonable inconvenience or hazard.

"Pet animal" means a dog, cat, domesticated rabbit, guinea pig, domesticated pig, or caged birds (passeriformes, piciformes, and psittaciformes only) so long as not bred for consumption.

"Primary pet enclosure" means any kennel, cage, or structure used to restrict only a pet animal as defined in this section to a limited area of space, and does not apply to the confinement of any animals that are raised for food, such as any poultry that is raised for meat or egg production and livestock, rabbits, or pigs that are raised specifically for meat production because these animals are not pets when raised for meat or egg production.

"Private place" means a place where one may reasonably expect to be safe from casual or hostile intrusion or surveillance, but does not include a place to which the public or a substantial group thereof has access.

"Public" means affecting or likely to affect a substantial number of persons.

"Public place" means a place to which the public or a substantial group of persons has access and includes highways, transportation facilities, schools, places of amusement or business, parks, playgrounds, prisons, and hallways, lobbies, and other portions of apartment houses and hotels not constituting rooms or apartments designed for actual residence.

"Record", for the purposes of sections 711-1110.9 and 711-1111, means to videotape, film, photograph, or archive electronically or digitally.

"Torment" means fail to attempt to mitigate substantial bodily injury with respect to a person who has a duty of care to the animal.

"Torture" includes every act, omission, or neglect whereby unjustifiable physical pain, suffering, or death is caused or permitted. [L 1972, c 9, pt of §1; am L 1986, c 192, §3; am L 1987, c 176, §4; am L 1992, c 292, §3; am L 1998, c 173, §1; am L 2003, c 48, §1; am L 2004, c 83, §1; am L 2007, c 114, §3; am L 2008, c 111, §1; am L 2010, c 147, §2; am L 2013, c 205, §4; am L 2015, c 35, §28]

COMMENTARY ON §711-1100

This section is definitional only and, of course, specifies no offense. A discussion of the definitions in this section, when needed or appropriate, is found in the commentary to the substantive offenses employing the terms defined.

SUPPLEMENTAL COMMENTARY ON §711-1100

The Code as adopted added Items (5) and (6). The Proposed Draft did not contain these items.

Act 192, Session Laws 1986, amended the definition of "animal" to exclude human beings, thereby foreclosing the possible interpretation of the statute to include within the offense persons engaged in boxing. House Conference Committee Report No. 37-86, Senate Conference Committee Report No. 27-86, and House Standing Committee Report No. 392.

Act 292, Session Laws 1992, amended this section by adding the definition of "facsimile" to strengthen the laws against harassment. Conference Committee Report No. 57.

Act 173, Session Laws 1998, amended this section by adding the definitions of "pet animal" and "necessary sustenance." Act 173 protected pet animals in Hawaii from neglect by defining minimum standards of care. The legislature found that pet animals deserved at least the minimum care of food, water, and protection from the elements. Act 173 established guidelines to be used to prevent the neglect and abuse of pet animals. Conference Committee Report No. 87.

Act 48, Session Laws 2003, amended this section by adding the definition of "record." The legislature found that advancement in technology has provided opportunity for "video voyeurism" in public places. A change in the offense of violation of privacy would address the growing concern for the offensive practice of "upskirt photography." House Standing Committee Report No. 1316.

Act 83, Session Laws 2004, amended the definition of "record" to include digital recordings within the purview of privacy offenses. Act 83 made statutory amendments to the existing privacy law in order to prohibit the inappropriate use of new

digital technologies, such as cellular phones, that are capable of taking digital photographs and transmitting those images. House Standing Committee Report No. 1174-04, Conference Committee Report No. 43-04.

Act 114, Session Laws 2007, amended this section by, among other things, defining "pet animal" as a dog, cat, domesticated rabbit, guinea pig, [domesticated pig,] or caged birds, so long as they are not bred for consumption. Act 114 strengthened Hawaii's animal cruelty laws. The legislature found that violence, whether against humans or animals, must not be tolerated in our society. Evidence suggests a link between animal abuse and the commission of violent acts against humans. Hawaii is only one of nine states in the United States without a felony offense for domestic animal abuse. The legislature also found that pet animals provide a close emotional bond and relationship with their owners and family members and friends. Violence and harm committed against the animals have a significant emotional impact on their owners and family. The felony provisions of Act 114 protected pet animals. Conference Committee Report No. 29.

Act 111, Session Laws 2008, amended this section by adding the definition of "equine animal." Act 111 extended to equine animals some of the legal protections accorded to pet animals relating to animal cruelty by making an offense involving serious bodily injury or death to an equine animal a class C felony. The legislature believed that horses belong under the protection of law and that adding equine animals to the list of animals protected under the animal cruelty law reflects the fact that companion animals come in all shapes and sizes. House Standing Committee Report No. 1589-08, Senate Standing Committee Report No. 2879, Conference Committee Report No. 20-08.

Act 147, Session Laws 2010, amended this section by adding the definition of "primary pet enclosure," and by amending the definition of "necessary sustenance" to include the requirements of an area of confinement in a primary pet enclosure and veterinary care when needed to prevent suffering. The legislature found that existing definitions applicable to cruelty to animals lack specificity in the areas regarding a primary pet enclosure and the range of care needed to sufficiently preserve a pet animal's health and well-being. Senate Standing Committee Report No. 2957, Conference Committee Report No. 37-10.

Act 205, Session Laws 2013, amended this section by adding the definition of "law enforcement animal." Act 205 amended §§711-1109.4 and 711-1109.5 to protect law enforcement animals in the line of duty. The legislature found that law enforcement animals are an integral part of Hawaii's law enforcement and

corrections agencies and are hand-selected and highly trained for their jobs. The animals diligently work side-by-side with law enforcement officers, deputies, and other personnel and should be afforded special protections. Conference Committee Report No. 128.

Act 35, Session Laws 2015, amended the definition of "necessary sustenance" by making technical nonsubstantive amendments.

" **§711-1101 Disorderly conduct.** (1) A person commits the offense of disorderly conduct if, with intent to cause physical inconvenience or alarm by a member or members of the public, or recklessly creating a risk thereof, the person:

(a) Engages in fighting or threatening, or in violent or tumultuous behavior;

(b) Makes unreasonable noise;

(c) Subjects another person to offensively coarse behavior or abusive language which is likely to provoke a violent response;

(d) Creates a hazardous or physically offensive condition by any act which is not performed under any authorized license or permit; or

(e) Impedes or obstructs, for the purpose of begging or soliciting alms, any person in any public place or in any place open to the public.

(2) Noise is unreasonable, within the meaning of subsection (1)(b), if considering the nature and purpose of the person's conduct and the circumstances known to the person, including the nature of the location and the time of the day or night, the person's conduct involves a gross deviation from the standard of conduct that a law-abiding citizen would follow in the same situation; or the failure to heed the admonition of a police officer that the noise is unreasonable and should be stopped or reduced.

The renter, resident, or owner-occupant of the premises who knowingly or negligently consents to unreasonable noise on the premises shall be guilty of a noise violation.

(3) Disorderly conduct is a petty misdemeanor if it is the defendant's intention to cause substantial harm or serious inconvenience, or if the defendant persists in disorderly conduct after reasonable warning or request to desist. Otherwise disorderly conduct is a violation. [L 1972, c 9, pt of §1; am L 1973, c 136, §9(a); am L 1974, c 164, §1; am L 1978, c 182, §1; am L 1979, c 79, §1; gen ch 1993; am L 2003, c 48, §2]

Note

Urinating or defecating in public (repealed December 31, 2016). L 2004, c 84, §2; L 2008, c 77; L 2010, c 75; L 2014, c 50; L 2015, c 35, §51.

Revision Note

In subsection (1)(a), (b), and (c), "or" deleted pursuant to §23G-15.

COMMENTARY ON §711-1101

The offense of "disorderly conduct" has been very broadly defined in the past (see below) to include numerous petty annoyances to the public. Section 711-1101 gives a far narrower definition to the offense, both because some of the matters previously treated under that heading are now treated elsewhere and because some of the previous provisions seem unwise. The section requires proof of an intent to cause physical inconvenience or alarm, or at least a reckless creation of a risk thereof. Subsection (1)(a) is a standard clause in disorderly conduct legislation, aimed at actual fights and at other behavior tending to threaten the public generally, for this section requires public alarm, etc., as distinguished from the private alarm which may accompany assault. This is an important point. A person may not be arrested for disorderly conduct as a result of activity which annoys only the police, for example.[1] Police officers are trained and employed to bear the burden of hazardous situations, and it is not infrequent that private citizens have arguments with them. Short of conduct which causes "physical inconvenience or alarm to a member or members of the public" arguments with the police are merely hazards of the trade, which do not warrant criminal penalties.

Subsection (1)(c) is directed at "free" speech which exceeds the bounds of constitutional protection. It is important not to limit free expression, so the formula adopted--"offensively coarse"--is meant to apply only to obscene and scatalogical language, and not to language that is politically or religiously offensive. The defendant must know, or must consciously disregard the risk, that the defendant's coarse language will be offensive. The subsection also prohibits abusive language likely to evoke a violent reaction from the hearer (though no such reaction need be proved) in order that the public peace will be promoted by its prohibition.

Subsection (1)(d) is defined to include creation of a hazardous or physically offensive condition by an act not covered by any authorized license or permit. It would prohibit,

for example, the use of a "stink bomb," strewing garbage or other noxious substances in public places, and turning off the lights in a public auditorium. Although there is some degree of overlap in some situations between this provision and §708-828 (criminal use of noxious substances) and §708-829 (criminal littering), subsection (1)(d) is needed to cover those cases of public annoyance where a private property owner does not wish to file a complaint or where title to property is not clear.

Disorderly conduct is a violation unless it is the defendant's intention to cause substantial harm or serious inconvenience, or if the defendant persists in disorderly conduct after a reasonable warning or request to desist.

The previous Hawaii statute covered a wide range of activity. The text of the former statute follows:

> Any person who with intent to provoke a breach of the peace, or whereby a breach of the peace may be occasioned, commits any of the following acts shall be deemed to have committed the offense of disorderly conduct:
>
> (1) Uses offensive, disorderly, threatening, abusive or insulting language, conduct or behavior;
>
> (2) Congregates with others on a public street or sidewalk and refuses to move on when ordered by the police;
>
> (3) By his actions causes a crowd to collect, except when lawfully addressing such a crowd;
>
> (4) Shouts or makes a noise either outside or inside a building during the nighttime to the annoyance or disturbance of any three or more persons;
>
> (5) Interferes with any person in any place by jostling against such person or unnecessarily crowding him or by placing a hand in proximity of such person's pocket, pocketbook or handbag;
>
> (6) Stations himself on the public streets or sidewalks or follows pedestrians for the purpose of soliciting alms, or who solicits alms on the public streets unlawfully;
>
> (7) Frequents or loiters about any public place soliciting men for the purpose of committing a crime against nature or other lewdness;
>
> (8) Causes a disturbance in any street car, railroad car, omnibus or other public conveyance, by running through it, climbing through windows or upon the seats, or otherwise annoying passengers or employees therein;
>
> (9) Stands on sidewalks or street corners and makes insulting remarks to or about passing pedestrians or annoys such pedestrians;

(10) Makes or causes to be made repeated telephone calls with intent to annoy and disturb another person or his family;

(11) Wears clothing of the opposite sex in any public place with intent to deceive other persons by failing to identify his or her sex.[2]

The above offense of disorderly conduct was punishable by a fine of not more than $1,000 or imprisonment of not more than 1 year, or both.[3]

It should be noted that all of the conduct covered by the previous law, except that included in paragraphs (6), (7), and (11), is covered by various sections of this chapter, if not by the offense of disorderly conduct itself.

SUPPLEMENTAL COMMENTARY ON §711-1101

When the legislature adopted the Code in 1972, it changed the wording of the Proposed Draft's subsection (1)(c), which is now subsection (1)(d). The Proposed Draft had recommended that the offense apply where the perpetrator commits an act "which serves no legitimate purpose of the actor." The legislature changed that phrase to any act "which is not performed under any authorized license or permit", since it felt the language of the Proposed Draft was unconstitutionally vague. Conference Committee Report No. 2 (1972).

Act 136, Session Laws 1973, made two amendments. The offense of disorderly conduct was amended to require an intent to cause physical inconvenience or alarm by members of the public. Previously, the offense merely required an intent to cause "public inconvenience, annoyance, or alarm." In addition, subsection (1)(b) (now subsection (1)(c)) was changed by adding the language "which is likely to provoke a violent response" after the word "present."

Act 164, Session Laws 1974, further amended the section by clarifying the offense when it involved the making of unreasonable noise. Conduct involving a gross deviation from the standard of conduct that a law abiding citizen would follow would be a violation of this provision. Senate Standing Committee Report No. 967-74, states:

> The addition of a new subsection (2) defines the quality of unreasonable noise, as a general principle of penal liability, used throughout the Hawaii Penal Code, which can be found in §702-206. This definition sets forth an intelligent, flexible and reasonable standard by which enforcement of this provision can be made. The enforcement of this section is not intended to interfere with reasonable necessary commercial activities justifiable in

their profession or trade and technologically tenable. For example, it is not an offense that commercial activity causes inconvenience upon a person or persons if, considering the nature and purpose of such activity and the circumstances surrounding the activity including the location, the nature of the day (whether a weekend or a holiday) and the time of the day or night, such activity is reasonable and prudent.

Your Committee has categorically ruled out the argument that people who sleep during the day should not bear a greater burden than those people who sleep at night. We are well aware that because of Hawaii's diverse educational, commercial and recreational activities, some people have to sleep during the day through a degree of noise activity. But we believe that to limit the noise level of the day to that of the night would impose a dangerous evil that will cause irreparable damage to the general health and welfare of this state. However, the Committee finds that it is necessary to establish a reasonable standard that can be applied to all noise situations and not just the quiet of the night.

Enforcement of proposed decible standards is impractical at this time. The state of the art and present technology do not lend themselves to an acceptable justification for their use in everyday enforcement.

Act 182, Session Laws 1978, added subsection (1)(e). Conference Committee Report (Senate No. 31-78, House No. 27) states: "The conduct which your Committee believes should be regulated is the impeding and obstructing while begging in a public place or place open to the public. Your Committee does not find that the specific conduct of begging alone is offensive but begging done in the specified manner which is offensive to the public should be regulated."

Act 79, Session Laws 1979, added subsection (2) in order to clarify the offense of unreasonable noise. Conference Committee Report No. 63 states:

Your Committee finds that under current statutes, in order to convict a person under the disorderly conduct statute for making unreasonable noise, one must prove that such person's actions involved a gross deviation from the standard of conduct of a law-abiding citizen. Prosecution has been difficult using this broad, if not vague, definition. This bill authorizes any police officer to make a determination of what is unreasonable noise and makes the failure of a person to heed his warning a punishable offense.

Act 79 also holds a renter, resident or owner-occupant of a premises guilty of a noise violation if he knowingly or negligently consents to unreasonable noise on his premises.

Act 48, Session Laws 2003, amended this section by updating the crime of disorderly conduct to punish "video voyeurism" in public places. Senate Standing Committee Report No. 637.

Case Notes

Police officers did not violate plaintiff's clearly established constitutional rights by arresting plaintiff without probable cause. 872 F. Supp. 746 (1994).

Sufficiency of complaint to charge offense under section discussed. 58 H. 279, 567 P.2d 1242 (1977).

Sufficiency of conduct that annoys the police only. 61 H. 291, 602 P.2d 933 (1979).

Harassment not a lesser included offense. 63 H. 548, 632 P.2d 654 (1981).

Noise level not adequate to constitute violation of subsection (1)(b). 64 H. 101, 637 P.2d 770 (1981).

Police may testify as to "physical inconvenience or alarm". 68 H. 238, 709 P.2d 607 (1985).

Lack of substantial evidence to support finding of "gross" deviation under subsection (2). 1 H. App. 10, 612 P.2d 123 (1980).

State failed to show that defendant possessed requisite state of mind for conviction under this section. 1 H. App. 10, 612 P.2d 123 (1980).

Evidence supported finding of disorderly conduct. 5 H. App. 120, 678 P.2d 1107 (1984).

State failed to prove that defendant intended to cause physical inconvenience or alarm or recklessly created a risk thereof to a member or members of public, where disorderly arrest was based on defendant's actions within apartment after police arrived. 77 H. 314 (App.), 884 P.2d 377 (1994).

Subsection (2) interpreted as implicitly requiring that a police officer's decision that noise is unreasonable must be supported by police officer's objectively reasonable finding that the noise is gross deviation from law-abiding citizen's standard of conduct; there was insufficient evidence of defendant's unreasonable noise to support the conviction of disorderly conduct/unreasonable noise either as a petty misdemeanor or as the lesser-included violation. 78 H. 282 (App.), 892 P.2d 475 (1995).

Insufficient evidence to establish that defendant's intent was to cause physical inconvenience or alarm by members of the public where all of defendant's statements and profanity were

directed only at police officers and theatre manager. 79 H. 538 (App.), 904 P.2d 552 (1995).

Insufficient evidence to convict defendant under this section where evidence indicated there was perhaps one other patron in the library on the day defendant raised defendant's voice, no physical disruption of library services was caused, and there was no finding that defendant acted with the intent to cause physical inconvenience to, or alarm by, a member or members of the public, or that defendant acted with reckless disregard that defendant's conduct might produce such a result. 107 H. 159 (App.), 111 P.3d 54 (2005).

Mentioned: 9 H. App. 315, 837 P.2d 1313 (1992).

§711-1101 Commentary:

1. An individual police officer may, however, be the object of harassment under §711-1106.

2. H.R.S. §772-2.

3. Id. §772-3.

" **§711-1102 Failure to disperse.** (1) When six or more persons are participating in a course of disorderly conduct likely to cause substantial harm or serious inconvenience, annoyance, or alarm, a law enforcement officer may order the participants and others in the immediate vicinity to disperse.

(2) A person commits the offense of failure to disperse if the person knowingly fails to comply with an order made pursuant to subsection (1).

(3) Failure to disperse is a misdemeanor. [L 1972, c 9, pt of §1; gen ch 1993; am L 2001, c 91, §4]

COMMENTARY ON §711-1102

This section provides a procedure under which a peace officer can order a group of six or more persons participating in a course of disorderly conduct likely to cause substantial harm or serious inconvenience, annoyance, or alarm to disperse. A similar order may be made to others in the immediate vicinity. Failure to obey such an order is a misdemeanor. The offense is thus an aggravated form of disorderly conduct which does not reach the point of riot or unlawful assembly.

Previous Hawaii law contained a somewhat similar section, allowing an order to disperse after "force or violence has been used disturbing the public peace."[1]

Case Notes

Double jeopardy did not bar retrial with regard to defendant's failure to disperse from the first floor of a shopping mall under this section, for which there was clearly sufficient evidence to support a conviction, where defendant was not expressly acquitted by the jury, defendant's conviction could not be assumed to include an implied acquittal on either of the acts offered by the prosecution to support the conviction, defendant was not convicted on a lesser included offense, and the jury did not refuse to convict defendant on the basis of either act on the first or second floor or choose between them. 124 H. 43, 237 P.3d 1109 (2010).

There was insufficient evidence that defendant violated this section by failing to disperse from the second floor of a shopping mall where officer did not testify concerning how long defendant remained on the second floor after officer ordered the crowd to disperse, other than observing that officer saw defendant again on the first floor at least twenty minutes later; defendant's presence on the first floor at least twenty minutes later indicated that defendant complied with the officer's order to disperse. 124 H. 43, 237 P.3d 1109 (2010).

There was sufficient evidence that defendant violated this section by failing to disperse from the first floor of a shopping mall where defendant was one of "six or more persons participating in a course of disorderly conduct" or that defendant was in the "immediate vicinity" of such a disturbance, officer ordered defendant to leave the area and had to tell the defendant "maybe ten more times", defendant would not leave, and thus failed to comply with the order. 124 H. 43, 237 P.3d 1109 (2010).

As this section's limit on freedom of association and movement is only within the immediate vicinity of the disorderly conduct and there is no "unlimited and indiscriminately sweeping infringement upon the freedom of movement and association", this section does not violate article I, §2 of the Hawaii constitution. 101 H. 153 (App.), 64 P.3d 282 (2003).

Section not unconstitutionally vague under article I, §5 of the Hawaii constitution as its language is specific and clear, it is narrowly tailored to a person's failure to disperse pursuant to a law enforcement order to leave the immediate vicinity of disorderly conduct, and citizens of this State should thus have no difficulty in understanding this section. 101 H. 153 (App.), 64 P.3d 282 (2003).

This section does not violate the right to privacy under article I, §2 of the Hawaii constitution as it is not a

"sweeping infringement on the freedom of movement and privacy"; to prevent the substantial harm or serious inconvenience, annoyance or alarm to the public, it is reasonably necessary for law enforcement to order those participating in the disorderly conduct and those in the immediate vicinity to disperse until the disorderly conduct comes to an end. 101 H. 153 (App.), 64 P.3d 282 (2003).

§711-1102 Commentary:

1. H.R.S. §764-3.

" **§711-1103 Riot.** (1) A person commits the offense of riot if the person participates with five or more other persons in a course of disorderly conduct:

(a) With intent to commit or facilitate the commission of a felony; or

(b) When the person or any other participant to the person's knowledge uses or intends to use a firearm or other dangerous instrument in the course of the disorderly conduct.

(2) Riot is a class C felony. [L 1972, c 9, pt of §1; gen ch 1993]

COMMENTARY ON §711-1103

In light of recent demonstrations by students and other militants, the importance of well-drafted statutes relating to riot, unlawful assembly, and disorderly conduct is self-evident. The goal is, on the one hand, not to curtail legitimate exercise of the rights of free speech and free assembly and, on the other hand, to give the police a useful tool to employ against conduct which involves crime or physical danger and which is no longer afforded constitutional protection.

Riot is the most serious of the offenses against public order. It is made a class C felony both because of the greater number of participants and because of the unlawful objectives. At least six persons must be involved (the defendant and five others) in "disorderly conduct," as that conduct is defined by §711-1101. This number of participants is taken from the previous Hawaii law and the Proposed Michigan Revised Criminal Code in preference to the Model Penal Code's smaller number of participants (three). Because §711-1103 defines riot in terms of aggravated disorderly conduct, it is necessary to prove the elements of disorderly conduct specified in §711-1101. In addition, there must be proof of one of two specified

aggravating circumstances. Under subsection (1)(a) the accused must intend to commit or facilitate the commission of a felony. Subsection (1)(b) makes disorderly conduct riot when the accused or any other participant to the accused's knowledge uses or intends to use a dangerous instrument.

Section 711-1103 is restrictively worded to prevent the use of the section to break up orderly demonstrations, meetings, or processions which happen to attract a hostile crowd, perhaps because unpopular views are being expressed. On the other hand, the section will be useful in breaking up disorderly demonstrations which threaten harm in one of the specified ways.

In the prior Hawaii law, riot was defined as:

> Any use of force or violence disturbing the public peace, or any threat or attempt to use such force or violence, if accompanied by immediate power of execution, by six or more persons acting together, and without authority or justification by law....[1]

The penalty for participating in any riot was a fine of not more than $1,000 or imprisonment of not more than two years or both.[2] There is no case law existing under this particular statute.

Note on treason. Although a number of proposed penal code revisions have included a crime of treason against the State, no such crime is here included. Treason is an offense amply covered in federal law,[3] and is not likely to be directed against the State government. It is the position of the Code, therefore, that riot and the other offenses in this chapter are sufficient to deal with any threat to the safety of the State. In fact, the crime of treason was not previously covered by Hawaii law, although there were numerous sections, repealed by this revision, which covered various treasonous activities. Those sections are discussed below. It will readily be seen that the sections in this chapter and in chapters 5 and 7 make it unnecessary to deal so specifically with the activities previously covered by Hawaii law. Moreover, there was considerable doubt about the constitutionality of some of the sections, particularly those relating to "criminal syndicalism," as they appeared to penalize speech and assembly rather than any activities directed at carrying out treasonous goals. To the extent that these activities ought to be criminal, they are made so by the Code's provisions on solicitation, conspiracy, attempt, terroristic threatening, riot, unlawful assembly, and the like.

The former law on treasonous activities was embodied in a number of provisions. H.R.S. §§721-1 to 721-5 prohibited anarchistic publications and criminal syndicalism. Anarchistic publications were those which advocated or were intended to

advocate "the commission of any act of violence, such as sabotage, incendiarism, sedition, anarchy, rioting or breach of the peace ..."[4] The printing, selling, or distribution of such anarchistic publications was punishable by a fine of not more than $1,000 or imprisonment for not more than one year. Upon a second conviction for the same offense within five years from the first conviction, a fine of not more than $5,000 or imprisonment for not more than one year, or both, could be imposed.[5] Criminal syndicalism was defined as "the doctrine which advocates crime, sabotage, violence, or other unlawful methods of terrorism as a means of accomplishing industrial or political ends."[6] Committing criminal syndicalism in its various forms was punishable by a fine of not more than $5,000 or imprisonment for not more than ten years.[7] Two or more persons were prohibited from assembling for the purpose of advocating or teaching the doctrine of criminal syndicalism. The penalty for so doing was a fine of not more than $5,000 or imprisonment for not more than ten years, or both.[8] Knowingly permitting the use of a building for unlawful assembly was punishable by a fine of not more than $500 or imprisonment for not more than one year, or both.[9]

Intentional injury to or interference with property (sabotage) was prohibited as follows:

> Whoever wilfully destroys, impairs, injures, interferes, or tampers with real or personal property intending or having reasonable grounds to believe that such act will hinder, delay or interfere with the preparation of the United States or of any of the states or territories for defense or for war, or with the prosecution of war by the United States, shall be fined not more than $10,000 or imprisoned at hard labor not more than twenty years, or both.[10]

The same penalty was imposed for industrial sabotage (intentionally defective workmanship) of any article or thing to be used in connection with the preparation by the United States or any state or territory for defense or for war.[11]

Besides the above, the use of disloyal or contemptuous language concerning the United States, its armed forces, or its flag, or the commission of an act of disloyalty which was reasonably calculated to cause a breach of the peace was punishable by a fine of not less than $100 nor more than $1,000, or imprisonment for not more than ten years, or both.[12] The use of pacifistic language during a time of war was punishable by a fine of not more than $1,000 or imprisonment for not more than one year, or both.[13]

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§711-1103 Commentary:

1. H.R.S. §764-1.

2. Id. §764-2.

3. 18 U.S.C. §2381.

4. H.R.S. §721-1.

5. Id.

6. Id. §721-2.

7. Id. §721-3.

8. Id. §721-4.

9. Id. §721-5.

10. Id. §767-2.

11. Id. §767-3.

12. Id. §733-1.

13. Id. §733-2.

" **§711-1104 Unlawful assembly.** (1) A person commits the offense of unlawful assembly if:

(a) The person assembles with five or more other persons with intent to engage in conduct constituting a riot; or

(b) Being present at an assembly that either has or develops a purpose to engage in conduct constituting a riot, the person remains there with intent to advance that purpose.

(2) Unlawful assembly is a misdemeanor. [L 1972, c 9, pt of §1]

COMMENTARY ON §711-1104

Section 711-1104 is intended to reach those who have assembled for the purpose of rioting or who are on their way to the scene of a riot, but who have not yet begun to riot, or who associate with a group of known potential rioters with intent to aid their cause. It thus comprises both unlawful assembly and riot at the

common law, and constitutes in effect an expanded concept of attempted riot. Punishment is at the misdemeanor level.

Specifically the section requires assembling with five or more others with intent to engage in conduct constituting a riot, or remaining at an assembly that develops a purpose to engage in a riot, with intent to advance that purpose.

Previous Hawaii law was directed at only specific instances of unlawful assembly. It was illegal under prior law to assemble for the purpose of advocating criminal syndicalism,[1] also, under the former disorderly conduct statute, it was illegal for persons congregating on a public street or sidewalk to refuse to move on at the orders of the police.[2] Thus, the Code's concept of unlawful assembly as an attempted riot offense is new to Hawaii law.

§711-1104 Commentary:

1. H.R.S. §721-4.

2. Id. §772-2(2).

" **§711-1105 Obstructing.** (1) A person commits the offense of obstructing if, whether alone or with others and having no legal privilege to do so, the person knowingly or recklessly:

(a) Obstructs any highway or public passage; or

(b) Provides less than thirty-six inches of space for passage on any paved public sidewalk.

(2) A person in a gathering commits the offense of obstructing if the person refuses to obey a reasonable request or order by a law enforcement officer:

(a) To move to prevent or to cease any activity prohibited under subsection (1); or

(b) To move to maintain public safety by dispersing those gathered in dangerous proximity to a public hazard.

(3) An order to move under subsection (2)(a), addressed to a person whose speech or other lawful behavior attracts an obstructing audience, is not reasonable if the obstruction can be readily remedied by police control.

(4) A person is not guilty of violating subsection (1) solely because persons gather to hear the person speak or because the person is a member of such a gathering.

(5) Obstructing is a petty misdemeanor if the person persists in the conduct specified in subsection (1) after a warning by a law enforcement officer; otherwise it is a violation. [L 1972, c 9, pt of §1; gen ch 1993; am L 2001, c 91, §4; am L 2014, c 51, §1]

COMMENTARY ON §711-1105

Although obstructing was formerly covered by the disorderly conduct statute, it raises certain important problems which indicate that it should have separate treatment. Primarily the problems relate to free speech and types of expressive conduct which, under the aegis of free speech, are constitutionally protected. Normally, the act of obstructing a public highway presents a great public inconvenience and serves no useful purpose. However, where the obstruction is caused by a crowd listening to a speaker, or even by a crowd protesting some official action, important goals are served by leaving the group as free from restriction as possible. The proposed section accomplishes these objectives.

Subsection (1) defines obstructing as knowing or reckless obstruction of any highway or public passage. "Obstructs" is defined in §711-1100 as "renders impassable without unreasonable inconvenience or hazard." This conduct constitutes a violation, and if the defendant fails to heed a warning by a peace officer, it may be treated as a petty misdemeanor. However, subsection (4) makes clear that a person does not violate subsection (1) solely because of the fact that people gather to hear the person speak, or because the person is a member of such a gathering.

Subsection (2) is intended to allow reasonable control by peace officers of a public gathering which obstructs highways or which is dangerously close to a public hazard, such as a flood. A person who fails to heed a reasonable request by a peace officer in such circumstances is guilty of a violation. However, subsection (3) declares that a person engaged in speech or other lawful behavior which attracts an obstructing crowd cannot be asked to move if the obstruction can be readily remedied by police control.

Previous Hawaii law treated obstruction as a part of disorderly conduct.[1] The prior statute recognized and protected the rights of the speaker, but it seems insufficient in that it did not protect the rights of the listening audience. The Code attempts to remedy this point.

SUPPLEMENTAL COMMENTARY ON §711-1105

Act 51, Session Laws 2014, amended subsections (1) and (2) by specifying that a person: (1) commits the offense of obstructing, whether alone or with others, if the person having no legal privilege to do so knowingly or recklessly provides less than thirty-six inches of space for passage on any paved public sidewalk; and (2) in a gathering, commits the offense if

the person refuses to obey a reasonable request or order by a law enforcement officer to move to prevent or to cease any activity that would obstruct a highway or public passage, or provide less than thirty-six inches of space for passage on any paved public sidewalk. Senate Standing Committee Report No. 3161.

§711-1105 Commentary:

1. H.R.S. §772-2(2) and (3).

" **§711-1106 Harassment.** (1) A person commits the offense of harassment if, with intent to harass, annoy, or alarm any other person, that person:

(a) Strikes, shoves, kicks, or otherwise touches another person in an offensive manner or subjects the other person to offensive physical contact;

(b) Insults, taunts, or challenges another person in a manner likely to provoke an immediate violent response or that would cause the other person to reasonably believe that the actor intends to cause bodily injury to the recipient or another or damage to the property of the recipient or another;

(c) Repeatedly makes telephone calls, facsimile transmissions, or any form of electronic communication as defined in section 711-1111(2), including electronic mail transmissions, without purpose of legitimate communication;

(d) Repeatedly makes a communication anonymously or at an extremely inconvenient hour;

(e) Repeatedly makes communications, after being advised by the person to whom the communication is directed that further communication is unwelcome; or

(f) Makes a communication using offensively coarse language that would cause the recipient to reasonably believe that the actor intends to cause bodily injury to the recipient or another or damage to the property of the recipient or another.

(2) Harassment is a petty misdemeanor. [L 1972, c 9, pt of §1; am L 1973, c 136, §9(b); am L 1992, c 292, §4; am L 1996, c 245, §2; am L 2009, c 90, §1]

Cross References

Power to enjoin and temporarily restrain harassment, see §604-10.5.

Surreptitious surveillance, see §707-733(1)(c).

COMMENTARY ON §711-1106

Harassment, a petty misdemeanor, is a form of disorderly conduct aimed at a single person, rather than at the public. The intent to harass, annoy, or alarm another person must be proved.

Subsection (1)(a) is a restatement of the common-law crime of battery, which was committed by any slight touching of another person in a manner which is known to be offensive to that person. Such contacts are prohibited, if done with requisite intent, in order to preserve the peace.

Subsection (1)(b) is likewise aimed at preserving peace. It prohibits insults, taunts, or challenges which are likely to provoke a violent or disorderly response. This is distinguished from disorderly conduct because it does not present a risk of public inconvenience or alarm.

Subsections (1)(c) and (1)(d) are aimed at abusive communications. The former prohibits any telephone call which is made with the specified intent and without any legitimate purpose. The latter prohibits any type of repeated communications which are anonymous, made at extremely inconvenient times, or in offensively coarse language. Again, the intent to harass, annoy, or alarm must be proved. Nearly all states have statutes prohibiting such conduct. Our aim is to make them broad enough to cover all types of potentially annoying communications.

Previous Hawaii law treated various forms of harassment as disorderly conduct.[1] In addition the law expressly prohibited the use of obscene or lascivious language over the telephone.[2]

SUPPLEMENTAL COMMENTARY ON §711-1106

Act 136, Session Laws 1973, deleted former subsection (1)(e) from this section. That subsection included as the offense of harassment the case where a person "engages in any other course of harmful or seriously distressing conduct serving no legitimate purpose of the defendant." The legislature felt that the subsection was overly vague. House Standing Committee Report No. 726.

Act 292, Session Laws 1992, amended this section to strengthen the laws against harassment by providing greater protection to victims of harassment while at the same time preserving the rights of citizens to engage in political expression and ordinary communication. Conference Committee Report No. 57.

Act 245, Session Laws 1996, amended subsection (1) by prohibiting a person from repeatedly making telephone calls, facsimile, or electronic mail transmissions without purpose of legitimate communication; deleting the requirement that various kinds of communications cause the recipient to reasonably believe that the actor intends to cause bodily injury or property damage; and making it a separate offense to make a communication using offensively coarse language that would cause the recipient to reasonably believe that the actor intends to cause bodily injury or property damage. Conference Committee Report No. 34.

Act 90, Session Laws 2009, amended subsection (1) by including any form of electronic communication within the scope of the offense. The legislature found that harassing or insulting electronic communications are a form of harassment that can be just as severe or punishing as other verbal communications or offensive contacts. Senate Standing Committee Report No. 1242, Conference Committee Report No. 10.

Case Notes

Defendant police officer and defendant resident manager had probable cause to arrest plaintiff for harassment. 855 F. Supp. 1167 (1994).

Plaintiff firearm permit applicant's allegations that plaintiff was denied a permit and ordered to surrender plaintiff's weapons because of a conviction of harassment more than ten years before under this section and that the conviction was not a crime of violence under §134-7(b) or federal law for the purposes of prohibiting ownership or possession of firearms were sufficient to state a 42 U.S.C. §1983 claim for a violation of plaintiff's Second Amendment rights. 869 F. Supp. 2d 1203 (2012).

Subsection (1)(a) was not categorically a crime of violence; court declined to interpret subsection (1)(a) in a manner that shifted the focus to whether the conduct caused a "threat of injury" as opposed to deterring conduct that offended a person's "psyche and mental well-being" even if there was no "threat of injury". 976 F. Supp. 2d 1200 (2013).

Where defendants argued that plaintiff was prohibited from possessing firearms under federal law because of the federal Lautenberg Amendment, which prohibits firearm ownership by any person who "has been convicted in any court of a misdemeanor crime of domestic violence", plaintiff's convictions for harassment did not qualify as a misdemeanor crime of domestic violence under federal law. 976 F. Supp. 2d 1200 (2013).

Elements of harassment construed. 60 H. 540, 592 P.2d 810 (1979).

Threatening and offensive remarks directed against police afforded police probable cause to arrest for harassment. 61 H. 291, 602 P.2d 933 (1979).

Harassment is not a lesser included offense of assault in the third degree in violation of §707-712. 63 H. 1, 620 P.2d 250 (1980).

Harassment not a lesser included offense of disorderly conduct. 63 H. 548, 632 P.2d 654 (1981).

Person charged with petty misdemeanor carrying maximum penalty of thirty days confinement, a fine, or both, is not entitled to jury trial. 64 H. 374, 641 P.2d 978 (1982).

Where minor's challenge to officer was not uttered in a manner likely to provoke a violent response on officer's part, there was insufficient evidence to support district family court's conclusion that minor committed offense of harassment in violation of subsection (1)(b). 76 H. 85, 869 P.2d 1304 (1994).

Because the broad language of §708-810 does not evidence an intent to confine crimes "against a person" to those enumerated in chapter 707, and harassment is a crime against a person, a conviction for burglary under §708-810 may be predicated on the offense of harassment. 89 H. 284, 972 P.2d 287 (1998).

An "illegitimate purpose" is not an element of the offense of harassment, as defined by subsection (1)(a); where substantial evidence that, after becoming angry and "yelling" at son, defendant slapped son in the face, trial court could reasonably have inferred that defendant intended defendant's conduct to "annoy" or "alarm" son. 90 H. 85, 976 P.2d 399 (1999).

Appellate court correctly held that there was sufficient evidence to sustain defendant's harassment conviction under subsection (1)(a) where defendant chose to slap minor in the face and strike minor with a bamboo stick at least five times with enough force to leave red welts visible the next day; based on the totality of circumstances in the case, substantial evidence existed to support the conclusion that the State proved beyond a reasonable doubt that the force defendant employed against minor was without due regard for minor's age and size, thus disproving defendant's parental justification defense under §703-309. 126 H. 494, 273 P.3d 1180 (2012).

Where appellate record referred to multiple cases in which a stay had been denied to petty misdemeanants pending appeal, indicating that the denial of a request for a stay of sentence appeared to be an issue that could potentially affect many petty misdemeanor defendants, was likely to recur in the future, and because there was no definitive case law on when the issuance of a stay after a petty misdemeanor conviction was appropriate,

appellate court erred in not addressing the family court's failure to stay defendant's sentence pending appeal based on the mootness doctrine because the public interest exception applied. 126 H. 494, 273 P.3d 1180 (2012).

Where defendant charged with harassment in violation of subsection (1)(a) claimed that the disjunctively worded complaint left defendant unsure of how to prepare a defense: (1) because defendant was charged with violating only one subsection of the statute, codifying a single category of harassing behavior, the complaint did not violate the Jendrusch rule; and (2) when charging a defendant under a single subsection of a statute, the charge may be worded disjunctively in the language of the statute as long as the acts charged are reasonably related so that the charge provides sufficient notice to the defendant. 131 H. 220, 317 P.3d 664 (2013).

Conviction reversed where defendant merely drove his automobile along narrow street in opposite direction from automobile of former girlfriend and did not insult, taunt, or challenge. 7 H. App. 582, 788 P.2d 173 (1990).

Record did not support a finding that defendant either insulted, taunted, or challenged dog owner, or that defendant did so in a manner likely to provoke a violent response. 77 H. 196 (App.), 881 P.2d 1264 (1994).

Where defendant came up behind victim unexpectedly and threatened victim, screamed a 10-minute tirade at victim, and were actions taken without significant provocation or cognizable justification, facts sufficient to enable a reasonable person to conclude defendant violated subsection (1)(b). 93 H. 513 (App.), 6 P.3d 385 (2000).

Defendant's conviction under this section vacated where trial court's ruling that defendant engaged in "reckless" conduct did not satisfy the specific intent requirement of this section. 95 H. 290 (App.), 22 P.3d 86 (2001).

Under the plain meaning of subsection (1)(a), "offensive physical contact" encompassed the conduct of defendant knocking off police officer's hat--offensive contact that, while separate and apart from the various forms of actual bodily touching, nevertheless involved contact with an item physically appurtenant to the body. 95 H. 290 (App.), 22 P.3d 86 (2001).

Sufficient evidence supported trial court's finding that defendant committed offense of harassment. 98 H. 459 (App.), 50 P.3d 428 (2002).

Defendant's conviction of harassment under this section reversed where trial court erroneously concluded that father's actions could not be seen as reasonably necessary to protect the welfare of the recipient, and the State failed its burden of disproving beyond a reasonable doubt the justification evidence

that was adduced, or proving beyond a reasonable doubt facts negativing the justification defense under §703-309. 106 H. 252 (App.), 103 P.3d 412 (2004).

Because there was no provision in §706-605 for the imposition of anger management or other treatment programs, but §706-624(2)(j) authorized the imposition of, inter alia, mental health treatment as a discretionary term of probation, district court erred by sentencing defendant to both the thirty-day term of imprisonment (the maximum term of imprisonment for a petty misdemeanor) and anger management classes for defendant's harassment conviction (a petty misdemeanor). Defendant could have been sentenced to a thirty-day term of incarceration or a six-month term of probation, but not both, and thus defendant's sentence was illegal. 130 H. 332 (App.), 310 P.3d 1033 (2013).

There was sufficient evidence to support the district court's finding that defendant was not acting to protect defendant's girlfriend where defendant's girlfriend was already the aggressor when defendant dragged victim by the hair to support defendant's conviction of harassment under subsection (1)(a). Further, defendant's girlfriend's ex-husband testified that defendant's girlfriend "went for" victim before defendant pulled victim by victim's hair, thus negating defendant's defense-of-others justification defense pursuant to §703-305. 130 H. 332 (App.), 310 P.3d 1033 (2013).

Mentioned: 9 H. App. 315, 837 P.2d 1313 (1992); 79 H. 538 (App.), 904 P.2d 552 (1995).

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§711-1106 Commentary:

1. E.g., H.R.S. §772-2(5) and (10).

2. H.R.S. §759-2.

" **§711-1106.4 Aggravated harassment by stalking.** (1) A person commits the offense of aggravated harassment by stalking if that person commits the offense of harassment by stalking as provided in section 711-1106.5 and has been convicted previously of harassment by stalking under section 711-1106.5 within five years of the instant offense.

(2) Aggravated harassment by stalking is a class C felony. [L 1995, c 159, §1; am L 2003, c 68, §1]

Cross References

Power to enjoin and temporarily restrain harassment, see §604-10.5.

Surreptitious surveillance, see §707-733(1)(c).

COMMENTARY ON §711-1106.4

Act 159, Session Laws 1995, added this section to provide for a class C felony offense of aggravated harassment by stalking. The legislature found that a stalker's behavior frequently is characterized by a series of acts directed at the same victim that are progressively more serious in nature. Thus, the legislature believed it necessary to provide enhanced penalties in those cases to deter that type of behavior and to protect the public safety. Conference Committee Report No. 77.

Act 68, Session Laws 2003, amended this section by deleting the requirement of violations of court orders and the requirement that the defendant have been convicted previously of harassment by stalking involving the same person, and inserting that the defendant have been convicted previously of harassment by stalking within five years of the instant offense. Conference Committee Report No. 54, House Standing Committee Report No. 1315.

" **§711-1106.5 Harassment by stalking.** (1) A person commits the offense of harassment by stalking if, with intent to harass, annoy, or alarm another person, or in reckless disregard of the risk thereof, that person engages in a course of conduct involving pursuit, surveillance, or nonconsensual contact upon the other person on more than one occasion without legitimate purpose.

(2) A person convicted under this section may be required to undergo a counseling program as ordered by the court.

(3) For purposes of this section, "nonconsensual contact" means any contact that occurs without that individual's consent or in disregard of that person's express desire that the contact be avoided or discontinued. Nonconsensual contact includes direct personal visual or oral contact and contact via telephone, facsimile, or any form of electronic communication, as defined in section 711-1111(2), including electronic mail transmission.

(4) Harassment by stalking is a misdemeanor. [L 1992, c 292, §2; am L 2003, c 68, §2; am L 2009, c 90, §2]

Cross References

Power to enjoin and temporarily restrain harassment, see §604-10.5.

Surreptitious surveillance, see §707-733(1)(c).

COMMENTARY ON §711-1106.5

Act 292, Session Laws 1992, created the offense of harassment by stalking to strengthen the laws against harassment. A person commits this offense if, with the intent to harass, annoy, or alarm another person, or in reckless disregard of the risk thereof, a person pursues or conducts surveillance upon another without legitimate purpose and under circumstances which would cause the other to reasonably believe that the actor intends to cause bodily injury or property damage. Conference Committee Report No. 57.

Act 68, Session Laws 2003, amended this section by requiring the defendant to engage in a course of conduct involving pursuit, surveillance, or nonconsensual contact on more than one occasion without legitimate purpose and defining "nonconsensual contact" as any contact that occurs without the individual's consent or in disregard of that person's express desire that the contact be avoided or discontinued. Act 68 also repealed the distinction that a single occurrence of a prohibited conduct is a petty misdemeanor. Conference Committee Report No. 54, House Standing Committee Report No. 1315.

Act 90, Session Laws 2009, amended subsection (3), clarifying the definition of "nonconsensual contact" to include contact by means of any form of electronic communication. The legislature found that harassing or insulting electronic communications are a form of harassment that can be just as severe or punishing as other verbal communications or offensive contacts. Senate Standing Committee Report No. 1242.

Case Notes

Where defendant was convicted of harassment by stalking under this section, which is not one of the sexual offenses defined in chapter 707, part V or chapter 846E, trial court abused its discretion when it ordered defendant to undergo sex offender treatment program participation as a condition of probation without a sufficient factual basis that was reasonably related to the nature and circumstances of the offense of harassment by stalking, of which defendant was found guilty. 116 H. 403 (App.), 173 P.3d 550 (2007).

" **[§711-1106.6] Harassment by impersonation.** (1) A person commits the offense of harassment by impersonation if that person poses as another person, without the express authorization of that person, and makes or causes to be made, either directly or indirectly, a transmission of any personal information of the person to another by any oral statement, any

written statement, or any statement conveyed by any electronic means, with the intent to harass, annoy, or alarm any person.

(2) Harassment by impersonation is a misdemeanor.

(3) For the purposes of this section:

"Personal information" means information associated with an actual person that is a name, an address, a telephone number, or an electronic mail address.

"Pose" means to falsely represent oneself, directly or indirectly, as another person or persons. [L 2008, c 133, §1]

Cross References

Impersonating a public servant or law enforcement officer, see §§710-1016, 710-1016.6, and 710-1016.7.

COMMENTARY ON §711-1106.6

Act 133, Session Laws 2008, added this section, creating the misdemeanor offense of harassment by impersonation. Conference Committee Report No. 27-08.

" **§711-1107 Desecration.** (1) A person commits the offense of desecration if the person intentionally desecrates:

(a) Any public monument or structure;

(b) A place of worship or burial; or

(c) In a public place the national flag or any other object of veneration by a substantial segment of the public.

(2) "Desecrate" means defacing, damaging, polluting, or otherwise physically mistreating in a way that the defendant knows will outrage the sensibilities of persons likely to observe or discover the defendant's action.

(3) Any person convicted of committing the offense of desecration shall be sentenced to a term of imprisonment of not more than one year, a fine of not more than $10,000, or both. [L 1972, c 9, pt of §1; gen ch 1993; am L 2002, c 198, §1]

Revision Note

In subsection (1)(a), "or" deleted pursuant to §23G-15.

COMMENTARY ON §711-1107

Previous Hawaii law prohibited certain types of desecration. For example, desecration of the United States flag was prohibited.[1] Section 711-1107 deals more generally with all acts of desecration; i.e., acts of physical damage to or

mistreatment of venerated places and objects under circumstances which the defendant knows are likely to outrage the sensibilities of persons who observe or discover the defendant's actions. Thus, any desecration of a public monument or structure; or a place of worship or burial (public or private); or, in a public place, the national flag, or any other object (such as certain religious objects) revered by a substantial segment of the public, will constitute an offense. Damage by desecration is treated separately from other types of property damage because the sense of outrage produced by such acts is out of proportion to the monetary value of the damage. Thus, desecration is a misdemeanor, although many such cases might otherwise be petty misdemeanors under §708-823 because the object desecrated is worth less than $50.

SUPPLEMENTAL COMMENTARY ON §711-1107

Act 198, Session Laws 2002, amended this section by changing the penalty for desecration from a misdemeanor to one year imprisonment, a fine of $10,000, or both. The legislature found that recent vandalism at cemeteries denoted that the current financial penalties of a misdemeanor offense for desecration were an insufficient deterrent. The $10,000 fine was consistent with the penalty in §6E-11(c), relating to destruction of historic property. The legislature believed that a burial place or grave deserved no less a penalty for damage than did a historical monument. Senate Standing Committee Report No. 2957, House Standing Committee Report No. 416-02.

§711-1107 Commentary:

1. H.R.S. §733-6; another example is §734-3 which prohibits desecration of a grave.

" **§711-1108 Abuse of a corpse.** (1) A person commits the offense of abuse of a corpse if, except as authorized by law, the person treats a human corpse in a way that the person knows would outrage ordinary family sensibilities.

(2) The preparation of a corpse for burial or cremation in a manner consistent with traditional Hawaiian cultural customs and practices shall not be a violation of this section.

(3) The burial or cremation of a corpse prepared consistent with traditional Hawaiian cultural customs and practices shall not be a violation of this section.

(4) Abuse of a corpse is a misdemeanor. [L 1972, c 9, pt of §1; gen ch 1993; am L 2015, c 171, §2]

COMMENTARY ON §711-1108

This section prohibits any sort of outrageous treatment of a human corpse, including sexual contact (necrophilia) and physical abuse. It does not, of course, relate to legally authorized activities of undertakers and physicians. Knowledge that ordinary family sensibilities would be outraged must be proved.

Previous Hawaii law prohibited the disinterment, disturbance, or scattering of any human body that has been legally interred.[1] Section 711-1108 is more comprehensive in coverage.

§711-1108 Commentary:

1. H.R.S. §734-3.

SUPPLEMENTAL COMMENTARY ON §711-1108

Act 171, Session Laws 2015, amended this section to recognize and support traditional Hawaiian burial or cremation practices by clarifying that the preparation, burial, or cremation of a corpse in a manner consistent with Hawaiian cultural customs and practices is not a violation of the Penal Code's prohibition of abuse of a corpse. The legislature found that Act 171 was necessary to address confusion about whether the use of traditional Hawaiian customs and practices to prepare human remains for burial or cremation and the burial or cremation of a corpse prepared consistent with those customs and practices violate the law. Senate Standing Committee Report No. 339, House Standing Committee Report No. 1383.

" **§711-1108.5 Cruelty to animals in the first degree.** (1) A person commits the offense of cruelty to animals in the first degree if the person intentionally or knowingly:

(a) Tortures, mutilates, or poisons or causes the torture, mutilation, or poisoning of any pet animal or equine animal resulting in serious bodily injury or death of the pet animal or equine animal; or

(b) Kills or attempts to kill any pet animal belonging to another person, without first obtaining legal authority or the consent of the pet animal's owner.

(2) Subsection (1)(a) shall not apply to:

(a) Accepted veterinary practices;

(b) Activities carried on for scientific research governed by standards of accepted educational or medicinal practices; or

(c) Cropping or docking as customarily practiced.

(3) Subsection (1)(b) shall not apply to:

(a) Humane euthanasia of any animal by an animal control officer, duly incorporated humane society, duly incorporated society for the prevention of cruelty to animals, or duly authorized governmental agency in accordance with American Veterinary Medical Association accepted standards; or

(b) Conduct which the actor believes to be necessary to avoid an imminent harm or evil to the actor, another person, or an animal; provided that the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by this section and is justifiable as provided in section 703-302 for choice of evils; provided further that, for purposes of this paragraph, as the justification described in section 703-302 shall also apply to conduct which the actor believes to be necessary to avoid an imminent harm or evil to an animal.

(4) Whenever any pet animal or equine animal is so severely injured that there is no reasonable probability that its life can be saved, the animal may be immediately destroyed without creating any offense under this section.

(5) Cruelty to animals in the first degree is a class C felony. In addition to any fines and imprisonment imposed under this section, any person convicted under this section shall be prohibited from possessing or owning any pet animal or equine animal for a minimum of five years from the date of conviction.

[(6)] For the purposes of this section, "person" means any individual; any firm, partnership, joint venture, association, limited liability company, corporation, estate, trust, receiver, or syndicate; or any other legal entity. [L 2007, c 114, §2; am L 2008, c 111, §2; am L 2011, c 135, §1; am L 2013, c 209, §2]

COMMENTARY ON §711-1108.5

Act 114, Session Laws 2007, created the offense of cruelty to animals in the first degree, making it a felony to intentionally or knowingly torture, mutilate, or poison or cause the torture, mutilation, or poisoning of any pet animal resulting in serious bodily injury or death of the pet animal. The legislature found that violence, whether against humans or animals, must be not tolerated in our society. Evidence suggests a link between animal abuse and the commission of violent acts against humans.

Hawaii is only one of nine states in the United States without a felony offense for domestic animal abuse. The legislature also found that pet animals provide a close emotional bond and relationship with their owners and family members and friends. Violence and harm committed against the animals have a significant emotional impact on their owners and family. The felony provisions of Act 114 protected pet animals. Conference Committee Report No. 29.

Act 111, Session Laws 2008, amended this section by making an offense involving serious bodily injury or death to an equine animal a class C felony, thus extending to equine animals some of the legal protections accorded to pet animals relating to animal cruelty. The legislature believed that horses belong under the protection of law and that adding equine animals to the list of animals protected under the animal cruelty law reflects the fact that companion animals come in all shapes and sizes. House Standing Committee Report No. 1589-08, Senate Standing Committee Report No. 2879, Conference Committee Report No. 20-08.

Act 135, Session Laws 2011, amended this section to include killing or attempting to kill any pet animal belonging to another person without first obtaining legal authority or the consent of the pet animal's owner, except for the humane euthanasia of an animal in accordance with American Veterinary Medical Association accepted standards or conduct that the actor believes necessary to avoid an imminent harm or evil to the actor, another person, or an animal. The legislature found that the existing language of this section did not expressly address any method of killing a pet animal other than torture, mutilation, or poisoning. The legislature believed that the loophole should be closed for several reasons. The killing of a pet animal for sport was not only abhorrent, but this type of aggressive behavior has wider implications. Animal abuse has connections to the abuse of family members and may increase aggressive or violent tendencies in children who witness their pets being abused or killed. There were concerns that animal abuse or killing perpetuates the cycle of violence because people who commit acts of serious animal abuse frequently have histories of, or future tendencies toward, violent crimes against humans. By expressly making the killing of a pet animal a criminal offense, the legislature intended to deter this conduct and its grave effects. Senate Standing Committee Report No. 559, Conference Committee Report No. 29.

Act 209, Session Laws 2013, amended this section to prohibit persons convicted of cruelty to animals in the first degree from possessing or owning any pet animal or equine animal for a minimum of five years from the date of conviction. The

legislature found that Act 209 was based on the concept that defendants convicted of cruelty to animals in the first degree should no longer be afforded the privilege of owning a pet animal or equine animal. Conference Committee Report No. 62.

" **§711-1109 Cruelty to animals in the second degree.** (1) A person commits the offense of cruelty to animals in the second degree if the person intentionally, knowingly, or recklessly:

(a) Overdrives, overloads, tortures, torments, beats, causes substantial bodily injury to, or starves any animal, or causes the overdriving, overloading, torture, torment, beating, or starving of any animal;

(b) Deprives a pet animal of necessary sustenance or causes such deprivation;

(c) Mutilates, poisons, or kills without need any animal other than insects, vermin, or other pests; provided that the handling or extermination of any insect, vermin, or other pest is conducted in accordance with standard and acceptable pest control practices and all applicable laws and regulations;

(d) Keeps, uses, or in any way is connected with or interested in the management of, or receives money for the admission of any person to, any place kept or used for the purpose of fighting or baiting any bull, bear, cock, or other animal, and includes every person who encourages, aids, or assists therein, or who permits or suffers any place to be so kept or used;

(e) Carries or causes to be carried, in or upon any vehicle or other conveyance, any animal in a cruel or inhumane manner;

(f) Confines or causes to be confined, in a kennel or cage, any pet animal in a cruel or inhumane manner;

(g) Tethers, fastens, ties, or restrains a dog to a doghouse, tree, fence, or any other stationary object by means of a choke collar, pinch collar, or prong collar; provided that a person is not prohibited from using such restraints when walking a dog with a hand-held leash or while a dog is engaged in a supervised activity; or

(h) Assists another in the commission of any act specified in subsections (1)(a) through (1)(g).

(2) Subsection (1)(a), (b), (c), (e), (f), (g), and (h) shall not apply to:

(a) Accepted veterinary practices;

(b) Activities carried on for scientific research governed by standards of accepted educational or medicinal practices; or

(c) Pest control operations conducted pursuant to chapter 149A by a pest control operator licensed pursuant to chapter 460J, if the pest control is performed under a written contract.

(3) Whenever any animal is so severely injured that there is no reasonable probability that its life or usefulness can be saved, the animal may be immediately destroyed without creating any offense under this section.

(4) Cruelty to animals in the second degree is a misdemeanor, except where the offense involves ten or more pet animals in any one instance which is a class C felony. [L 1972, c 9, pt of §1; am L 1986, c 192, §§1, 2; am L 1998, c 173, §2; am L 2007, c 114, §4; am L 2009, c 160, §1; am L 2011, c 226, §1; am L 2013, c 210, §2]

Law Journals and Reviews

Cruelty to Animals: Recognizing Violence Against Nonhuman Victims. 23 UH L. Rev. 307 (2000).

Case Notes

Constitutionality upheld. 61 H. 136, 597 P.2d 590 (1979).

" **§711-1109.1 Authority to enter premises; notice of impoundment of animal; damage resulting from entry.** (1) If there is probable cause to believe that a pet animal or equine animal is being subjected to treatment in violation of section 711-1108.5, 711-1109, 711-1109.3, or 711-1109.35, as applicable, a law enforcement officer, after obtaining a search warrant, or in any other manner authorized by law, may enter the premises where the pet animal or equine animal is located to provide the pet animal or equine animal with food, water, and emergency medical treatment or to impound the pet animal or equine animal. If after reasonable effort, the owner or person having custody of the pet animal or equine animal cannot be found and notified of the impoundment, an impoundment notice shall be conspicuously posted on the premises and within seventy-two hours after posting, the notice shall be sent by certified mail to the address, if any, from which the pet animal or equine animal was removed.

(2) A law enforcement officer is not liable for any damage resulting from an entry under subsection (1), unless the damage resulted from intentional or reckless behavior on behalf of the law enforcement officer.

(3) A court may order a pet animal or equine animal impounded under subsection (1) to be held at a duly incorporated

humane society or duly incorporated society for the prevention of cruelty to animals. A facility receiving the pet animal or equine animal shall provide adequate food and water and may provide veterinary care.

(4) For purposes of this section, "law enforcement officer" shall have the same meaning as [in] section 710-1000. [L 2006, c 239, pt of §1; am L 2007, c 114, §5; am L 2008, c 128, §§2, 7; am L 2009, c 11, §15 as superseded by c 160, §3; am L 2011, c 149, §§2, 6; am L 2012, c 25, §1]

Note

The repeal and reenactment note at subsection (1) in the main volume took effect on July 1, 2015, pursuant to L 2008, c 128, §7; L 2009, c 160, §3; and L 2011, c 149, §6.

Case Notes

Defendant, an officer of the Hawaii Island Humane Society, had authority under state law to apply for and execute the search warrant. 947 F. Supp. 2d 1087 (2013).

" **§711-1109.2 Forfeiture of animal prior to disposition of criminal charges.** (1) If any pet animal or equine animal is impounded pursuant to section 711-1109.1, prior to final disposition of a criminal charge under section 711-1108.5, 711-1109, 711-1109.3, or 711-1109.35, as applicable, against the pet animal's or equine animal's owner, any duly incorporated humane society or duly incorporated society for the prevention of cruelty to animals that is holding the pet animal or equine animal may file a petition in the criminal action requesting that the court issue an order for forfeiture of the pet animal or equine animal to the county or to the duly incorporated humane society or duly incorporated society for the prevention of cruelty to animals prior to final disposition of the criminal charge. The petitioner shall serve a true copy of the petition upon the defendant and the prosecuting attorney.

(2) Upon receipt of a petition pursuant to subsection (1), the court shall set a hearing on the petition. The hearing shall be conducted within fourteen days after the filing of the petition, or as soon as practicable.

(3) At a hearing conducted pursuant to subsection (2), the petitioner shall have the burden of establishing probable cause that the pet animal or equine animal was subjected to a violation of section 711-1108.5, 711-1109, 711-1109.3, or 711-1109.35, as applicable. If the court finds that probable cause exists, the court shall order immediate forfeiture of the pet

animal or equine animal to the petitioner, unless the defendant, within seventy-two hours of the hearing:

(a) Posts a security deposit or bond with the court clerk in an amount determined by the court to be sufficient to repay all reasonable costs incurred, and anticipated to be incurred, by the petitioner in caring for the pet animal or equine animal from the date of initial impoundment to the date of trial; or

(b) Demonstrates to the court that proper alternative care has been arranged for the pet animal or equine animal.

Notwithstanding subsection (3)(a), a court may waive, for good cause shown, the requirement that the defendant post a security deposit or bond.

(4) If a security deposit or bond has been posted in accordance with subsection (3)(a), the petitioner may draw from the security deposit or bond the actual reasonable costs incurred by the petitioner in caring for the pet animal or equine animal until the date of final disposition of the criminal action. If the trial is continued to a later date, any order of continuance shall require the defendant to post an additional security deposit or bond in an amount determined by the court that shall be sufficient to repay all additional reasonable costs anticipated to be incurred by the petitioner in caring for the pet animal or equine animal until the date of final disposition of the criminal action, and the petitioner may draw from the additional security deposit or bond as necessary.

(5) No pet animal or equine animal may be destroyed by a petitioner under this section prior to final disposition of a criminal charge under section 711-1108.5, 711-1109, 711-1109.3, or 711-1109.35, as applicable, against the pet animal's or equine animal's owner, except in the event that the pet animal or equine animal is so severely injured that there is no reasonable probability that its life can be saved.

(6) Forfeiture of a pet animal or equine animal under this section shall not be subject to the provisions of chapter 712A.

(7) In addition to any reasonable costs incurred under subsection (4) by the petitioner in the caring for the pet animal or equine animal, the court may award reasonable attorney's fees and court costs to the petitioner following the conviction of the defendant.

(8) As used in this section, "pet animal or equine animal" includes any offspring from the pet animal or equine animal that was pregnant at the time of the rescue and born during the impoundment of the pet animal or equine animal. [L 2006, c 239, pt of §1; am L 2007, c 114, §6; am L 2008, c 128, §§3, 7; am L 2009, c 11, §15 as superseded by c 160, §3; am L 2011, c 149, §§3, 6; am L 2012, c 25, §2]

Note

The repeal and reenactment notes at subsections (1), (3), and (5) in the main volume took effect on July 1, 2015, pursuant to L 2008, c 128, §7; L 2009, c 160, §3; and L 2011, c 149, §6.

" **§711-1109.3 Cruelty to animals by fighting dogs in the first degree.** (1) A person commits the offense of cruelty to animals by fighting dogs in the first degree if the person:

(a) Knowingly:

(i) Causes, sponsors, arranges, or holds a dogfight for entertainment or financial gain; or

(ii) Owns, trains, transports, possesses, sells, transfers, or equips any dog with the intent that the dog shall be engaged in a dogfight; or

(b) Recklessly:

(i) Allows a dogfight to occur on any property owned or controlled by the person; or

(ii) Allows any dog intended to be used for a dogfight to be kept, trained on, or transported in, any property owned or controlled by the person.

(2) Nothing in this section shall prohibit any of the following:

(a) The use of dogs in the management of livestock by the owner of the livestock or the owner's employees or agents or other persons in lawful custody thereof;

(b) The use of dogs in hunting wildlife including game; or

(c) The training of dogs or the use of equipment in the training of dogs for any purpose not prohibited by law.

(3) As used in this section, "dogfight" means a dog or dogs pitted against another dog or dogs with the intent that the encounter will result in injury to one or more of the dogs.

(4) Violation of this section shall be a class B felony.

(5) If there is any conflict between this section and section 711-1109, or any other provision of law, this section shall apply. [L 1983, c 129, §1; am L 1987, c 230, §5; am L 2011, c 149, §4]

" **[§711-1109.35] Cruelty to animals by fighting dogs in the second degree.** (1) A person commits the offense of cruelty to animals by fighting dogs in the second degree if the person knowingly:

(a) Wagers on a dogfight;

(b) Attends or pays to attend a dogfight; or

(c) Possesses any device intended to enhance the dog's fighting ability with the intent that the device be used to train or prepare the dog for a dogfight.

(2) As used in this section:

"Bait dog" means a live animal used to train or prepare dogs for a dogfight.

"Device" means both animate and inanimate objects and includes live animals used as bait dogs.

"Dogfight" means a dog or dogs pitted against another dog or dogs with the intent that the encounter will result in injury to one or more of the dogs.

"Wager" means staking or risking something of value on the outcome of a dogfight.

(3) Cruelty to animals by fighting dogs in the second degree is a class C felony. [L 2011, c 149, §1]

" **[§711-1109.37] Cruelty to animals by trapping.** (1) A person commits the offense of cruelty to animals by trapping if the person intentionally, knowingly, or recklessly uses, sets, or maintains:

(a) A steel-jawed leg-hold trap; or

(b) A snare, conibear trap, or foot- or leg-hold trap in an area zoned as residential or any other area where such snare or trap is prohibited by law or rule; except under the situations described in subsection (2).

(2) Subsection (1)(b) shall not apply to employees of state or federal agencies, or persons acting as a designated cooperator or an agent of the State, who are carrying out activities required under a management plan approved by state or federal agencies, pursuant to a mandatory statutory duty for the protection of species listed as threatened or endangered species, or other wildlife species protected by law, or for the protection of public health, safety, or property.

(3) As used in this section:

"Conibear trap" means a contrivance consisting of metal or steel designed to kill by crushing the body or severing the spinal cord of any animal. "Conibear trap" shall not include snap traps used for rodent control.

"Foot- or leg-hold trap" means a contrivance consisting of metal or steel that is off-set, padded or laminated, and is designed to capture and hold any animal by a foot or limb.

"Snare" means a contrivance consisting of a noose, regardless of material, designed to capture, trap, or kill any animal or hold any animal by a foot, limb, or neck.

"Steel-jawed leg-hold trap" means a spring-powered contrivance that captures or holds the limb of an animal by exerting a lateral force with fix-mounted jaws.

(4) Cruelty to animals by trapping is a misdemeanor. [L 2013, c 208, §3]

" **§711-1109.4 Causing injury or death to a service dog or law enforcement animal.** (1) A person commits the offense of causing injury or death to a service dog or law enforcement animal if:

(a) The person recklessly causes substantial bodily injury to or the death of any service dog or law enforcement animal while the service dog or law enforcement animal is in the discharge of its duties; or

(b) The person is the owner of a dog and recklessly permits that dog to attack a service dog or law enforcement animal while the service dog or law enforcement animal is in the discharge of its duties, resulting in the substantial bodily injury or death of the service dog or law enforcement animal.

(2) Subsection (1) shall not apply to:

(a) Accepted veterinary practices;

(b) Activities carried on for scientific research governed by standards of accepted educational or medicinal practices; or

(c) Cropping or docking as customarily practiced and permitted by law.

(3) Any person who commits the offense of causing injury or death to a service dog or law enforcement animal shall be guilty of a class C felony.

(4) In addition to any other penalties, any person who is convicted of a violation of this section shall be ordered to make restitution to:

(a) The owner of the service dog or law enforcement animal for any veterinary bills and out-of-pocket costs incurred as a result of the injury to the service dog or law enforcement animal; and

(b) The person, entity, or organization that incurs the cost of retraining or replacing the service dog or law enforcement animal for the cost of retraining or replacing the service dog or law enforcement animal if it is disabled or killed.

(5) As used in this section "service dog" shall have the same meaning as in section 347-2.5. [L 2002, c 259, pt of §1; am L 2011, c 175, §9; am L 2013, c 205, §2]

" **§711-1109.5 Intentional interference with the use of a service dog or law enforcement animal.** (1) A person commits the offense of intentional interference with the use of a service dog or law enforcement animal if the person, with no legal justification, intentionally or knowingly strikes, beats, kicks, cuts, stabs, shoots, or administers any type of harmful substance or poison to a service dog or law enforcement animal while the service dog or law enforcement animal is in the discharge of its duties.

(2) Subsection (1) shall not apply to:

(a) Accepted veterinary practices;

(b) Activities carried on for scientific research governed by standards or accepted educational or medicinal practices; or

(c) Cropping or docking as customarily practiced and permitted by law.

(3) Intentional interference with the use of a service dog or law enforcement animal is a misdemeanor.

(4) In addition to any other penalties, any person who is convicted of a violation of this section shall be ordered to make restitution to:

(a) The owner of the service dog or law enforcement animal for any veterinary bills and out-of-pocket costs incurred as a result of the injury to the service dog or law enforcement animal; and

(b) The person, entity, or organization that incurs the cost of retraining or replacing the service dog or law enforcement animal for the cost of retraining or replacing the service dog or law enforcement animal, if it is disabled or killed.

(5) Nothing in this section is intended to affect any civil remedies available for a violation of this section.

(6) As used in this section, "service dog" shall have the same meaning as in section 347-2.5. [L 2002, c 259, pt of §1; am L 2011, c 175, §10; am L 2013, c 205, §3]

" **§711-1109.6 REPEALED.** L 2009, c 160, §3.

" **[§711-1109.7] Pet animal or equine animal desertion.** (1) It shall be unlawful for the owner or any person in possession of any pet animal or equine animal to desert the pet animal or equine animal.

(2) Any person who violates subsection (1) shall be guilty of a petty misdemeanor and subject to a fine not exceeding $1,000 in addition to any other penalties.

(3) Any person who violates subsection (1) and recklessly causes the death of or substantial bodily injury to the pet

animal or equine animal shall be guilty of a misdemeanor and subject to a fine not exceeding $2,000 in addition to any other penalties.

(4) Each pet animal or equine animal that is deserted in violation of subsection (1) or suffers death or substantial bodily injury as a result of a violation of subsection (1) shall constitute a separate offense.

(5) For the purposes of this section, "desert" means to leave without the intent to return. [L 2016, c 165, §2]

Revision Note

Subsections redesignated pursuant to §23G-15.

SUPPLEMENTAL COMMENTARY ON §§711-1109 TO 711-1110

Act 165, Session Laws 2016, added §711-1109.7, establishing the offense of pet animal or equine animal desertion. The legislature found that thousands of animals, primarily dogs and cats, were abandoned across Hawaii every year, contributing to increased animal control costs, animal suffering and overpopulation, increased euthanasia rates at local animal shelters, and possible harm to native wildlife. The legislature further found that stronger penalties for animal desertion would encourage pet owners to work with local shelters and animal control contractors when a pet must be re-homed, strengthen pet retention and the human-animal bond, and protect pet owners and the animals themselves. Conference Committee Report No. 117-16.

" **§711-1110 Relating to agent of society.** The agent of any society which is formed or incorporated for the prevention of cruelty to animals, upon being appointed thereto by the president of such society in any district in the State, may within such district make arrests and bring before any district judge thereof offenders found violating the provisions of section 711-1109 to be dealt with according to law. [L 1972, c 9, pt of §1]

COMMENTARY ON §§711-1109 TO 711-1110

When the legislature adopted the Code in 1972, it declined to accept the Proposed Draft's treatment of the offense of cruelty to animals. Section 711-1109 as adopted clarifies the existing law relating to the offense of "cruelty to animals." It makes it a crime to "knowingly or recklessly" overdrive, overload, torture, torment, deprive of necessary sustenance, cruelly beat, or needlessly mutilate or kill any living creature. The section

prohibits the keeping, using, management, or receipt of money for admission for fighting or baiting any "bull, bear, dog, cock, or other creature." It also bars the carrying of any creature in a cruel or inhumane manner, and bars any other act towards the furtherance of any act of cruelty to animals.

The section provides that if a domestic animal is so severely injured that there is no reasonable probability that its life or usefulness can be saved, the animal may be immediately destroyed.

The section also states that the provisions do not apply to "accepted veterinary practices" and "scientific research" activities.

Section 711-1110 is a new section which was not contained in the Proposed Draft. It authorizes agents of any society for the prevention of cruelty to animals to make arrests for violations of §711-1109.

The Code basically retains the prior existing Hawaii law relating to this subject. Thus the provisions set forth in HRS chapter 722, with updating, appear to be restated in substantial part in the Code. The Code treatment thus differs from the brief provision recommended by the Proposed Draft. The legislature felt that the provision was too vague to prevent some types of mistreatment of animals. Conference Committee Report No. 2 (1972).

SUPPLEMENTAL COMMENTARY ON §§711-1109 TO 711-1110

Act 192, Session Laws 1986, amended §711-1109 to provide that the intentional, knowing, or reckless poisoning of an animal, except insects and vermin, constitutes the offense of cruelty to animals. The prohibition was enacted in light of the increasing incidences of paraquat poisoning of animals and because of the uncertainty of whether the present law applied to such acts. House Conference Committee Report No. 37-86, Senate Conference Committee Report No. 27-86, House Standing Committee Report No. 392.

Section 711-1109.3 was added by Act 129, Session Laws 1983, to prohibit the practice of dog fighting and its related activities. While those activities could be prosecuted under §711-1109, the legislature felt the need to impose a more severe sanction than the misdemeanor penalty imposed in that section. Senate Standing Committee Report No. 347, House Standing Committee Report No. 1054.

Act 173, Session Laws 1998, amended §711-1109 to provide that depriving pet animals of necessary sustenance constitutes the crime of cruelty to animals. The legislature noted that the statute identified only those acts which were the most heinous

and extreme, such as beating, mutilation, poisoning, starvation, and torture. However, on a daily basis, other less overt acts such as daily neglect also resulted in the inhumane treatment of animals. Thus, the legislature agreed that pet animals deserved a minimum level of care including adequate food, water, and shelter. Senate Standing Committee Report No. 3222, Conference Committee Report No. 87.

Act 259, Session Laws 2002, added §§711-1109.4 and 711-1109.5, creating criminal offenses for causing injury or death to a guide dog, signal dog, or service animal, and for intentional interference with the use of a guide dog, signal dog, or service animal. Act 259 recognized the unique skills of guide dogs, signal dogs, and service animals that have completed lengthy and specialized training to serve their owners with disabilities. The dogs have become the object of taunting and injury from people or from other dogs. Conference Committee Report No. 58-02.

Act 239, Session Laws 2006, added §§711-1109.1 and 711-1109.2, allowing: (1) law enforcement officers to enter premises and impound a pet animal when there is probable cause to believe the pet animal is being subjected to cruel treatment; and (2) a court to order the forfeiture of an impounded pet animal prior to the disposition of a criminal action against the pet animal's owner. The forfeiture was intended to pay for the animal's care, not to punish the owner. Act 239 provided a way to implement the legal principle that, despite the impoundment, the obligation to provide adequate care for the pet animal remains with the owner. Conference Committee Report No. 6-06, Senate Standing Committee Report No. 2592.

Act 114, Session Laws 2007, strengthened Hawaii's animal cruelty laws. Act 114 amended §711-1109 by making conduct against any animal resulting in substantial bodily injury a misdemeanor. Act 114 also amended §§711-1109.1 and 711-1109.2 by conforming the forfeiture provisions to apply to the felony prohibitions of the Act. Act 114 created the offense of cruelty to animals in the first degree, making it a felony to intentionally or knowingly torture, mutilate, or poison or cause the torture, mutilation, or poisoning of any pet animal resulting in serious bodily injury or death of the pet animal. The legislature found that violence, whether against humans or animals, must be not tolerated in our society. Evidence suggests a link between animal abuse and the commission of violent acts against humans. Hawaii is only one of nine states in the United States without a felony offense for domestic animal abuse. The legislature also found that pet animals provide a close emotional bond and relationship with their owners and family members and friends. Violence and harm committed against the

animals have a significant emotional impact on their owners and family. The felony provisions of Act 114 protected pet animals. Conference Committee Report No. 29.

Act 128, Session Laws 2008, added §711-1109.6, criminalizing animal hoarding as a misdemeanor. Act 128 was in response to recent incidences of the keeping of a large number of animals, typically dogs and cats, without providing adequate care to the animals. The legislature found that animal hoarding is an under-recognized community problem affecting both human and animal welfare. Act 128 sunsets on July 1, 2011. Conference Committee Report No. 45-08.

Act 128, Session Laws 2008, criminalized animal hoarding as a misdemeanor in §711-1109.6, and made conforming amendments to §§711-1109.1 and 711-1109.2. Act 128 sunsets on July 1, 2011. Conference Committee Report No. 45-08.

Act 11, Session Laws 2009, provided for the reenactment of §§711-1109.1(1) and 711-1109.2(1), (3), and (5) upon the repeal of Act 128, Session Laws 2008.

Act 160, Session Laws 2009, amended §711-1109(1) and (2) to clarify the offense of cruelty to animals in the second degree by including intentionally, knowingly, or recklessly: (1) confining or causing to be confined, in a kennel or cage, any pet animal in a cruel or inhumane manner; or (2) tethering, fastening, tying, or restraining a dog to a doghouse, tree, fence, or any other stationary object by means of a choke collar, pinch collar, or prong collar; provided that a person is not prohibited from using the restraints when walking a dog with a handheld leash or while a dog is engaged in a supervised activity. Conference Committee Report No. 85.

Act 160, Session Laws 2009, amended §711-1109.6(1) by decreasing from ["more than twenty"] to "more than fifteen," the number of dogs, cats, or combination of dogs and cats required to be possessed for the animal hoarding statute to apply. Conference Committee Report No. 85, Senate Standing Committee Report No. 590.

Act 160, Session Laws 2009, also extended the sunset date of Act 128, Session Laws 2008, relating to animal hoarding, [affecting §§711-1109.6, 711-1109.1, and 711-1109.2,] from July 1, 2011 to July 1, 2015. Conference Committee Report No. 85.

Act 149, Session Laws 2011, created a new offense, §711-1109.35, cruelty to animals by fighting dogs in the second degree, a class C felony. Act 149 amended §711-1109.3 by converting the existing offense to cruelty to animals by fighting dogs in the first degree, clarifying the elements of the offense, and increasing the penalty from a class C felony to a class B felony. Act 149 also amended §§711-1109.1(1) and 711-1109.2(1), (3), and (5) by adding cruelty to animals by fighting

dogs to the offenses for which a dog may be impounded or forfeited. The legislature found that dogfighting is a brutal practice which often results in the death of the participating dogs within hours or days after the fight. Also, because dogs used for fighting have been bred for generations to be dangerously aggressive toward other animals, the presence of the dogs in a community increases the risk of attacks on not only other animals, but potentially on children, whose small size may cause a fighting dog to perceive a child as another animal. Hawaii ranked fiftieth in a recent national ranking of the weakest state dogfighting laws, primarily because Hawaii lacked a penalty for attending or wagering on an organized dogfight. Act 149 was intended to address the demand for dogfighting, in an attempt to deter the callous practice. Act 149 also specifically prohibited the use of other animals as bait to train fighting dogs. Bait animals are often stolen animals, stray pets, or animals obtained through advertisements that offer pets free to a good home. Senate Standing Committee Report No. 562, House Standing Committee Report No. 1098.

Act 149, Session Laws 2011, also provided for the reenactment of §§711-1109.1(1) and 711-1109.2(1), (3), and (5) upon the repeal of Act 128, Session Laws 2008, as amended by Act 160, Session Laws 2009.

Act 175, Session Laws 2011, amended §§711-1109.4 and 711-1109.5 to conform to the definition of "service dog" established in chapter 347 by the Act. House Standing Committee Report No. 1497.

Act 226, Session Laws 2011, amended §711-1109(1) by requiring that any handling or extermination of insects, vermin, or other pests be conducted in accordance with standard and acceptable pest control practices and all applicable laws and regulations. House Standing Committee Report No. 1300.

Act 25, Session Laws 2012, amended §711-1109.1 to add equine animals to those animals that may be subject to impoundment in the course of an animal cruelty case. The legislature found that Hawaii's animal cruelty laws acknowledged equine animals as companion animals like other pet animals that typically have special meaning to or a relationship with their owners. As such, Act 25 provided the same protections to equine animals that are afforded to pet animals. Senate Standing Committee Report No. 2453, House Standing Committee Report No. 1194-12.

Act 25, Session Laws 2012, amended §711-1109.2 by adding equine animals to those animals that may be subject to forfeiture in the course of an animal cruelty case, subsection (7) to allow a court discretion to determine whether attorney's fees should be awarded to the petitioner following the conviction of the defendant, and subsection (8) to clarify that

a pet animal or equine animal includes any offspring from a pet animal or equine animal that was pregnant at the time of a rescue and born during the impoundment of the pet animal and equine animal. The legislature found that Hawaii's animal cruelty laws acknowledged equine animals as companion animals like other pet animals that typically have special meaning to or a relationship with their owners. However, the forfeiture law did not include equine animals that are often held in limbo during animal cruelty investigations. As such, Act 25 provided the same protections to equine animals that are afforded to pet animals. Senate Standing Committee Report No. 2453, House Standing Committee Report No. 1194-12.

Act 205, Session Laws 2013, amended §711-1109.4 to include recklessly causing substantial bodily injury to or death of any law enforcement animal. Act 205 also established that a violation is a class C felony and provided restitution. The legislature found that law enforcement animals are an integral part of Hawaii's law enforcement and corrections agencies and are hand-selected and highly trained for their jobs. The animals diligently work side-by-side with law enforcement officers, deputies, and other personnel and should be afforded special protections. Act 205 protected law enforcement animals in the line of duty. Conference Committee Report No. 128.

Act 205, Session Laws 2013, amended §711-1109.5 to include intentionally or knowingly striking, beating, kicking, [cutting,] stabbing, shooting, or administering any type of harmful substance or poison to a law enforcement animal. Act 205 provided certain exceptions to the offense, established a violation as a misdemeanor, and provided restitution. The legislature found that law enforcement animals are an integral part of Hawaii's law enforcement and corrections agencies and are hand-selected and highly trained for their jobs. The animals diligently work side-by-side with law enforcement officers, deputies, and other personnel and should be afforded special protections. Act 205 protected law enforcement animals in the line of duty. Conference Committee Report No. 128.

Act 208, Session Laws 2013, added §711-1109.37, establishing an animal cruelty offense for the use of steel-jawed leg-hold traps, or the use of snares, conibear traps, and foot- or leg-hold traps in residential or other prohibited areas. The legislature found that this Act would allow for the use of appropriate tools to control feral animals, such as pigs, goats, sheep, deer, and wild cattle, where there is a potential for these animals to damage natural resource areas, while at the same time establishing reasonable additional protections for pet animals in residential areas, where they are most likely to be inadvertently caught if certain animal control tools are

employed. Act 208 also provided an exemption for state or federal employees to use snares, conibear traps, and foot- or leg-hold traps in residential or other prohibited areas for certain purposes. Conference Committee Report No. 61.

Act 210, Session Laws 2013, amended §711-1109 by elevating the penalty for the offense of cruelty to animals in the second degree from a misdemeanor to a class C felony when the offense involves ten or more pet animals in any one instance, to ensure that defendants who were convicted of animal cruelty involving multiple pet animals served time in jail. Conference Committee Report No. 74.

" **§711-1110.5 Surrender or forfeiture of animals.** Upon conviction, guilty plea, or plea of nolo contendere for any violation of section 711-1108.5, 711-1109, 711-1109.3, or 711-1109.35:

(1) The court may order the defendant to surrender or forfeit the animal whose treatment was the basis of the conviction or plea to the custody of a duly incorporated humane society or duly incorporated society for the prevention of cruelty to animals for the time and under the conditions as the court shall order; and

(2) The court also may order the defendant to surrender or forfeit any other animals under the possession, custody, or control of the defendant to the custody of a duly incorporated humane society or duly incorporated society for the prevention of cruelty to animals for the time and under the conditions as the court shall order, if there is substantial evidence that the animals are being abused or neglected.

The court shall order the defendant to reimburse the duly incorporated humane society or duly incorporated society for the prevention of cruelty to animals for reasonable costs incurred to care, feed, and house any animal that is surrendered or forfeited pursuant to this section. [L 1985, c 262, §1; am L 2006, c 238, §1; am L 2007, c 114, §7; am L 2008, c 128, §§4, 7; am L 2009, c 11, §15 as superseded by c 160, §3; am L 2011, c 149, §§5, 6]

Note

The repeal and reenactment note in the main volume took effect on July 1, 2015, pursuant to L 2008, c 128, §7; L 2009, c 160, §3; and L 2011, c 149, §6.

COMMENTARY ON §711-1110.5

Act 262, Session Laws 1985, requires the defendant convicted of cruelty to animals to surrender: (1) the animal whose abuse led to the conviction; and (2) any other animal if there is evidence of its abuse or neglect. The Legislature felt that a court-ordered hiatus in the custody of the abused animal would accomplish the clear intent of this measure to protect abused animals from further harm. House Standing Committee Report No. 421, Senate Standing Committee Report No. 897.

Act 238, Session Laws 2006, amended this section to clarify that animal care costs incurred for abused or neglected animals will be the responsibility of the abuser. These animals are often left in the custody of humane societies while the court resolves the criminal case against the abuser. A case often takes months or years to be resolved, while the animals are cared for at the humane society's expense. Act 238 made it clear that it is the abuser who is financially responsible for the care of the animals. Conference Committee Report No. 7-06, Senate Standing Committee Report No. 2579.

Act 114, Session Laws 2007, amended this section, among others, by conforming the forfeiture provisions to apply to the felony prohibitions of the Act. Act 114 created the offense of cruelty to animals in the first degree, making it a felony to intentionally or knowingly torture, mutilate, or poison or cause the torture, mutilation, or poisoning of any pet animal resulting in serious bodily injury or death of the pet animal. The legislature found that violence, whether against humans or animals, must be not tolerated in our society. Evidence suggests a link between animal abuse and the commission of violent acts against humans. Hawaii is only one of nine states in the United States without a felony offense for domestic animal abuse. The legislature also found that pet animals provide a close emotional bond and relationship with their owners and family members and friends. Violence and harm committed against the animals have a significant emotional impact on their owners and family. The felony provisions of Act 114 protected pet animals. Conference Committee Report No. 29.

Act 128, Session Laws 2008, criminalized animal hoarding as a misdemeanor in §711-1109.6, and made conforming amendments to this section. Act 128 sunsets on July 1, 2011. Conference Committee Report No. 45-08.

Act 11, Session Laws 2009, provided for the reenactment of §711-1110.5 upon the repeal of Act 128, Session Laws 2008.

Act 160, Session Laws 2009, extended the sunset date of Act 128, Session Laws 2008, relating to animal hoarding, [affecting this section,] from July 1, 2011 to July 1, 2015. Conference Committee Report No. 85.

Act 149, Session Laws 2011, amended this section by adding cruelty to animals by fighting dogs to the offenses that may force forfeiture of a dog. The legislature found that dogfighting is a brutal practice which often results in the death of the participating dogs within hours or days after the fight. Also, because dogs used for fighting have been bred for generations to be dangerously aggressive toward other animals, the presence of the dogs in a community increases the risk of attacks on not only other animals, but potentially on children, whose small size may cause a fighting dog to perceive a child as another animal. Senate Standing Committee Report No. 562, House Standing Committee Report No. 1098.

Act 149, Session Laws 2011, also provided for the reenactment of §711-1110.5 upon the repeal of Act 128, Session Laws 2008, as amended by Act 160, Session Laws 2009.

" **§711-1110.9 Violation of privacy in the first degree.** (1) 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:

(a) 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; or

(b) The person knowingly discloses an image or video of another identifiable person either in the nude, as defined in section 712-1210, or engaging in sexual conduct, as defined in section 712-1210, without the consent of the depicted person, with intent to harm substantially the depicted person with respect to that person's health, safety, business, calling, career, financial condition, reputation, or personal relationships; provided that:

(i) This paragraph shall not apply to images or videos of the depicted person made:

(A) When the person was voluntarily nude in public or voluntarily engaging in sexual conduct in public; or

(B) Pursuant to a voluntary commercial transaction; and

(ii) Nothing in this paragraph shall be construed to impose liability on a provider of "electronic communication service" or "remote computing service" as those terms are defined in section 803-41, for an image or video disclosed through

the electronic communication service or remote computing service by another person.

(2) Violation of privacy in the first degree is a class C felony. In addition to any penalties the court may impose, the court may order the destruction of any recording made in violation of this section. [L 1999, c 278, §1; am L 2003, c 48, §3; am L 2004, c 83, §2; am L 2014, c 116, §1]

COMMENTARY ON §711-1110.9

Act 278, Session Laws 1999, added this section to make it a felony to take sexual photographs or videotapes of a person without that person's consent and when the person expects privacy. The legislature found that current laws criminalizing a violation of privacy do not distinguish between surreptitious recording of any events and sounds in a private place, and the more egregious offense of installing a hidden device to surreptitiously record or observe persons while they are undressed or engaging in sexual activity. The legislature believed that using a hidden device to record someone while engaged in very personal acts merits a higher penalty than simply using a hidden device to record any events in a private place. Senate Standing Committee Report No. 1579, Conference Committee Report No. 87.

Act 48, Session Laws 2003, amended this section to update the crime of violation of privacy in the first degree to punish "video voyeurism" in public places. The legislature found that through technological advancements, recording and broadcasting devices are easily concealed. Incidents of "video voyeurism" in public places have occurred but are not chargeable under existing laws. Changing the offense of violation of privacy would address the growing concern for the offensive practice of "upskirt photography." Senate Standing Committee Report No. 637, House Standing Committee Report No. 1316.

Act 83, Session Laws 2004, amended this section to clarify that the offense of violation of privacy in the first degree included the use or installation, or both, in any private place and without the consent of the person or persons entitled to privacy therein, of any device for observing, recording, amplifying, or broadcasting another person in a stage of undress or sexual activity in that place. House Standing Committee Report No. 1174-04.

Act 116, Session Laws 2014, expanded the offense of violation of privacy in the first degree to include knowingly disclosing an image or video of another identifiable person either in the nude or engaging in sexual conduct without the consent of the depicted person with intent to harm substantially the depicted

person. Act 116 also provided immunity for: (1) the distribution of images or videos made of the depicted person while voluntarily nude or voluntarily engaging in sexual conduct in public, or pursuant to a voluntary commercial transaction; and (2) the providers of electronic communication service or remote computing service for images or videos disclosed through the service by another person. The legislature found that California legislation that was signed into law in 2013 prohibited a "revenge porn" perpetrator from distributing sexually explicit pictures that were intended to be private. A number of other states have since considered similar legislation. Advancements in cellular and internet technology have made it easy to disseminate and access intimate images, videos, and recordings that depict an individual in the nude or engaged in sexual activity. These images and recordings can be used to retaliate against the depicted individual. Act 116 addressed the concerns and ramifications of the dissemination of a representation of nude person or, of a person engaging in sexual conduct without the depicted person's consent by making the dissemination a criminal offense. Conference Committee Report No. 29-14, Senate Standing Committee Report No. 3162.

" **§711-1111 Violation of privacy in the second degree.** (1) 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:

(a) Trespasses on property for the purpose of subjecting anyone to eavesdropping or other surveillance in a private place;

(b) Peers or peeps into a window or other opening of a dwelling or other structure adapted for sojourn or overnight accommodations for the purpose of spying on the occupant thereof or invading the privacy of another person with a lewd or unlawful purpose, under circumstances in which a reasonable person in the dwelling or other structure would not expect to be observed;

(c) Trespasses on property for the sexual gratification of the actor;

(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 other than another person in a stage of undress or sexual activity; provided that this paragraph shall not prohibit a person from making a video or audio recording or taking a photograph of a

law enforcement officer while the officer is in the performance of the officer's duties in a public place or under circumstances in which the officer has no reasonable expectation of privacy and the person is not interfering with the officer's ability to maintain safety and control, secure crime scenes and accident sites, protect the integrity and confidentiality of investigations, and protect the public safety and order;

(e) Installs or uses outside a private place any device for hearing, recording, amplifying, or broadcasting sounds originating in that place which would not ordinarily be audible or comprehensible outside, without the consent of the person or persons entitled to privacy therein;

(f) Covertly records or broadcasts an image of another person's intimate area underneath clothing, by use of any device, and that image is taken while that person is in a public place and without that person's consent;

(g) Intercepts, without the consent of the sender or receiver, a message or photographic image by telephone, telegraph, letter, electronic transmission, or other means of communicating privately; but this paragraph does not apply to:

(i) Overhearing of messages through a regularly installed instrument on a telephone party line or an extension; or

(ii) Interception by the telephone company, electronic mail account provider, or telephone or electronic mail subscriber incident to enforcement of regulations limiting use of the facilities or incident to other operation and use;

(h) Divulges, without the consent of the sender or the receiver, the existence or contents of any message or photographic image by telephone, telegraph, letter, electronic transmission, or other means of communicating privately, if the accused knows that the message or photographic image was unlawfully intercepted or if the accused learned of the message or photographic image in the course of employment with an agency engaged in transmitting it; or

(i) Knowingly possesses materials created under circumstances prohibited in section 711-1110.9.

(2) This section shall not apply to any dissemination, distribution, or transfer of images subject to this section by an electronic communication service provider or remote storage

service in the ordinary course of its business. For the purpose of this subsection:

"Electronic communication" means any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or part by a wire, radio, electromagnetic, photoelectronic, or photo-optical system.

"Electronic communication service" means any service that provides to users thereof the ability to send or receive wire or electronic communications.

"Electronic communication service provider" means any person engaged in the offering or sale of electronic communication services to the public.

"Electronic communication system" means any wire, radio, electromagnetic, photo-optical, or photoelectronic facilities for the transmission of wire or electronic communications, and any computer facilities or related electronic equipment for the electronic storage of such communications, including e-mail, web hosting, multimedia messaging services, and remote storage services offered by an electronic communication service provider.

"Remote storage service" means the provision to the public of computer storage or processing services by means of an electronic communication system.

(3) For the purposes of this section:

"Intimate areas" means any portion of a person's underwear, pubic area, anus, buttocks, vulva, genitals, or female breast.

"Intimate areas underneath clothing" does not include intimate areas visible through a person's clothing or intimate areas exposed in public.

"Public place" means an area generally open to the public, regardless of whether it is privately owned, and includes but is not limited to streets, sidewalks, bridges, alleys, plazas, parks, driveways, parking lots, buses, tunnels, buildings, stores, and restaurants.

(4) Violation of privacy in the second degree is a misdemeanor. In addition to any penalties the court may impose, the court may order the destruction of any recording made in violation of this section. [L 1972, c 9, pt of §1; gen ch 1993; am L 1999, c 278, §2; am L 2003, c 48, §4; am L 2004, c 83, §3; am L 2006, c 230, §48; am L 2012, c 59, §1; am L 2016, c 164, §2]

Revision Note

In subsection (2), definitions rearranged pursuant to §23G-15.

Cross References

Electronic eavesdropping, see chapter 803, part IV.

COMMENTARY ON §711-1111

This section is provided on the theory that in an era of increasing use of electronic eavesdropping devices, criminal sanctions should be used to protect an individual's right of privacy. Wiretapping is contrary to federal law, but it is right that state law should also be on record against it. Therefore, in addition to simple trespassory, nonmechanical eavesdropping, covered in subsection (1)(a), §711-1111 forbids any sort of electronic or mechanical eavesdropping or surveillance whether done through some physical connection with the place under surveillance or not. Thus subsection (1)(b) forbids installation or use of eavesdropping equipment in a "private place" (defined in §711-1100) whereas subsection (1)(c) forbids the use anywhere of equipment designed to receive sounds originating in a private place and normally inaudible or incomprehensible outside. Physical contact with the private place is not necessary. Subsection (1)(d) generally forbids wiretapping, but does not apply to listening in on a party line or extension phone (these are risks known to all telephone users and are not of the magnitude of a wiretap), nor does it apply to interception by the telephone company or a subscriber seeking to ascertain that the telephone is not being put to improper use. Thus a company with a telephone switchboard would not be guilty of a crime if it ordered an employee to monitor calls in order to assure that instructions limiting use of the telephone to business calls were being followed. Subsection (1)(e) forbids anyone to divulge the existence or contents of a telephone call, telegram, or letter, which he knows was unlawfully intercepted, or which he learned of in the course of his employment by a transmitting agency, without the consent of the sender or the receiver. Since subsection (1)(d) has the exceptions noted, subsection (1)(e) would not cover the party line eavesdropper who reveals what he has overheard.

Previous Hawaii law in this area was limited to violations of privacy resulting from interception or recordation of telephone and wire communications.[1] The Code, therefore, is broader in its overall scope than prior law. However, as applied to telephone and wire interceptions or recordations, the Code would limit criminal liability to situations where the conduct was engaged in without the consent of both parties (sender and receiver) to the conversation or communication. If one of the parties to the communication authorizes its interception or recordation (e.g., in an attempt to trace obscene or

extortionary telephone calls), criminal sanctions ought not to result.

SUPPLEMENTAL COMMENTARY ON §711-1111

Act 278, Session Laws 1999, amended this section, more specifically, by making the offense of violation of privacy in the second degree a misdemeanor. The offense does not include the installation of any device for, among other things, videotaping or filming another person in a state of undress or sexual activity, which is covered under §711-1110.9. The knowing possession of materials created under circumstances prohibited in §711-1110.9 is included as an offense under this section.

Act 48, Session Laws 2003, amended this section to update the crime of violation of privacy in the second degree to punish "video voyeurism" in public places. The legislature found that through technological advancements, recording and broadcasting devices are easily concealed. Incidents of "video voyeurism" in public places have occurred but are not chargeable under existing laws. Changing the offense of violation of privacy would address the growing concern for the offensive practice of "upskirt photography." Senate Standing Committee Report No. 637, House Standing Committee Report No. 1316.

Act 83, Session Laws 2004, amended this section to include photographic images among the types of private communications that may not be intercepted or divulged without the consent of the sender or receiver, except when the images are disseminated, distributed, or transferred by electronic communication service providers or remote storage services in the ordinary course of business. Act 83 also defined the terms "electronic communication," "electronic communication service," "electronic communication service provider," "electronic communication system," and "remote storage service." Act 83 made statutory amendments to the existing privacy law in order to prohibit the inappropriate use of new digital technologies, such as cellular phones, that are capable of taking digital photographs and transmitting those images. House Standing Committee Report No. 826-04, Conference Committee Report No. 43-04.

Act 230, Session Laws 2006, amended subsection (1) to add peering or peeping into windows and trespassing on property for sexual gratification to the offense of violation of privacy in the second degree. House Standing Committee Report No. 665-06.

Act 59, Session Laws 2012, amended this section to exclude the surveillance of another in a stage of undress or sexual activity as such acts are covered by violation of privacy in the first degree. The legislature found that existing law regarding a

violation of privacy in the second degree, a misdemeanor, as it pertains to a person in a stage of undress or sexual activity was also covered by the felony offense of violation of privacy in the first degree. According to testimony submitted, case law required that a violator be charged under the lesser charge in order to avoid constitutional due process and equal protection issues. Act 59 would resolve that conflict by excluding the behavior from the lesser second degree offense, thereby allowing violators to be charged under the felony offense. House Standing Committee Report No. 664-12, Senate Standing Committee Report No. 3199.

Act 164, Session Laws 2016, amended this section to establish an exception to the offense of violation of privacy in the second degree for a person making a video or audio recording or photograph of a law enforcement officer while the officer is in the performance of duties in a public place or under circumstances in which the officer has no reasonable expectation of privacy; provided that the officer may take reasonable action to maintain safety and control, secure crime scenes and accident sites, protect the integrity and confidentiality of investigations, and protect the public safety and order. The legislature found that with the popularity and widespread use of smart phones with video or audio recording and photographing capabilities, recordings and photos of law enforcement officers who are exercising their duties have been used as evidence in police conduct matters or widely disseminated via social media. However, such recordings and photographs may be seen as obstructing government operations or an invasion of privacy. Act 164 established an exception under certain circumstances to enable a person to record or photograph a law enforcement officer exercising the officer's duties without violating the law. Senate Standing Committee Report No. 2525, Conference Committee Report No. 129-16.

Law Journals and Reviews

Don't Smile, Your Image Has Just Been Recorded on a Camera-Phone: The Need For Privacy in the Public Sphere. 27 UH L. Rev. 377 (2005).

§711-1111 Commentary:

1. H.R.S. §§275-3 and 275-5.

" **[§711-1112] Interference with the operator of a public transit vehicle.** (1) A person commits the offense of

interference with the operator of a public transit vehicle if the person interferes with the operation of a public transit vehicle or lessens the ability of the operator to operate the public transit vehicle by:

(a) Intentionally, knowingly, or recklessly causing bodily injury to the operator of the public transit vehicle; or

(b) Threatening, by word or conduct, to cause bodily injury to the operator of the public transit vehicle with the intent to terrorize, or in reckless disregard of the risk of terrorizing the operator of the public transit vehicle.

(2) For the purposes of this section, "public transit vehicle" is a public paratransit vehicle providing service to the disabled, any transit vehicle used for the transportation of passengers in return for legally charged fees or fares, any school bus, or any taxi.

(3) Interference with the operator of a public transit vehicle is a class C felony. [L 1996, c 87, §3]

Cross References

Unauthorized entry into motor vehicle, see §§708-836.5 and 708-836.6.

COMMENTARY ON §711-1112

Act 87, Session Laws 1996, added the new offense of interference with the operator of a public transit vehicle due to the increased danger to the public involved when the operators are terrorized or assaulted. Conference Committee Report No. 30.