

**TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
THIRTIETH LEGISLATURE, 2019**

ON THE FOLLOWING MEASURE:

H.B. NO. 748, RELATING TO PROPERTY FORFEITURE.

LATE

BEFORE THE:

HOUSE COMMITTEE ON JUDICIARY

DATE: Wednesday, February 13, 2019 **TIME:** 2:01 p.m.

LOCATION: State Capitol, Room 325

TESTIFIER(S): Clare E. Connors, Attorney General, or
Gary K. Senaga or Michael S. Vincent, Deputy Attorney General

Chair Lee and Members of the Committee:

The Department of the Attorney General (“the Department”) provides comments on this measure. This bill proposes changes to the asset forfeiture program by requiring a felony conviction prior to the forfeiture of any property and removing the distribution of property and money from state and local governments and the criminal forfeiture fund to the Hawaii law enforcement assisted diversion program and the state general fund. The bill, however, keeps intact the Department’s responsibilities for receiving forfeited property, selling or destroying the forfeited property, compromising or paying valid claims and making other dispositions authorized by law.

With these responsibilities, the bill is unclear as to how or when the Department’s costs and expenses will be paid. The requirement that forfeiture occur only upon conviction is of particular concern due to the storage and maintenance costs that will be incurred before the conviction occurs.

In section 2 of the bill, section 712A-16(2), Hawaii Revised Statutes, is amended to provide that money and sale proceeds after payment of administrative expenses shall be distributed half to the Hawaii law enforcement assisted diversion program and half to the State general fund. The Department is concerned that the repeal of section 712A – 16(2)(a) – (c) would gut the revolving criminal forfeiture funds established under section 712A – 16(4) which is used among other things, for payments of expenses necessary to run the forfeiture program. We recommend that this measure be held. Thank you for the opportunity to testify.

DEPARTMENT OF THE PROSECUTING ATTORNEY
CITY AND COUNTY OF HONOLULU

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THE HONORABLE CHRIS LEE, CHAIR
HOUSE COMMITTEE ON JUDICIARY
Thirtieth State Legislature
Regular Session of 2019
State of Hawai'i

February 13, 2019

RE: H.B. 748; RELATING TO PROPERTY FORFEITURE.

Chair Lee, Vice-Chair San Buenaventura and members of the House Committee on Judiciary, the Department of the Prosecuting Attorney of the City and County of Honolulu submits the following testimony in opposition to H.B. 748.

Essentially, this measure would prohibit civil asset forfeiture by reason of the commission of a covered offense, unless the State proves various matters “beyond a reasonable doubt” (a standard of proof often used in criminal law). Rather than forcing such a far-reaching and premature overhaul of Hawaii’s well-conceived program, the Department strongly encourages the Legislature to consider the recommendations of the State Auditor, published June 2018 (available online at files.hawaii.gov/auditor/Reports/2018/18-09.pdf), which are currently in the process of being implemented.

Current forfeiture laws are used to immediately and effectively disrupt the infrastructure of criminal activity and protect the community. This is a civil legal process that operates independently from any related criminal cases, much like civil lawsuits and criminal charges proceed independently from each other in other circumstances. Via asset forfeiture, the manufacturing, packaging, distribution, and sale of illegal drugs can be immediately thwarted by seizing the materials, tools, equipment, cash, vehicles, and other items related to these enterprises. The changes proposed by H.B. 748 would significantly compromise law enforcement’s ability to deter this illegal conduct, and in turn the safety of our neighborhoods, by conflating the relevant civil and criminal standards and proceedings and upending a generally well-conceived and well-established program.

Concerns about “innocent owners” being deprived of their property or “policing for profit” are unfounded. Hawaii’s forfeiture laws provide for the protection of property owners’ rights, and numerous safeguards are already codified in the statute. We are confident that property is being seized and forfeited fairly and equitably and the abuse present in other jurisdictions simply does not exist here.

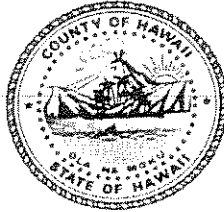
Before any drastic changes, such as those proposed in H.B. 748, are made to Hawaii’s forfeiture laws, further discussion and review should take place, at a minimum, to study its impact on law enforcement and the safety of the public. In 2016, the Legislature considered a bill (S.B. 2149) to require that the Department of the Attorney General establish a working group to review and discuss Hawaii’s forfeiture laws and make recommendations to improve these laws, including identifying any areas of concern or abuse. While we firmly believe that Hawaii’s asset forfeiture program is generally well-conceived and well-operated, we understand that “nothing is perfect,” and are open to being part of a process to evaluate all areas of the program.

Also in 2016, the Legislature passed H.C.R. 4 (2016), requesting that the Hawaii State Auditor conduct a study of Hawaii’s asset forfeiture program. After an in-depth study, the Auditor issued a report in June 2018, recommending that formal rules and procedures be promulgated by the Attorney General, to ensure uniform procedures for all parties and increased transparency for the public. Notably, the Auditor opined that the program’s dismissal rates seem high—14% statewide—and the program may actually be overstating the reported seized property values (due to possibly double-counting refiled cases). In recent months, the Attorney General has circulated draft rules, which are currently being reviewed by stakeholders for further discussion and finalization, so a potential working group could also evaluate the implementation and efficacy of these rules.

For all of the foregoing reasons, the Department of the Prosecuting Attorney of the City and County of Honolulu opposes H.B. 748. Thank for you the opportunity to testify on this matter.

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OFFICE OF THE PROSECUTING ATTORNEY

TESTIMONY IN OPPOSITION TO HB 748

A BILL FOR AN ACT RELATING TO PROPERTY
FOREITURE

COMMITTEE ON JUDICIARY

Rep. Chris Lee, Chair
Rep. Joy San Buenaventura, Vice Chair

Wednesday, February 13, 2019, 2:01 p.m.
State Capitol, Conference Room 325

Honorable Chair Lee, Honorable Vice Chair San Buenaventura, and Members of the Committee on Judiciary, the Office of the Prosecuting Attorney, County of Hawai'i submits the following testimony in **STRONG OPPOSITION** to House Bill 748.

This measure prohibits civil asset forfeiture by reason of the commission of a covered offense, to the extent of the property owner's interest, unless the covered offense is a felony for which the property owner has been convicted, prohibits forfeiture of an animal prior to disposition of criminal charges, and directs half of the proceeds to the Hawai'i law enforcement assisted diversion program and the remaining half to the state general revenue fund.

The vast majority of our asset forfeiture cases result directly from narcotics trafficking. According to the CDC, in 2017 over 70,000 people died as a result of drug overdose. The Hawai'i's Asset Forfeiture Program is one of the most successful ways to undermine the economic infrastructure of drug traffickers and other criminal enterprises. Criminal enterprises generate a profit from the sale of their "product" or "services" through criminal activity. Asset forfeiture can immediately remove the tools, equipment, cash flow, profit, and sometimes the product itself from the criminals and the criminal organization, rendering the criminal organization powerless to operate.

The Audit of the Department of The Attorney General's Asset Forfeiture Program: A Report to the Governor and the Legislature of the State of Hawai'i was published in June 2018. The Department of the Attorney General has taken numerous steps to address and implement the findings and recommendation of that audit.

We believe the changes suggested in HB 748 would create a more time consuming, expensive and difficult process, which would weaken the deterrent effect of our current asset forfeiture laws. There needs to be further discussion on the ramifications of reducing law enforcement's ability to deter these criminal enterprises, as well as time to allow for the adoption

of the updated Administrative Rules – and the clarity and conformity they will bring – likely resulting in improved outcomes.

National pushback against asset forfeiture is largely arising in reaction to mainland states and communities where asset forfeiture has been shown to be used in a discriminatory manner – this has not been shown to be a problem here in Hawai'i.

The Office of the Prosecuting Attorney, County of Hawai'i believes that the current asset forfeiture program is not being abused and we remain committed to the cause of ensuring that any property forfeited is within the interest of justice.

For the foregoing reasons, the Office of the Prosecuting Attorney, County of Hawai'i, **STRONGLY OPPOSES** the passage of House Bill No. 748. Thank you for the opportunity to testify on this matter.

POLICE DEPARTMENT
CITY AND COUNTY OF HONOLULU

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KIRK CALDWELL
MAYOR

SUSAN BALLARD
CHIEF

JOHN D. McCARTHY
JONATHAN GREMS
DEPUTY CHIEFS

OUR REFERENCE CT-TA

February 13, 2019

The Honorable Chris Lee, Chair
and Members
Committee on Judiciary
House of Representatives
Hawaii State Capitol
415 South Beretania Street, Room 325
Honolulu, Hawaii 96813

Dear Chair Lee and Members:

SUBJECT: House Bill No. 748, Relating to Property Forfeiture

I am Major Calvin Tong of the Narcotics/Vice Division of the Honolulu Police Department (HPD), City and County of Honolulu.

The HPD opposes House Bill No. 748, Relating to Property Forfeiture.

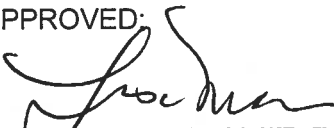
If passed, this bill would require the conviction of a felony offense before civil forfeiture cases could proceed. This delay of the civil forfeiture proceeding could unduly deprive an individual of property that would likely have been seized as evidence in the criminal offense. Allowing the civil forfeiture case to proceed without the requirement of a criminal conviction speeds the civil adjudication process and if warranted, the return of property to its rightful owner.

In addition, this bill eliminates the investigating local law enforcement agency from the proceeds of the forfeited property. The HPD relies on the proceeds from forfeiture property to fund unbudgeted equipment, training, and investigative expenses. Cutting these funds would have a direct impact on the services we provide to the community.

In keeping with our commitment to serving and protecting our community with aloha, the HPD urges you to oppose House Bill No. 748, Relating to Property Forfeiture.

Thank you for the opportunity to testify.

APPROVED:


for: Susan Ballard
Chief of Police

Sincerely,


Calvin Tong, Major
Narcotics/Vice Division



Dedicated to safe, responsible, humane and effective drug policies since 1993

TO: House Committee on Judiciary
FROM: Carl Bergquist, Executive Director
HEARING DATE: February 13, 2019, 2:01PM
RE: HB748, Relating to Property Forfeiture, **SUPPORT**

Dear Chair Lee, Vice Chair San Buenaventura and Committee Members:

The Drug Policy Forum of Hawai'i (DPFHI) **strongly supports** this measure to reform Hawaii's outdated civil asset forfeiture law. The law itself is a relic of the 1980s' War on Drugs, and [consigns Hawaii to the very bottom of a nationwide ranking of similar laws](#). In short, our forfeiture law allows for the use of an upside down civil process to seize people's assets after using the low "preponderance of the evidence" standard to establish a connection, but requiring no conviction or charge, to an alleged crime. Requiring a conviction related to the property seizure, as HB748 does, brings a modicum of justice into the process. We applaud that the bill seemingly removes the profit incentive from the arresting and prosecuting agencies as the Department of the Attorney General, and instead redirects one half of sale proceeds to the state general fund. While we are strong supporters of Law Enforcement Assisted Diversion (LEAD), we are leery of funding, even in part, this important program with forfeiture proceeds. We also suggest a few amendments to the bill.

At the very latest, the revelations in the Auditor's Report "Audit of the Department of the Attorney General's Asset Forfeiture Program" (18-09) amply highlighted the degree to which forfeiture had been shrouded in a lack of accountability and injustice.¹ There were no administrative rules, no policies or procedures and no responsible manager in place for a program that oversaw the seizure and sale of innocent people's assets. Orwellian is an apt term here. Further, **the guidance for property owners to recover property lost was completely insufficient**. For many people, even one day without a

¹ <http://files.hawaii.gov/auditor/Overviews/2018/18-09AuditorSummary.pdf>

vehicle unjustly seized can mean the loss of a job with resulting devastation for a family. At this point, we must remind ourselves that this program nominally exists to tackle crime and target drug kingpins. The innocent here are not just collateral damage of a possibly unconstitutional policy, but of a dereliction of duty of their own highest law enforcement officer, the Department of the Attorney General.

DPFH was recently party to an amicus brief filed in the U.S. Supreme Court in a case involving forfeiture, [Timbs v. Indiana](#).² While the case may be narrowly decided to rule that the Excessive Fines Clause of the Eight Amendment of the US Constitution applies to the states, at its heart it involved a forfeiture case of vehicle worth far more than the crime at issue. In the amicus, we ensured that the Hawai'i Auditor's report was referenced, highlighting that a whopping 85% of forfeiture cases were uncontested between 2006 and 2015.³ In June, the Court appears likely to rule for Mr. Timbs and his vehicle in the aforementioned narrow fashion. One day, however, it is likely to return to the issue of forfeiture laws like Indiana's or Hawaii's, and strike them down. If HB748 is adopted by the Legislature, we may well have nipped that issue in the bud.

SUGGESTED AMENDMENTS:

- Introduction of a "beyond a reasonable doubt" standard of proof replacing the current "preponderance of the evidence" standard, see [SB1467 SD1](#) (Section 3);
- Termination of the use of administrative proceedings to handle forfeiture cases, replacing them with judicial proceedings, see [SB1467 SD1](#) (Section 7);
- Requiring that the State pay for the secure storage of seized assets, see [SB1467 SD1](#) (Section 5);
- Narrowing the list of covered offenses in HRS §712A-4 to felonies, exempting small amount drug possession, "promoting a dangerous drugs in the third degree" (§712-1243);
- Inserting a prohibition of Hawai'i law enforcement agencies participating in "[equitable sharing](#)" operations with federal law enforcement .Without such a

² Timbs v. Indiana, Docket Nr 17-1091, argued November 28, 2018. Decision expected by June 2019.

³ <http://www.drugpolicy.org/press-release/2018/09/dpa-files-amicus-brief-supreme-court-case-arguing-excessive-fines-clause>.

prohibition, local police could circumvent the intent of this bill, be party to the deprivation of Hawai'i residents property without a charge or conviction and profit off such forfeitures. California and other states have successfully reigned in this practice, which has been expanded by the Trump Administration.⁴;

- Distributing all proceeds to the State General Fund. It is our hope that fewer forfeitures will be conducted as a result of this bill, and as such we would not want an important program like LEAD to be dependent on a unstable, shrinking revenue stream.

Mahalo for the opportunity to testify.

⁴ <https://harvardlawreview.org/2018/06/how-crime-pays-the-unconstitutionality-of-modern-civil-asset-forfeiture-as-a-tool-of-criminal-law-enforcement/>.

TESTIMONY IN SUPPORT OF HB 748

TO: House Committee on Judiciary

FROM: Nikos Leverenz
Grants, Development & Policy Manager

DATE: February 13, 2019 (2:01 PM)

Chair Lee, Vice-Chair San Buenaventura, and Members of the Committee:

Hawai'i Health & Harm Reduction Center (HHRC) **supports** HB 748, which would reform this state's asset forfeiture laws to protect the rights of innocent property owners against undue and often unsubstantiated executive actions against them.

Last year, [the Hawaii State Auditor found serious shortcomings in the practice of asset forfeiture over the past three decades](#) up to the present day, including the absence of administrative rules from the state Attorney General describing procedures and practice requirements. As such, "the program cannot fully account for the property it has obtained by forfeiture, is unable to adequately manage its funds, and cannot review or reconcile its forfeiture case data to ensure accurate reporting of information to the Legislature and the general public."

HHRC works with many individuals who are impacted by poverty, housing instability, and other social determinants of health. Many have behavioral health problems, including those relating to substance use and underlying mental health conditions. Under Hawaii's current law governing asset forfeiture innocent property owners who do not have the economic means to post bond and hire an attorney to secure their property are effectively left without legal recourse.

We support vigorous transparency provisions that note each incidence of forfeiture, including the value of the property, the seizing agency, and the dates of seizure and forfeiture. Annual independent audits could also help ensure that this legislature and the public have the confidence that the Attorney General and county officials are operating within prescribed statutory boundaries.

While we are grateful for the intent to find a new potential funding source for law enforcement assisted diversion (LEAD), all forfeiture proceeds should be directed to the general fund without restriction so that the legislature is able to respond to its budgetary priorities in a given year. As the audit notes, the Attorney General and county officials have been poor stewards of forfeiture funds, ignoring the statutory requirement that 20 percent of funds from the Criminal Forfeiture Fund be dedicated to drug abuse education, prevention, and rehabilitation programs.

Importantly, we also support an amendment to this bill that would preclude federal adoption of asset forfeiture cases so that county officials are not able to circumvent reforms forwarded by this legislature. California's legislature included this crucial provision in their asset forfeiture reform two years ago.

Thank you for the opportunity to testify on this measure.



Hawai'i

Committee: House Committee on Judiciary
Hearing Date/Time: Wednesday, February 13, 2019, 2:00 p.m.
Place: Conference Room 325
Re: Testimony of the ACLU of Hawai'i in Support of H.B. 748, Relating to Property Forfeiture

Dear Chair Lee, Vice Chair San Buenaventura, and Members of the Committee on Judiciary:

The American Civil Liberties Union of Hawai'i ("ACLU of Hawai'i") writes in support of, with one suggested amendment to, H.B. 748, which would reform Hawai'i's civil asset forfeiture law by prohibiting forfeiture except in cases where the property owner has been convicted of a covered felony offense, and by reducing the profit incentive to seize property by directing half of all forfeiture proceeds to the general fund. In order to completely eliminate the profit incentive to seize property, however, we respectfully request that the Committee amend this bill to direct 100 percent of proceeds to the general fund, rather than tying forfeiture proceeds to a particular program.

Hawai'i's current civil asset forfeiture law is based on the legal fiction that property can be guilty. Civil asset forfeiture is a civil action initiated by the government against a piece of property on the basis that the property was used in the commission of a covered criminal offense. Due to the way that the current law is written, government can seize (and profit from) property without obtaining a criminal conviction in connection with the property. Although this practice is often justified as a way to incapacitate large-scale criminal operations, it has been used to create revenue for law enforcement with little restriction or accountability. Critics often call this practice "policing for profit," because, under Hawai'i's law, the seizing agency (usually a county police department) keeps 25 percent of the profits from forfeited property; the prosecuting attorney's office keeps another 25 percent, and the remaining 50 percent goes into the criminal forfeiture fund, which finances the asset forfeiture division within the Department of the Attorney General, the agency charged with adjudicating the vast majority of forfeiture cases (rather than the courts). At every step of the process, there exists a clear profit motive to a) seize property, and b) ensure that seized property is successfully forfeited and auctioned by the state.

Hawai'i's law enforcement is abusing the current system. The Hawai'i State Auditor conducted a study of civil asset forfeiture in Hawai'i, which was published in June 2018.¹ The report found that in fiscal year 2015, "**property was forfeited without a corresponding criminal charge in 26 percent of the asset forfeiture cases.**" This means that during this period, in over one quarter of all

¹ State of Hawai'i, Office of the Auditor, *Audit of the Department of the Attorney General's Asset Forfeiture Program, Report No. 18-09* (June 2018).

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civil property forfeiture cases, not only was there no conviction, but *there were not even criminal charges filed*.²

It comes as no surprise that Hawai‘i’s civil asset forfeiture law is regarded among the worst in the nation, receiving a grade of D- by the Institute for Justice.³ A low standard of proof and a lack of administrative rules governing forfeitures means that property can be seized when it has only a tenuous connection to the alleged underlying offense, and property may be forfeited even when there have been **no criminal charges filed. This is often a substantial burden on the property owner**, who may lose their job or home because the state seized their means of transportation or money needed to pay rent. While the law contains a provision intended to protect innocent property owners, this provision is inadequate and the burden placed on property owners seeking to challenge a forfeiture makes it nearly impossible in most cases for innocent people to recover their property.

This legislation is necessary to rectify the harms caused by our current system and to prevent its continued abuse. **This bill still allows property to be seized — but not forfeited — prior to conviction, which achieves the purported objective of stopping criminal operations.** To more completely eliminate the profit motive that law enforcement may have to target innocent property owners, we respectfully request that the measure be amended to direct *all* proceeds to the general fund.

For the above reasons, we urge the Committee to support this measure. Thank you for the opportunity to testify.

Sincerely,



Mandy Fernandes
Policy Director
ACLU of Hawai‘i

The mission of the ACLU of Hawai‘i is to protect the fundamental freedoms enshrined in the U.S. and State Constitutions. The ACLU of Hawai‘i fulfills this through legislative, litigation, and public education programs statewide. The ACLU of Hawai‘i is a non-partisan and private non-profit organization that provides its services at no cost to the public and does not accept government funds. The ACLU of Hawai‘i has been serving Hawai‘i for 50 years.

² This creates a possible scenario in which the prosecutor’s office petitions the Department of the Attorney General to forfeit property on the basis that the property was used in the commission of a criminal offense *without ever even alleging* that an actual person committed the offense that is at the center of the forfeiture.

³ Institute for Justice, *Policing for Profit: The Abuse of Civil Asset Forfeiture*, 2nd Edition (November 2015) available at <https://ij.org/report/policing-for-profit>.

HB-748

Submitted on: 2/11/2019 9:35:16 PM

Testimony for JUD on 2/13/2019 2:01:00 PM

| Submitted By | Organization | Testifier Position | Present at Hearing |
|---------------------|---------------------|-------------------------------|-------------------------------|
| Gerard Silva | Individual | Oppose | No |

Comments: