



HAWAI'I STATE ETHICS COMMISSION

State of Hawai'i · Bishop Square, 1001 Bishop Street, ASB Tower 970 · Honolulu, Hawai'i 96813

Committee: Committee on Labor
Bill Number: H.B. 2120
Hearing Date/Time: February 6, 2020, 9:10 a.m.
Re: Testimony of the Hawai'i State Ethics Commission **SUPPORTING THE INTENT** of H.B. 2120, Relating to the State Ethics Code

Dear Chair Johanson, Vice Chair Eli, and Committee Members:

The Hawai'i State Ethics Commission ("Commission") supports the intent of H.B. 2120, which seeks to promote integrity in government by expanding the existing Conflicts of Interests statute to include legislators and others.

Currently, the Conflicts of Interests law, Hawai'i Revised Statutes ("HRS") § 84-14, applies differently to legislators and other state employees. For example, HRS § 84-14(a) prohibits employees from taking official action directly affecting their own financial interests; this provision does not apply to legislators.

This discrepancy between employees and legislators is intended to recognize that:

- Legislators have constitutional protections while engaged in "legislative functions": per article III, section 7 of the Hawai'i Constitution, "No member of the legislature shall be held to answer before any other tribunal for any statement made or action taken in the exercise of the member's legislative functions[.]" This protection is intended to support a strong and independent legislature; and
- Legislators serve as representatives of their constituents. Requiring legislators to recuse themselves may leave constituents without a voice on certain pieces of legislation.

While the Commission and its staff always try to educate the public about the rationale behind legislators' omission from some of the Ethics Code's conflicts of interests provisions, the Commission frequently entertains skeptical questions from members of the public (and other state employees) as to why legislators appear to be held to a "lower" standard of conduct regarding conflicts of interests. These differing standards of conduct can undermine the public's faith in government.

The Commission respectfully suggests that the Legislature could strengthen the Conflicts of Interests law, while accommodating legislators' constitutional protections, in several ways:

- By adding the following phrase: “Nothing in this section shall be construed to prohibit a legislator from introducing bills and resolutions, from serving on a committee, or from making statements or taking action in the exercise of the legislator's legislative functions.”¹ Legislators would be prohibited from taking “official action” affecting their own financial interests; for example, they would be prohibited from using legislative allowance funds at a business owned by the legislator’s spouse. With this amendment, however, legislators would still be permitted to vote on measures affecting their own financial interests: that is, a legislator who sits on the board of a non-profit organization would still be permitted to vote on a Grant In Aid application by that non-profit organization; or
- By adding a new subsection to HRS § 84-14 requiring each house of the Legislature to adopt internal rules – to be enforced by the Legislature itself – prohibiting legislators from voting on matters in which they have conflicts of interests. The Legislature can then adopt (and enforce) its own rules without raising concerns about legislative immunity.

The Commission has not had an opportunity to discuss the inclusion of judges and justices in the Conflicts of Interests law, and therefore takes no position on this provision at this time. The Commission notes that judges and justices are bound by their own code of ethics, with a Commission on Judicial Conduct to oversee compliance. See https://www.courts.state.hi.us/courts/judicial_conduct/commission_on_judicial_conduct; see also Attorney General Opinion 2015-02 (concluding that a separate code of ethics for judges is constitutional and is consistent with separation of powers concerns), available at <https://ag.hawaii.gov/wp-content/uploads/2012/11/AG-OP-NO-15-2.pdf>. At this time, however, the Ethics Commission has no reason to believe that this separate structure for judges and justices is a cause for concern with respect to judicial ethics.

Finally, the Commission notes that H.B. 2120 also includes delegates to the constitutional convention in the Conflicts of Interests law, but this provision is likely unconstitutional: article XIV of the Hawai‘i Constitution provides that the constitutional convention shall adopt its own code of ethics (to be administered by the Ethics Commission). As such, requiring delegates to the constitutional convention to comply with HRS § 84-14 (part of the code of ethics adopted by the Legislature) may raise constitutional concerns.

Thank you for your continuing support of the Commission’s work and for considering the Commission’s testimony on H.B. 2120.

Very truly yours,

Daniel Gluck
Executive Director and General Counsel

¹ This language tracks existing language in the Fair Treatment law, HRS § 84-13, including language proposed in [H.B. 1673](#).



The Judiciary, State of Hawai‘i

Testimony to the Thirtieth State Legislature, 2020 Session

House Committee on Labor and Public Employment

Representative Aaron Ling Johanson, Chair

Representative Stacelynn K.M. Eli, Vice Chair

Thursday, February 6, 2020, 9:10 a.m.

State Capitol, Conference Room 309

by

Rodney A. Maile

Administrative Director of the Courts

Bill No. and Title: House Bill No. 2120, Relating to the State Ethics Code.

Purpose: Amends certain conflicts of interests provisions of the Hawai‘i State Ethics Code to include members of the legislature, delegates to the constitutional convention, and justices and judges of all state courts.

Judiciary's Position:

This bill proposes to amend the State Ethics Code to include members of the legislature, delegates to the constitutional convention, and justices and judges of all state courts.

Based on our review of this bill, this bill raises significant questions under the Hawai‘i Constitution, existing statutes, case law, and court rules. Accordingly, the Judiciary must respectfully oppose passage as it relates to justices and judges.

As relates to justices and judges, Article VI, Section 5 provides:

The supreme court shall have the power to reprimand, discipline, suspend with or without salary, retire or remove from office any justice or judge for misconduct or disability, as provided by rules adopted by the supreme court.

The supreme court shall create a commission on judicial discipline which shall have authority to investigate and conduct hearings concerning allegations of misconduct or disability and to make recommendations to the supreme court



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concerning reprimand, discipline, suspension, retirement or removal of any justice or judge.

As relates to others, Article XIV of the Hawai'i Constitution provides:

The people of Hawaii believe that public officers and employees must exhibit the highest standards of ethical conduct and that these standards come from the personal integrity of each individual in government. To keep faith with this belief, the legislature, each political subdivision and the constitutional convention shall adopt a code of ethics which shall apply to appointed and elected officers and employees of the State or the political subdivision, respectively, including members of the boards, commissions and other bodies.

Each code of ethics shall be administered by a separate ethics commission, except the code of ethics adopted by the constitutional convention which shall be administered by the state ethics commission. The members of ethics commissions shall be prohibited from taking an active part in political management or in political campaigns. Ethics commissioners shall be selected in a manner which assures their independence and impartiality.

Each code of ethics shall include, but not be limited to, provisions on gifts, confidential information, use of position, contracts with government agencies, post-employment, financial disclosure and lobbyist registration and restriction. The financial disclosure provisions shall require all elected officers, all candidates for elective office and such appointed officers and employees as provided by law to make public financial disclosures. Other public officials having significant discretionary or fiscal powers as provided by law shall make confidential financial disclosures. All financial disclosure statements shall include, but not be limited to, sources and amounts of income, business ownership, officer and director positions, ownership of real property, debts, creditor interests in insolvent businesses and the names of persons represented before government agencies.

Therefore, while it is imperative that legislators, constitutional convention members, judges and justices scrupulously avoid conflicts of interests, the proposed legislation raises significant constitutional questions. This bill would provide restrictions already existing in the law. Also, it would create confusion as to which entity -- the Ethics Commission or the Commission on Judicial Conduct and ultimately the supreme court -- would enforce (i.e., investigate, make determinations and take appropriate action) alleged violations of long-established rules and statutes governing conflicts of interest, disqualification and recusal.

Present Restrictions under the Law:

Current rules and statutory provisions specify situations for which a judge or justice must disqualify or recuse him/herself and also which positions and situations a judge may simply not become involved. Each prohibition specified in the proposed bill is covered under existing laws.



Revised Code of Judicial Conduct

Pursuant to the Constitutional mandates of Article VI, Section 5, the Hawai‘i Supreme Court has promulgated various rules governing judicial conduct. Canon 1 of the Revised Code of Judicial Conduct mandates that “a judge shall avoid impropriety and the appearance of impropriety” in all of the judge’s activities. Canon 3 states that “A judge shall conduct the judge’s personal and extrajudicial activities to minimize the risk of conflict with the duties of judicial office.”

As for disqualification, Rule 2.11 mandates that a judge must disqualify or recuse him/herself in “any proceeding in which the judge’s impartiality might reasonably be questioned.” The Rule provides an illustrative list of situations for which a judge must disqualify or recuse him or herself -- including where the judge, the judge’s spouse or domestic partner, or a person within the third degree of relationship to either of them, the spouse or domestic partner of such a person, is a party to the proceeding, or an officer, director, general partner, managing member, or trustee of a party; acting as a lawyer in the proceeding, or a person who has more than a de minimis interest that could be substantially affected by the proceeding.

Rule 3.11 concerns financial, business or remunerative activities of judges and prohibits judges from serving as an officer, director, manager, general partner, advisor, or employee of any business entity. Moreover, judges are prohibited from engaging in any financial activities that will interfere with the proper performance of the duties of judicial office; lead to frequent disqualification or recusal of the judge; involve the judge in frequent transactions or continuing business relationships with lawyers or other persons likely to come before the court on which the judge serves; or result in violation of other provisions of [the Revised Code of Judicial Conduct.]

Beyond rules and statutes, caselaw has provided precedent for determining when disqualification is needed. For instance, in *State v. Ross*, 80 Hawai‘i 371, 379, 974 P.2d 11 (1998), the Hawai‘i Supreme Court noted its recognition that “aside from the technical absence of bias or conflict of interest, certain situations may give rise to such uncertainty concerning the ability of the judge to rule impartially that disqualification becomes necessary....” “[T]here may be circumstances that cast suspicion on the fairness of the judge ... so that it may be advisable for a judge not technically disqualified to withdraw sua sponte.” (Case citations omitted.) Moreover, Rule 15 of Rules of the Supreme Court of the State of Hawai‘i requires judges and justices to file annual judicial financial disclosure statements that detail the financial interests of the judges, their spouses or domestic partners, and dependent children. These statements are available for public inspection.



HRS Section 601-7

Haw. Rev. Stat. Section 601-7 concerns the disqualification of judges. This statute prescribes disqualification for relationship, pecuniary interests, or where the judge previously served as “of counsel” in the matter presently pending before the judge. For example, a judge may not sit in any case in which “the judge’s relative by affinity or consanguinity within the third degree is counsel, or interested either as a plaintiff or defendant, or in the issue of which the judge has, either directly or through such relative, a more than de minimis pecuniary interest.” The statute also permits parties to seek disqualification on the grounds of personal judicial bias and further specifies the procedure for seeking disqualification.

Amending the ethics code to include restrictions on judges’ conduct that is already prohibited under existing law would be duplicative and confusing, particularly given that present laws, rules and case law are in many ways more stringent than the provisions contemplated by this bill.

Enforcement:

This bill will create unnecessary conflicts to which entity is responsible for enforcement. Under the State Ethics Code, the state ethics commission is imbued with the power to investigate and make decisions and mete punishment concerning violations of the code of ethics. (See HRS § 84-31 (Duties of Commission). The Hawai‘i State Constitution imbues the supreme court with the power to “promulgate rules and regulations for all courts relating to process, practice, procedure.... which shall have the force and effect of law.” (State Constitution, article VI, section 7). Moreover, under the Hawai‘i State Constitution, the Commission on Judicial Conduct has authority for investigating, then recommending actions to the supreme court about judge or justices’ conduct. (State Constitution, article VI, section 5.) And the supreme court has sole “power to reprimand, discipline, suspend ... retire or remove from office any justice or judge for misconduct ... as provided by rules adopted by the supreme court.” (State Constitution, article VI, section 5). If judges and justices are included in the Hawai‘i State Ethics Code, it will create clear conflict as to which entity, or entities, would investigate and when appropriate, discipline violators. This will lead to both conflicting processes and consequences.

Summary:

To place new restrictions in the Ethics Code, enforced by the Ethics Commission, that are redundant to those in the Revised Code of Judicial Conduct and enforced by the Commission on Judicial Conduct and the Hawai‘i Supreme Court, creates redundancy at best, and confusion at worst, in determining responsibility for enforcing allegations of judicial misconduct predicated upon potential conflicts of interest.



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We therefore respectfully oppose this measure. Thank you for the opportunity to testify on this measure.

Statement Before The
HOUSE COMMITTEE ON LABOR & PUBLIC EMPLOYMENT

Thursday, February 6, 2020
9:10 AM
State Capitol, Conference Room 309

in consideration of
HB 2120
RELATING TO THE STATE ETHICS CODE.

Chair JOHANSON, Vice Chair ELI, and Members of the House Labor & Public Employment Committee

Common Cause Hawaii supports HB 2120, with ministerial amendments, which amends certain parts of the conflicts of interests provision of the State Ethics Code to include members of the legislature, delegates to the constitutional convention, and justices and judges of all state courts.

Common Cause Hawaii is a nonprofit, nonpartisan, grassroots organization dedicated to reforming government and strengthening democracy. Common Cause Hawaii works to restore faith in our government and our democracy that has been shattered in the last few years through ethics, accountability, and transparency reforms. These reforms are probably the most important tools to restoring the people's trust in their elected leaders and government – to show people that their government is acting for the people's interest versus serving their own interests.

In a recent [Honolulu Star-Advertiser poll](#) published on Sept. 22, 2019, a majority of local residents feel that Hawaii's elected officials do not care what they think and generally do not have high ethical standards. This must change for people to have confidence in our government.

Currently, under Hawaii Conflicts of Interests statute – section 84-14, Hawaii Revised Statutes (HRS) – legislators are defined differently than employees and therefore are not covered by every subsection of the Hawaii Conflicts of Interests statute.

HB 2120 would include legislators in the conflicts of interests coverage, specifically subsections (a),(b), and (e), of HRS § 84-14. Legislators would be, under HB 2120, like other government employees:

- (a) Prevented from taking any official action directly affecting:
 - (1) A business or other undertaking in which they have a substantial financial interest; or
 - (2) A private undertaking in which they are engaged as legal counsel, advisor, consultant, representative, or other agency capacity
- (b) Prevented from assisting any person or business or act in a representative capacity before any state or county agency for a contingent compensation in any transaction involving the State.
- (e) Prevented from assisting any person or business or act in a representative capacity before a state or county agency for a fee or other consideration on any bill, contract, claim, or other transaction or proposal involving official action by the agency if they, as legislators, have official authority over that state or county agency unless they have complied with the disclosure requirements of HRS § 84-17.

There appears to be a ministerial error in HB 2120, which deleted employees from HRS § 84-14(c), instead of inserting legislators into HRS § 84-14(e). Common Cause Hawaii suggests that HB 2120 be amended to correct for this error.

HB 2120 will show that legislators takes ethics seriously. They will not profit or gain from their time in office. HB 2120 is a step towards restoring people's faith in our government. As we have seen, democracy is fragile; people need to have confidence in our government. Please act to restore that trust through ethics reform.

Thank you for the opportunity to testify in support of HB 2120, with ministerial amendments. If you have further questions of me, please contact me at sma@commoncause.org.

Very respectfully yours,

Sandy Ma
Executive Director, Common Cause Hawaii



HB-2120

Submitted on: 2/3/2020 6:57:07 PM

Testimony for LAB on 2/6/2020 9:10:00 AM

Submitted By	Organization	Testifier Position	Present at Hearing
Michael Golojuch Jr	Individual	Support	No

Comments:

HB-2120

Submitted on: 2/3/2020 7:12:58 PM

Testimony for LAB on 2/6/2020 9:10:00 AM

Submitted By	Organization	Testifier Position	Present at Hearing
Caroline Kunitake	Individual	Support	No

Comments:

Dear Chair Johanson and Members of the House Labor and Public Employment Committee,

I am writing in support of HB2120. HB 2120 amends certain parts of the conflicts of interests provision of the State Ethics Code to include members of the legislature, delegates to the constitutional convention, and justices and judges of all state courts.

HB 2120 will show that legislators takes ethics seriously. They will not profit or gain from their time in office. HB 2120 is a step towards restoring people's faith in our government. As we have seen, democracy is fragile; people need to have confidence in our government. Please act to restore that trust through ethics reform.

Please support HB 2120.

Mahalo,

Caroline Kunitake

HB-2120

Submitted on: 2/4/2020 7:53:29 AM

Testimony for LAB on 2/6/2020 9:10:00 AM

Submitted By	Organization	Testifier Position	Present at Hearing
Christine Weger	Individual	Support	No

Comments:

Please act favorably on this bill and also HB 2124 and 2125. Each of these bills will inspire the confidence your constituents. This is crucial at this important moment in our country's history.

These are basic measures that are common at the federal level and in other states. Hawaii can do no less.