

SB-228

Submitted on: 2/11/2023 9:45:53 AM

Testimony for JDC on 2/14/2023 9:40:00 AM

Submitted By	Organization	Testifier Position	Testify
Daniel Foley	Testifying for Commission to Improve Standards of Conduct	Support	Written Testimony Only

Comments:

Dear Mr. Chairman and members of the Senate Judiciary Committee,

AS Chair of the Commission to Improve Standards of Conduct, I support SB 228 for the reasons stated in the Commission's December 1, 2022 Final Report to the House of Representatives, specifically at page 20 of the Report.

Mahalo, Judge Daniel Foley (ret.)



**TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
KA 'OIHANA O KA LOIO KUHINA
THIRTY-SECOND LEGISLATURE, 2023**

ON THE FOLLOWING MEASURE:
S.B. NO. 228, RELATING TO FRAUD.

BEFORE THE:
SENATE COMMITTEE ON JUDICIARY

DATE: Tuesday, February 14, 2023 **TIME:** 9:40 a.m.

LOCATION: State Capitol, Room 016

TESTIFIER(S): Anne E. Lopez, Attorney General, or
David Van Acker, Deputy Attorney General

Chair Rhoads and Members of the Committee:

The Department of the Attorney General (Department) supports this bill and provides the following comments.

This bill creates three felony offenses that mirror federal criminal statutes: (1) making a false, fictitious, or fraudulent claim against the State; (2) using or making false statements or entries within the three branches of the State; and (3) general fraud. This bill provides state and local law enforcement with much needed tools to combat corruption, fraud, and waste. As the Commission to Improve Standards of Conduct's (Commission) Final Report recognized, ". . . the State's Penal Code and enforcement agencies do not have sufficient authority to adequately investigate, charge, and sentence instances of corruption and fraud." Dec. 1, 2022, at page 19. The proposals put forth in this bill are intended to capture a broad array of conduct that are currently punishable at the federal level but not the state or local level.

The portion of the bill relating to fraud (section 2, page 4, lines 1-15) is based on 18 United States Code (U.S.C.) sections 1341, 1343, 1344, and 1346. Currently, the Hawaii Revised Statutes (HRS) grades theft offenses based on specific monetary thresholds. In many situations, however, it is challenging for law enforcement to determine the specific value stolen by an offender using a fraudulent scheme. As a result, there are substantial barriers in charging some known offenders with felony offenses. For instance, in *State v. Atwood*, 129 Hawai'i 414 (2013), an unlicensed

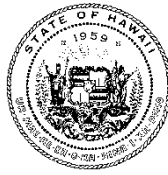
contractor misrepresented his license status and entered into a home remodeling contract fraudulently. The Supreme Court of Hawaii held that the prosecution lacked probable cause to charge the defendant, because the defendant intended to perform and did perform the contracted work despite the misrepresentation. The Court further held that the prosecution failed to provide a specific amount of property that was deprived as there was no showing that any money obtained by the defendant was not in exchange for the contracted work. This bill would enable law enforcement to prosecute fraud and avoid the *Atwood* problem altogether by not requiring the prosecution to prove a specific amount stolen. Instead, the bill establishes a class B felony offense, regardless of the amount, for engaging in conduct to falsely or fraudulently obtain money or property.

The portion of the bill relating to false, fictitious, or fraudulent claims (section 3, at page 4, line 19, through page 5, line 9) is based on 18 U.S.C. section 287. The purpose of this portion of the bill is to protect the government against those who would cheat or mislead it in the administration of its programs. The United States Courts of Appeals are divided as to whether the false statements or claims need to be material. The terms "material" and "claim" are defined in section 661-21, HRS, which is Hawaii's civil version of the false claims act. In order to avoid that type of uncertainty, it may be worth incorporating the definitions of "material" and "claim" into the bill and requiring that the false, fictitious, or fraudulent claim to be material to the State, a county, or any department thereof.

The portion of the bill relating to use of false statements or entries (section 3, at page 5 line 10, through page 7, line 2) is based on 18 U.S.C. section 1001. The purpose of this portion of the bill is to prohibit deceptive practices aimed at frustrating or impeding the legitimate functions of government's executive, legislative, and judiciary branches. The Department notes that under section 702-210, HRS, the requirement that an offense be committed wilfully is satisfied if a person acts knowingly. It may be prudent to amend "person knowingly and wilfully" on page 5, line 15, to "person intentionally or knowingly".

This bill will provide a mechanism to increase the public's trust and confidence in our state and local government while providing law enforcement with a tool to adequately deter and commensurately punish public corruption.

Thank you for the opportunity to testify.



STATE OF HAWAII
CAMPAIGN SPENDING COMMISSION


235 SOUTH BERETANIA STREET, ROOM 300
HONOLULU, HAWAII 96813

February 13, 2023

TO: The Honorable Karl Rhoads, Chair
Senate Committee on Judiciary

The Honorable Mike Gabbard, Vice Chair
Senate Committee on Judiciary

Members of the Senate Committee on Judiciary

FROM: Kristin Izumi-Nitao, Executive Director
Campaign Spending Commission 

SUBJECT: **Testimony on S.B. No. 228, Relating to Fraud.**

Tuesday, February 14, 2023
9:40 a.m., Conference Room 16 & Videoconference

Thank you for the opportunity to testify on this bill.¹ The Campaign Spending Commission (“Commission”) supports this bill.

This bill is modeled after federal law and it (1) establishes the offense of making a false, frivolous, or fraudulent claim against the State or any county as a class B felony, (2) prohibits the use or making of false statements or entries in matters within the jurisdiction of the executive, legislative, or judicial branches of the State as a class C felony, and (3) Establishes a general fraud statute that is intended to cover schemes to obtain financial, or other gains by means of statements, misrepresentations, concealment of important information, or deception as a class C felony. The Commission supports the enhancement of criminal penalties for offenses involving public corruption. If enforced, the Commission believes that criminal penalties are the most effective remedies to deter public corruption.

The Commission requests that this Committee pass this bill.

¹ The companion bill is H.B. No. 127.

STATE OF HAWAI‘I
OFFICE OF THE PUBLIC DEFENDER

**Testimony of the Office of the Public Defender,
State of Hawai‘i to the Senate Committee on Judiciary**

February 14, 2023

S.B. No. 228: RELATING TO FRAUD

Chair Rhoads, Vice Chair Gabbard, and Members of the Committees:

The Office of the Public Defender (“OPD”) supports the goals of the Commission to Improve Standards to restore public trust in state government and to increase the level of transparency in its operations and accountability of individuals. The OPD also recognizes that to improve the standard of conduct within government, and to more effectively combat fraud, waste, and corruption, it is necessary to establish criminal offenses and penalties. However, the OPD has serious concerns regarding the penalties imposed in the foregoing bill. Therefore, we must oppose S.B. No. 228.

Fraud

This measure imposes a mandatory indeterminate term of imprisonment of ten years with a mandatory minimum term of one year. The OPD opposes any measure that strips judges of sentencing discretion and the ability to consider a broad range of options in the disposition of a case.

Not all conduct, constituting fraud, is the same, and therefore, should not be treated or punished the same. Certainly, conduct of a government employee claiming sick leave while not sick, is not the same as government officials of the Honolulu International Airport being involved in a bid-rigging scheme that spanned five years, and funneled repair work that needed to be done at the airport to specific contractors who overbilled the airport for their work. *See* Hawai‘i Department of Attorney General [News Release No. 2006-34](#) issued October 27, 2006. The employee claiming unauthorized sick leave should not be punished the same as the airport officials. But, as currently written, this measure would subject both to mandatory prison sentences.

Circuit Court judges are subjected to a rigorous vetting process. A process that involves a roughly 40+ page judicial application, an investigation by the Hawai‘i

State Bar Association, another investigation by the Judicial Selection Committee, selection by the Governor, questioning by the Senate Judiciary Committee, and confirmation by the full Senate. Judges are selected for their integrity, diligence, legal knowledge and ability, and their ability to fulfill the responsibilities and duties of the position. Judges should retain the power and authority to treat and consider each case on an individual basis. Judges should have the discretion to weigh mitigating factors as well as aggravating factors and to sentence the defendants that come before them accordingly. They are in a much better position to review a person's history, character, remorse, rehabilitative efforts, or lack thereof, family support etc.

False, fictitious or fraudulent claim

This measure would also deny a deferred acceptance of guilty or no-contest plea to anyone convicted of using or making a false statement or entry in matters within the jurisdiction of the executive, legislative, or judicial branches or making a false, fictitious, or fraudulent claim against the State of Hawai'i or the county government.

Again, judges should be allowed to maintain their discretion on a case-by-case basis to grant deferral in these types of cases. Judges cannot exercise this discretion without meeting the requirements of HRS § 853-1, which provides, in pertinent part:

(1) When a defendant voluntarily pleads guilty or nolo contendere, prior to commencement of trial, to a felony, misdemeanor, or petty misdemeanor; (2) It appears to the Court that the defendant is not likely to engage in a criminal course of conduct; and

* * * *

(3) The ends of justice and the welfare of society do not require that the defendant shall presently suffer the penalty imposed by law, the court, without accepting the plea of nolo contendere or entering a judgment of guilt and with the consent of the defendant and after considering the recommendations, if any, of the prosecutor, may defer further proceedings.

If the present measure passes, defendants charged with these offenses would be prohibited from requesting a deferral of their charges. As stated in HRS Chapter 853, the trial court, after considering the merits of the case, and hearing from the prosecutor, may or may not grant a defendant's motion to defer the proceedings. In order for the trial court to defer the proceedings, ***it must find that the defendant is not likely to re-offend or engage in a (further) course of criminal conduct, and***

that the ends of justice and welfare of society do not require the defendant receive a criminal conviction.

Because of this high standard, ***the vast majority of requests by defendants to defer their criminal proceedings are not granted by the trial courts.*** Defendants must still be deemed worthy of a deferral. Criminal history, seriousness of the offense, history of substance abuse, lack of employment, and previous criminal behavior (even if uncharged) are common reasons cited to by prosecutors and judges for a denial of a defendant's motion to defer the acceptance of his or her guilty or no contest plea.

Why is it important that some defendants receive deferrals of their criminal proceedings? A criminal conviction follows an individual for the rest of his/her life. It will impact his/her ability to seek and maintain employment and to receive government benefits. A defendant who is youthful, immature, naïve or may have fallen under the influence of a superior, but is remorseful and is not likely to re-offend should be allowed, in limited circumstances, to be given the opportunity for a second chance -- a chance to avoid a criminal conviction.

Moreover, as previously stated, not all conduct, which would constitute the basis for a false statement or claim are the same. As stated above, a State government employee with no previous criminal record who has taken unauthorized sick leave should be eligible for a deferral under HRS Chapter 853.

Finally, it is simply unfair that a defendant who committed this newly created offense (by taking unauthorized sick leave) is not eligible for a deferral while criminal defendants who are charged with more serious Class B felony offenses under our current penal code are eligible for a deferral. For example, defendants charged with the offenses of Robbery in the Second Degree (Class B felony), Theft in the First Degree (Class B felony, in which defendant is alleged to have stolen property valued over \$20,000), and Burglary in the First Degree (class B felony, in which a defendant is alleged to enter into a person's home unlawfully) are eligible.

Thank you for the opportunity to testify on this measure.

DEPARTMENT OF THE PROSECUTING ATTORNEY
CITY AND COUNTY OF HONOLULU

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THOMAS J. BRADY
FIRST DEPUTY
PROSECUTING ATTORNEY

THE HONORABLE KARL RHOADS, CHAIR
SENATE COMMITTEE ON JUDICIARY
Thirty-Second State Legislature
Regular Session of 2023
State of Hawai`i

February 14, 2023

RE: S.B. 228; RELATING TO FRAUD.

Chair Rhoads, Vice Chair Gabbard, and members of the Senate Committee on Judiciary, the Department of the Prosecuting Attorney of the City and County of Honolulu (“Department”) submits the following testimony in **strong support** of S.B. 228. This bill is part of the Department's 2023 legislative package, and we thank you for hearing it.

The purpose of S.B. 228 is to establish new criminal offenses under state law, that mirror similar statutes currently used under federal law to deter fraud, false claims, and false statements in the course of business for the executive, legislative, or judicial branches of our government.

Given the years of scandal that have shaken the public’s trust in Hawaii’s state and local government, the Department believes that our state laws should be amended to reflect the egregious nature of certain offenses—such as bribery—that involve a serious abuse of authority, or betray the public’s trust to a heightened degree. Every day, thousands of dedicated government workers serve the public diligently and honorably, and their hard work and good reputation should not be marred by those who would selfishly seek their own profits.

While federal prosecutors have largely taken the lead in prosecuting recent incidents of government officials being bribed, this is largely due to the greater effectiveness and severity of federal laws on the matter. To better equip county prosecutors with the tools to prosecute this type of public corruption, the State also needs more effective laws with serious consequences. We believe SB. 228 would do so in a reasonable manner.

For all of the foregoing reasons, the Department of the Prosecuting Attorney of the City and County of Honolulu **strongly supports** the passage of S.B. 228. Thank you for the opportunity to testify on this matter.



Committee on Judiciary
Chair Karl Rhoads, Vice Chair Mike Gabbard

Tuesday, February 14, 2023, 9:40 a.m., Conference Room 016 & Videoconference

SENATE BILL 228 – RELATING TO FRAUD

TESTIMONY

Donna Oba, Legislative Committee, League of Women Voters of Hawaii

Chair Rhoads, Vice Chair Gabbard, and Committee Members:

The League of Women Voters of Hawaii offers comments on this measure.

The League supports vigorous prosecution of criminal fraud, including creation of new state felony fraud statutes such as this one.

However, the bill includes provisions for mandatory minimum sentences and makes convicted persons ineligible for a deferred acceptance of guilty plea or “nolo contendere.” Using such sentencing restricts the ability of judges to treat each defendant fairly, based on all the facts of the case, the criminal history of the defendant and the circumstances surrounding the case.

We respectfully request that you amend this measure by removing references to mandatory minimum sentences found in Section 2, §708 of the bill and references to deferred acceptances of guilty plea found in Section 3, §710. The League supports consistent use of general sentencing guidelines rather than one-size-fits-all sentencing.

We are skeptical that mandatory minimum sentences will deter fraud, which more likely depends on motive, opportunity, and rationalization by the criminal. Using mandatory minimum sentences and restricting sentences also comes close to violation of the doctrine of the separation of powers. For Hawaii’s government to work correctly, each of the three co-equal branches of government must respect the jurisdictions of the other two while executing reasonable checks and balances on them to maintain the proper balance of power among the three branches.

Thank you for the opportunity to submit testimony.

SB-228

Submitted on: 2/11/2023 2:36:33 PM

Testimony for JDC on 2/14/2023 9:40:00 AM

Submitted By	Organization	Testifier Position	Testify
Dara Carlin, M.A.	Individual	Support	Written Testimony Only

Comments:

Stand in STRONG SUPPORT

SB-228

Submitted on: 2/12/2023 10:08:30 PM

Testimony for JDC on 2/14/2023 9:40:00 AM

Submitted By	Organization	Testifier Position	Testify
Shana Wailana Kukila	Individual	Support	Remotely Via Zoom

Comments:

Aloha Senators,

This testimony is in full support of SB288, which relates to fraud and public accountability.

While I support this bill, I would humbly request that there be a specific process to report fraud and other crimes by public servants that is easily accessible and available to the public. That is real access to justice.

In this particular bill, there is no apparent mechanism that will allow the average citizen to report these crimes besides the prosecutor's office, who may not have the time, resources, or expertise to prioritize this type of white collar crime.

My suggestion is to include into the bill a reporting process for the average citizen or whistle blower to file criminal complaints that will be handled by a white collar crime unit that covers only government corruption (the ombudsman has no real traction in this area). Making a law to add on to the duties of the prosecutor's office may not be handled properly if detectives do not know the laws of white collar crime or do not want to prosecute those in power who may be their cronies or benefactors.

A second issue with the bill is that it does not address the criminal actions of those in the legislature who violate important laws such as driving under the influence - and whom are still allowed to serve with impunity. To earn the public trust, lawmakers must be held accountable for their actions and lose their job just like everyone else experiences as a penalty for a DUI. It's an insult and an injustice to those who lost their jobs for getting a DUI when those who make those laws do not suffer in the same way for the same crimes. This is just one example of the many crimes committed by lawmakers that erodes the public trust.

The commission to improve the standards of conduct last year did not seem to want to address this issue in their meetings or recommendations, which I believe they should have. My suggestion to the commission was to have a mechanism whereby if a lawmaker commits a serious crime such as driving under the influence, it's automatic referral to the judicial branch for investigation and ultimate expulsion from their position, and a new leader shall be appointed by the governor or the second in the race can take the seat.

It doesn't make sense to anyone that lawmakers are able to drive under the influence on Hawai'i's roads, thus endangering others, because there is no real consequence. They are able to afford the best lawyers and from what we have seen, there is little accountability at the legislature for bad and unlawful behavior. This is the real issue, and one I hope this bill will be amended to address, or that another bill will be able to address. Lawmakers are not above the law. That is the bottom line of public accountability.

Mahalo,

Shana W, Kukila

Hilo, Hawai'i