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S.B. No. 2130: RELATING TO HARASSMENT

Chair David Tarnas  
Vice Chair Gregg Takayama  
Honorable Committee Members

The Office of the Public Defender **opposes** this bill.

This bill is duplicative and creates a new misdemeanor offense for conduct already covered by the electronic eavesdropping statute in Hawai'i Revised Statutes § 803-42(a)(8). It is harder to prove than the class C felony prosecution because of the specific state of mind requirement in the bill and is unnecessary.



**TESTIMONY OF  
THE DEPARTMENT OF THE ATTORNEY GENERAL  
KA 'OIHANA O KA LOIO KUHINA  
THIRTY-SECOND LEGISLATURE, 2024**

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**ON THE FOLLOWING MEASURE:**

S.B. NO. 2310, S.D. 1, RELATING TO HARASSMENT.

**BEFORE THE:**

HOUSE COMMITTEE ON JUDICIARY AND HAWAIIAN AFFAIRS

**DATE:** Wednesday, March 13, 2024      **TIME:** 2:00 p.m.

**LOCATION:** State Capitol, Room 325 and Videoconference

**TESTIFIER(S):** Anne E. Lopez, Attorney General, or  
Tricia M. Nakamatsu, Deputy Attorney General

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Chair Tarnas and Members of the Committee:

The Department of the Attorney General (the Department) appreciates the intent of this bill, but respectfully asks that it be deferred.

The purpose of this bill is to create a new misdemeanor offense that prohibits a person from using a location tracker to harass, stalk, or perpetuate a crime against another person without the person's knowledge.

The Department believes that section 803-42(a)(8), Hawaii Revised Statutes (HRS), already addresses many of these concerns, inasmuch as that statute prohibits anyone from:

Intentionally install[ing] or us[ing] a mobile tracking device without first obtaining a search warrant or other order authorizing the installation and use of such device, unless the device is installed by or with consent of the owner of the property on which the device is installed.

Even without prosecutors having to prove a defendant had any specific intent to harass, stalk, or perpetuate a crime against another person, the fact that a mobile tracking device is installed or used without the other person's consent—and without a search warrant—constitutes an offense under this provision. Violation of section 803-42(a)(8), HRS, is a class C felony.

Pursuant to the definition in section 803-41, HRS:

"Tracking device" means an electronic or mechanical device that permits the tracking of the movement of a person or object, but does not include a device when installed:

- (1) In a motor vehicle or other vehicle by or with the permission of the owner or person in lawful possession of the motor vehicle or other vehicle for the purpose of tracking the movement of the motor vehicle or other vehicle; or
- (2) By or at the request of a police department or law enforcement agency in a "bait vehicle".

We believe the term "tracking device" or "mobile tracking device," as used in section 803-42(a)(8), encompasses all or nearly all "location trackers," as that term is defined in this bill, on page 1, line 9, through page 2, line 7:

For purposes of this section, "location tracker" means an electronic or mechanical device that allows a person to remotely determine or track the position or movement of another person or an object. The term includes the following:

- (a) A device that stores geographic data for subsequent access or analysis;
- (b) A device that allows real-time monitoring or movement;
- (c) An unmanned aerial vehicle as defined in section 188-23.5; or
- (d) A cellular telephone or other wireless or cellular communications device, or an electronic device that communicates with a cellular telephone or other wireless or cellular communications device, including by means of an application installed on or accessed through a cellular telephone or other wireless or cellular communications device.

It is uncertain whether the term "tracking device" or "mobile tracking device," as used in section 803-42(a)(8), HRS, would include "[a]n unmanned aerial vehicle as defined in section 188-23.5," which is covered by subsection (2)(c) above (on page 1, lines 16-17, of the bill). The plain wording of sections 803-41 and 803-42, HRS, does not provide a clear indication of whether the applicable tracking device must be "installed" in or on the property of another, or whether it can simply be used as a standalone device, totally apart and away from the property of another.

That said, we note that section 711-1114(1)(a), HRS, trespass with an unmanned aircraft system, prohibits:

Cross[ing] the property line of another and com[ing] within fifty feet of a dwelling to coerce, intimidate, or harass another person or, after having been given actual notice to desist, for any other reason.

Violation of section 711-1114 is a misdemeanor, with limited exceptions if the person had consent of someone lawfully on the property, or was operating the unmanned aircraft system in accordance with federal regulations.

In addition, section 711-1106.5(1), HRS, harassment by stalking, makes it a misdemeanor offense:

[I]f, 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.

Although harassment by stalking requires the behavior to occur on more than one occasion, and requires proof of specific intent to harass, annoy, or alarm another person, this behavior could presumably be done through use of an unmanned aerial device or unmanned aircraft system.

Conduct constituting harassment by stalking could potentially become a class C felony if the specific facts of a case meet the requirements for section 708-893, HRS, use of a computer in the commission of a separate crime. The list of qualifying offenses for increased penalties pursuant to section 708-893, HRS, includes harassment (section 711-1106, HRS); aggravated harassment by stalking (section 711-1106.4); and harassment by stalking (section 711-1106.5).

Because the Department believes that existing statutes already address the majority of concerns that are intended to be addressed by this bill, and potentially does so at a higher level of penalty, the Department respectfully asks that this bill be deferred.

**DEPARTMENT OF THE PROSECUTING ATTORNEY  
KA 'OIHANA O KA LOIO HO'OPI'I  
CITY AND COUNTY OF HONOLULU**

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**THE HONORABLE DAVID TARNAS, CHAIR  
HOUSE COMMITTEE ON JUDICIARY AND HAWAIIAN AFFAIRS  
Thirty-Second State Legislature  
Regular Session of 2024  
State of Hawai'i**

March 13, 2024

**RE: S.B. 2310 SD 1; RELATING TO HARASSMENT.**

Chair Tarnas, Vice Chair Takayama, and members of the House Committee on Judiciary and Hawaiian Affairs, the Department of the Prosecuting Attorney of the City and County of Honolulu (“Department”) **supports** passage of S.B. 2310 SD 1, but offers two recommended revisions:

S.B. 2310 offers a critical tool for prosecuting stalking cases aggravated by the increased availability of remote tracking tools, including drones, cellphones, and wireless personal area networks. Both the harassment by stalking<sup>1</sup> and aggravated harassment by stalking<sup>2</sup> offenses require repeated conduct on more than one occasion. This bill facilitates effective prosecution by requiring only proof of nonconsensual use of a location tracker and criminal intent.

The Department offers two proposed revisions to this bill:

(1) Revising the first subsection to read: “A person commits the offense of harassment by use of a location tracker if that person, with intent to harass, stalk, or perpetuate a crime against another person, uses a location tracker without the other person’s knowledge.” As presently drafted, the language is unclear whether the victim’s lack of knowledge refers to the location tracker or the defendant’s criminal intent.

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<sup>1</sup> H.R.S. § 711-1106.5 (West, Westlaw through Act 1 of the 2024 Regular Session).

<sup>2</sup> *Id.* § 711-1106.4 (requiring prior conviction for harassment by stalking).

(2) Increasing the penalty to a Class C felony. H.R.S. Section 803-42(a)(8) currently prohibits nonconsensual installation or use of a mobile tracking device as a Class C felony.<sup>3</sup> H.R.S. Section 803-42(a)(8) does not require proof of intent to harass, stalk, or perpetuate a crime against another person. In other words, H.R.S. Section 803-42(a)(8) is an included offense of the proposed crime here.<sup>4</sup>

Because harassment by use of location tracker is graded as a misdemeanor, while the included offense is a felony, it creates a problem under *State v. Modica*.<sup>5</sup> Grading the proposed offense as a Class C felony would eliminate this problem. It would also be proportional to the conduct because the specific intent is already limited to criminal conduct (harassment, stalking, and other crimes).

Thank you for the opportunity to testify.

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<sup>3</sup> *Id.* § 803-42(a)(8) (exception where authorized by search warrant or court order).

<sup>4</sup> *Id.* § 701-109(4)(defining included offenses).

<sup>5</sup> 58 Haw. 249, 251, 567 P.2d 420, 422 (1977). *See also State v. Sasai*, 143 Hawai'i 285, 295-99, 429 P.3d 1214, 1224-28(2018)(applying *Modica* rule to dismiss prosecution).

**SB-2310-SD-1**

Submitted on: 3/9/2024 11:44:05 AM

Testimony for JHA on 3/13/2024 2:00:00 PM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Testify</b>
Jacqueline S. Ambrose	Individual	Support	Written Testimony Only

Comments:

Aloha,

Yes to prohibiting a person from using a location tracker to harass, stalk, or perpetuate a crime against another person without their knowledge.

**SB-2310-SD-1**

Submitted on: 3/9/2024 11:48:25 AM

Testimony for JHA on 3/13/2024 2:00:00 PM

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

Comments:

Stand in Support



**SB-2310-SD-1**

Submitted on: 3/12/2024 7:45:05 AM

Testimony for JHA on 3/13/2024 2:00:00 PM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Testify</b>
Glen Kagamida	Individual	Support	Written Testimony Only

Comments:

SUPPORT. MORE, SIMILAR TYPE BILLS NEEDED.

MAHALO!