

**TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
KA 'OIHANA O KA LOIO KUHINA
THIRTY-THIRD LEGISLATURE, 2025**

ON THE FOLLOWING MEASURE:
S.B. NO. 871, RELATING TO ARSON.

LATE

BEFORE THE:
SENATE COMMITTEE ON PUBLIC SAFETY AND MILITARY AFFAIRS

DATE: Wednesday, January 29, 2025 **TIME:** 3:00 p.m.

LOCATION: State Capitol, Room 225

TESTIFIER(S): Anne E. Lopez, Attorney General, or
Mark S. Tom, Deputy Attorney General

Chair Elefante and Members of the Committee:

The Department of the Attorney General (Department) provides the following comments.

The purpose of the bill is to improve public safety by: (1) designating mandatory minimum periods of imprisonment for repeat arson offenders; (2) requiring additional penalties for arson that endangers vulnerable areas; and (3) requiring restitution to victims of arson.

While increased penalties should provide a greater deterrent to arson offenses, the Department recommends formatting the new "additional penalties" section of the bill at page 3, line 12-20 differently. Standalone penalty statutes, kept separate from their respective charges under the Hawaii Revised Statutes (HRS), are unnecessarily confusing and should be avoided when possible. For purposes of clarity in charging a criminal case and potential record-keeping purposes, the Department recommends placing any penalties that relate to a specific charge within the same section as the charge. Thus, the Department suggests removing subsection (2) of the additional penalties new section proposed by section 2 of the bill on page 3, lines 16-20, that creates a mandatory minimum term of imprisonment for repeat arson offenders of four sections of HRS listed in subsection (2), and placing those mandatory minimum provisions within each applicable section in part XIII of chapter 708, HRS, as amended by section 3 of this bill as set forth below:

§708-8251 Arson in the first degree. (1) A person commits the offense of arson in the first degree if the person intentionally or knowingly sets fire to or causes to be burned property and:

- (a) Knowingly places another person in danger of death or bodily injury; or
- (b) Knowingly or recklessly damages the property of another, without the other's consent, in an amount exceeding \$20,000.

(2) Arson in the first degree is a class A felony.

(3) A person who is convicted of arson in the first degree and has any prior conviction under section 708-8251, 708-8252, 708-8253, or 708-8254 shall be sentenced to an indeterminate term of imprisonment of twenty years pursuant to section 706-659 with a fifteen-year mandatory minimum term of imprisonment without possibility of parole.

(4) A person who is convicted of arson in the first degree, and the property damaged is a school, hospital, or living facility, shall be sentenced to an indeterminate term of imprisonment of twenty years pursuant to section 706-659 with a five-year mandatory minimum term of imprisonment without possibility of parole.

§708-8252 Arson in the second degree. (1) A person commits the offense of arson in the second degree if the person intentionally or knowingly sets fire to or causes to be burned property and:

- (a) Recklessly places another person in danger of death or bodily injury; or
- (b) Knowingly or recklessly damages the property of another, without the other's consent, in an amount exceeding \$1,500.

(2) Arson in the second degree is a class B felony.

(3) A person who is convicted of arson in the second degree and has any prior conviction under section 708-8251, 708-8252, 708-8253, or 708-8254 shall be sentenced to an indeterminate term of imprisonment of ten years pursuant to section 706-660 with a five-year mandatory minimum term of imprisonment without possibility of parole.

(4) A person who is convicted of arson in the second degree, and the property damaged is a school, hospital, or living facility shall be sentenced to an indeterminate term of imprisonment of ten years pursuant to section 706-660 with a five-year mandatory minimum term of imprisonment without possibility of parole.

§708-8253 Arson in the third degree. (1) A person commits the offense of arson in the third degree if the person intentionally or knowingly sets fire to or causes to be burned property and:

- (a) Negligently places another person in danger of death or bodily injury; or

- (b) Knowingly or recklessly damages the property of another, without the other's consent, in an amount exceeding \$500.
- (2) Arson in the third degree is a class C felony.
- (3) A person who is convicted of arson in the third degree and has any prior conviction under section 708-8251, 708-8252, 708-8253, or 708-8254 shall be sentenced to an indeterminate term of imprisonment of five years pursuant to section 706-660 without the possibility of parole.
- (4) A person who is convicted of arson in the third degree, and the property damaged is a school, hospital, or living facility shall be sentenced to an indeterminate term of imprisonment of five years pursuant to section 706-660 without possibility of parole.

§708-8254 Arson in the fourth degree. (1) A person commits the offense of arson in the fourth degree if the person intentionally, knowingly, or recklessly sets fire to, or causes to be burned, property and thereby damages the property of another without the other's consent.

(2) Except as provided in subsection (3), arson in the fourth degree shall be a misdemeanor.

(3) Arson in the fourth degree shall be a class C felony if the act was committed during the time period and within the geographic area in which a red flag warning was in effect. The state of mind requirement for the offense shall not be applicable to the fact that the red flag warning was in effect at the time and within the geographic area in which the act was committed. The state of mind requirement applicable to the attendant circumstances that the red flag warning was in effect at the time and within the geographic area in which the act was committed shall be negligence.

The Department notes that the term "living facility" at page 3, line 19, and page 7, line 4, may be overly broad and may encompass vulnerable areas that are not intended to be covered by this bill. The Department suggests adding a definition for this term to clarify the places that are meant to be included.

Lastly, the Department is concerned that this bill contains subjects that go beyond the subject expressed in the title of this bill, "arson," which could subject the bill to constitutional challenge. Article III, section 14, of the Constitution of the State of Hawaii mandates that "[e]ach law shall embrace but one subject, which shall be expressed in its title." The Department suggests removing the new section proposed in section 2 of this bill, "**§708- Victim restitution.**" on page 3, lines 8-11, and subsection (1) of the second proposed new section, "**§708- Additional penalties.**" on page 3, lines 12-15, as these are general provisions that relate to restitution and penalties in

chapter 708, HRS, rather than the specific offense of arson. In addition, victim restitution is already addressed for all victims of crime, under section 706-646, HRS. Specifically, section 706-646(2) and (3) states:

(2) The court shall order the defendant to make restitution for reasonable and verified losses suffered by the victim or victims as a result of the defendant's offense when requested by the victim. The court shall order restitution to be paid to the crime victim compensation commission if the victim has been given an award for compensation under chapter 351. If the court orders payment of a fine in addition to restitution or a compensation fee, or both, the payment of restitution and compensation fee shall be made pursuant to section 706-651.

(3) In ordering restitution, the court shall not consider the defendant's financial ability to make restitution in determining the amount of restitution to order. The court, however, shall consider the defendant's financial ability to make restitution for the purpose of establishing the time and manner of payment. The court shall specify the time and manner in which restitution is to be paid. While the defendant is in the custody of the department of corrections and rehabilitation, restitution shall be collected pursuant to chapter 353 and any court-ordered payment schedule shall be suspended. Restitution shall be a dollar amount that is sufficient to reimburse any victim fully for losses, including but not limited to:

- (a) Full value of stolen or damaged property, as determined by replacement costs of like property, or the actual or estimated cost of repair, if repair is possible;
- (b) Medical expenses, which shall include mental health treatment, counseling, and therapy;
- (c) Funeral and burial expenses; and
- (d) Lost earnings, which shall include paid leave.

Thank you for the opportunity to provide comments on this bill.

JON N. IKENAGA
PUBLIC DEFENDER

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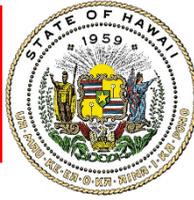
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January 28, 2025

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S.B. No. 871: RELATING TO ARSON

Chair Elefante, Vice-Chair Wakai, and Members of the Committee on Public Safety and Military Affairs:

The Office of the Public Defender (OPD) **opposes S.B. No. 871**. This bill seeks to increase the penalties for the arson offenses in Chapter 708, including imposing mandatory minimum terms of imprisonment if arson is committed under certain circumstances and for repeat arson offenders.

Draconian Consequences / Results / Punishment

Section 2, p. 3, “additional penalties” (“the additional penalties section of the bill”) states that a person who is convicted of any offense under sections 708-8251 through 708-8254 that “endangers or affects a vulnerable area such as a school, hospital, or living facility shall be sentenced to an **additional term of imprisonment** of five years.”

(2) A person who is convicted of any offense under sections 708-8251, 708-8252, 708-8253, or 708-8254 that endangers or affects a vulnerable area such as a school, hospital, or living facility shall be sentenced to an additional term of imprisonment of five years.

Under this language, Arson in the First Degree, HRS § 708-8251, a Class A felony, would be punishable by up to 25 years in prison, Arson in the Second Degree, HRS § 708-8252, a Class B felony would be punishable by up to 15 years in prison, Arson in the Third Degree, HRS § 708-8253, a Class C felony, would be punishable by up to 10 years in prison, and Arson in the Fourth Degree HRS § 708-8254, a misdemeanor or Class C felony, would be punishable by up to 6 years in prison or 10 years in prison if a red flag warning was in effect. In addition, if the person was a repeat arson offender, they could be sentenced to up to 25 years in prison, with a 15-year mandatory minimum for a conviction under HRS

§ 708-8251, Arson in the First Degree, and up to 15 years in prison with a 5-year mandatory minimum for a conviction under HRS § 708-8252. It is unclear whether this draconian punishment scheme was the actual intent of the bill or an unintended consequence.

Extended terms of imprisonment provision does not comply with extended term requirements in the Penal Code

By imposing an additional five-year term to sentences for arson offenses committed in vulnerable areas, the additional penalties section of the bill imposes extended terms of imprisonment (see above) by extending each of the sentences by five years.

(2) A person who is convicted of any offense under sections 708-8251, 708-8252, 708-8253, or 708-8254 that endangers or affects a vulnerable area such as a school, hospital, or living facility shall be sentenced to an additional term of imprisonment of five years.

The statutory guidelines for extended terms of imprisonment are set forth in HRS Chapter 706. HRS § 706-662 governs the imposition of extended terms of imprisonment for felony convictions. Extended terms of imprisonment are available only if the defendant is found to be a “a persistent offender,” “a professional criminal,” “a dangerous person,” “a multiple offender,” “an offender against the elderly, handicapped or a minor eight years of age or younger,” “a hate crime offender,” or is convicted under HRS § 707-702.5 and did not remain at the scene of the crime and render reasonable assistance. There is no mention of arson committed in vulnerable areas as being subject to extended term sentencing so this is problematic at the outset. HRS § 706-664, sets forth the procedure for imposing extended terms of imprisonment, including the right to a jury. This bill bypasses the extended term provisions of the Penal Code and seeks to create an independent statutory section imposing extended terms of imprisonment of five years for each arson offense which endangers or affects a vulnerable area. Additionally, the bill seeks to impose extended terms of imprisonment for misdemeanor convictions (Arson in the Fourth Degree) which would not be subject to the provisions of Chapter 706 which only apply to felony convictions.¹ On its face, the extended term provisions of this bill would violate an individual’s right to due process to the extent that it seeks to impose extended terms of imprisonment without the requisite procedural safeguards, including the right to a jury determination. State v. Mugaotega, 115 Hawai‘i 432, 168 P.3d 562 (2007).

¹ It is also confusing as to why a five-year term is added to each degree of arson rather than a graduated term which increases based on the degree of arson committed. The five-year term is ¼ of the Class A sentence, ½ of the Class B sentence, equal to the Class C sentence and five times the misdemeanor sentence.

Violation of HRS § 706-624(2)(a) for arson offenders sentenced to probation

Section 2, p. 3, “additional penalties” section of the bill imposes a mandatory term of imprisonment of five years for an arson offender convicted of arson in any degree committed that endangers or affects a vulnerable area such as a school, hospital, or living facility.

(2) A person who is convicted of any offense under sections 708-8251, 708-8252, 708-8253, or 708-8254 that endangers or affects a vulnerable area such as a school, hospital, or living facility shall be sentenced to an additional term of imprisonment of five years.

In addition to this constituting an illegally-imposed extended term sentence (see above), this section directly conflicts with HRS § 706-624(2)(a) for an arson offender who is sentenced to probation. Arson in the second, third and fourth degrees are probationable offenses. However, the imposition of a five-year term of imprisonment on a probation sentence for a Class B, Class C or misdemeanor offense would violate the provisions of HRS § 706-624(2)(a). Under that section which sets forth the maximum term of incarceration which can be imposed as a condition of probation, the maximum term of imprisonment for a Class B probation sentence is eighteen months the maximum term of imprisonment for a Class C probation sentence is one year and the maximum term of imprisonment for a misdemeanor prison sentence is six months. The “additional penalties” section of the bill would impose a sentence of imprisonment exceeding that allowable for persons sentenced to probation for arson in the second, third and fourth degrees. Thus, the court could not sentence a defendant convicted of arson which endangers or affects a vulnerable area to probation because the requisite five-year term of imprisonment would exceed the maximum allowable for probation sentences. If the court did impose a probation sentence it could not legally impose the additional five-year term of imprisonment. If the intent of the “additional penalties” section was to preclude probation as a sentence for arson offenders who endanger or affect a vulnerable area, this is a confusing, improper, ineffective and likely illegal way to achieve that end.

Victim Restitution

Section 2, p. 3, “Victim restitution,” is unnecessarily duplicative of HRS § 706-646(2) which already requires the court to order the defendant to make restitution for reasonable and verifiable losses suffered by the victim or victims as a result of the defendant’s offense when requested by the victim.

Mandatory Minimum Terms of Imprisonment

The OPD strongly opposes the imposition of mandatory minimum terms for repeat offenders convicted of Arson in the First Degree, HRS § 708-8251 and Arson in the Second Degree, HRS § 708-8252.

An indeterminate term of incarceration means that once the person is sentenced to prison, the Hawai'i Paroling Authority will fix a minimum sentence which sets forth the minimum amount of prison time a person must serve before they become eligible for release on parole. Under this bill, repeat arson offenders convicted of Arson in the First Degree would be required to serve a fifteen-year mandatory minimum term of imprisonment and repeat offenders convicted of Arson in the Second Degree would be required to serve a five year mandatory minimum term of imprisonment.

The OPD has long been an opponent of mandatory sentencing laws. Mandatory sentencing laws paint with a broad brush; they ignore salient differences between cases or offenders, rendering low-level, nonviolent offenders indistinguishable from serious, violent offenders in terms of punishment. All cases are treated the same in regard to sentencing, despite an individual's actual role in the crime.

For example, persons may commit arson offenses as a result of a mental illness. Under this amendment, judges and the Hawai'i Paroling Authority would be precluded from considering mental illness and other mitigating factors that could arise in an arson case. They would be without discretion to fashion an appropriate sentence or determine eligibility for release, even if the situation called for it.

Negative effects of mandatory sentencing on the courts

The mandatory minimum sentence in this proposed bill will negatively impact the court's ability to administer justice and manage court backlog and congestion. Criminal courts are, by nature, tasked with managing very heavy caseloads. Due to the severity of punishment under this mandatory sentencing scheme, absent any meaningful plea offer by the prosecution, repeat arson offenders will have no choice but to roll the dice and take their chances by demanding jury trials. This law will have the effect of creating major drain on the court system.

Negative impact on our prisons and jails

Not only will there be a negative impact on the trial courts, but our prisons would also be impacted. Prior to deciding on passing this amendment, the legislature must consider that our prisons will quickly become more overcrowded. Our jails and prisons are filled above

both design and operational capacity. A significant portion of Hawai‘i’s prison population are incarcerated in a contracted private, for-profit prison in Arizona; they are exiled thousands of miles away from their families, friends, and crucial support networks. According to a recent study by the Prison Policy Initiative, in 2024, Hawai‘i had an incarceration rate of 367 per 100,000 people.² Although Hawai‘i ranked 41st among the 50 states, if every state was an independent nation, Hawai‘i would have the 50th highest incarceration rate in the world.³ Hawai‘i locks up a higher percentage of people than almost any democratic country on earth.⁴ With the recent nationwide review of criminal justice policies, it is concerning that the trend in the State of Hawai‘i is to increase criminal penalties involving mandatory prison terms.

Thank you for the opportunity to comment on this measure.

² Prison Policy Initiative, “States of Incarceration: The Global Context 2024” *See* <https://www.prisonpolicy.org/global/2024.html>

³ *Id.*

⁴ <https://www.prisonpolicy.org/profiles/HI.html>

LATE

HONOLULU POLICE DEPARTMENT
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HOPE LUNA NUI MĀKA'I

OUR REFERENCE TC-BT

January 29, 2025

The Honorable Brandon J.C. Elefante, Chair
and Members
Committee on Public Safety
and Military Affairs
State Senate
415 South Beretania Street, Room 225
Honolulu, Hawai'i 96813

Dear Chair Elefante and Members:

SUBJECT: Senate Bill No. 871, Relating to Arson

I am Thomas Chang, Captain of the Criminal Investigation Division of the Honolulu Police Department (HPD), City and County of Honolulu.

The HPD supports Senate Bill No. 871, Relating to Arson.

This bill is crucial for protecting the community and safeguarding potential victims. It aims to discourage people from participating in activities that threaten public safety and essential resources. Stricter penalties and longer prison sentences for repeat offenders are essential to tackle the increased danger presented by those with a track record of reckless or harmful behavior. These actions will enhance accountability and act as a deterrent to prevent future crimes. Additionally, this law will strengthen the HPD's ability to address arson-related offenses effectively.

The HPD urges you to support Senate Bill No. 871, Relating to Arson.

Thank you for the opportunity to testify.

APPROVED:

Sincerely,


Arthur J. Logan
Chief of Police


Thomas Chang, Captain
Criminal Investigation Division