

Justin F. Kollar
Prosecuting Attorney

Kevin K. Takata
First Deputy



Rebecca A. Vogt
Second Deputy

Diana Gausepohl-White
Victim/Witness Program Director

OFFICE OF THE PROSECUTING ATTORNEY

County of Kaua'i, State of Hawai'i

3990 Ka'ana Street, Suite 210, Lihu'e, Hawai'i 96766
808-241-1888 ~ FAX 808-241-1758
Victim/Witness Program 808-241-1898 or 800-668-5734

**TESTIMONY OF PROSECUTING ATTORNEY JUSTIN F. KOLLAR TO THE
COUNCIL CONCERNING PROPOSED DRAFT BILL 2573**

Council Chair Rapozo, Vice Chair Kagawa, members of the Council:

Aloha. For the record, I am Prosecuting Attorney Justin F. Kollar and I am here today to offer the following comments concerning proposed Draft Bill 2573 (Relating to Declaring a Public Nuisance to Protect Health, Safety, and Property From the Effects of Various Types of Air Pollution).

This Office is concerned, that while well-intentioned, this Bill, if enacted, could result in unanticipated consequences and present logistical obstacles rendering this Bill difficult, if not impossible, to enforce.

The Draft Bill criminalizes the release of smoke or particulate matter into the atmosphere when that release causes harm to the health of another. Therefore, three separate facts must be proven beyond a reasonable doubt in order to achieve a conviction; first, that the smoke or particulate matter was knowingly, intentionally, or recklessly released from a particular source, second, that it was inhaled by another person, and third, that the smoke or particulate matter caused harm to the health of another.

As to the first element, police and law enforcement would need access to sophisticated air testing equipment and the training to be able to properly operate it. There is a cost factor for this type of equipment and training which is not currently budgeted for.

As to the inhalation and resultant damage to the health of the purported victim of the offense, it would be necessary to engage medical and health experts to prove the element of causation. Such experts typically cost hundreds of dollars per hour to engage; and would be necessary in each case for the review of medical records, examination of the purported victim, preparation of reports, meeting time with prosecutors and/or police, and court time. These expenses could be considerable, and are not currently budgeted for. Furthermore, this

Office typically reserves the use of expert witnesses for felony crimes due to the costs and logistics involved.

In addition to the logistical challenges presented, legal challenges exist. Individuals on Kaua'i who make use of fireplaces and other smoke-producing equipment typically do so in order to warm their residences or prepare food for family consumption. This justification for the conduct involved would be likely to bring the proscribed conduct within the protections afforded by the defense of "Choice of evils", as defined in Section 703-302 of the Hawai'i Revised Statutes.

Further, with regards to proving the requisite mens rea to sustain the conviction, the prosecution would be required to prove beyond a reasonable doubt that not only did the defendant act intentionally, knowingly, or recklessly in causing the release of the particulate matter or smoke, but that the actor did so intentionally, knowingly, or recklessly with regards to the risk of that conduct adversely affecting the health of another, meaning that the defendant, at the very least, knew of the risk that his conduct would adversely affect the health of a person. In a situation where the purported victim is unusually sensitive to the effects of smoke (that is produced using traditional methods of wood burning), it would be difficult to prove that mens rea.

Moreover, as a matter of public policy, this Office discourages legislation intended to encourage the use of the criminal justice system as a way to resolve individualized disputes arising between neighbors. In cases where a specific situation arises that appears to be particularly localized and not of widespread public concern, the civil justice system would appear to be the most appropriate venue for the seeking of redress.

Mahalo nui loa for your time and attention and for the opportunity to express our comments concerning proposed Draft Bill 2573.