Testimony of the Office of the Public Defender
State of Hawaii
to the House Committee on Judiciary

February 3, 2011

H.B. No. 820: RELATING TO BILL OF RIGHTS FOR VICTIMS.

Chair Keith-Agaran and Members of the Committee:

We oppose the passage of H.B. No. 820 in its current form. While there are some provisions of the bill that are reasonable, much of what is proposed is already law and other proposals would cost a significant amount of money to implement.

We will take up our major concerns first. We object to the proposed right in HRS 801D-4 (a)(4) for victims or surviving family members "to be present at and to be informed of all criminal proceedings where the defendant has the right to be present". That would essentially be every court proceeding that is held on the record, including motions to continue the trial date brought by the state or the defense, motions to withdraw as counsel, all pre-trial motions (e.g. to compel discovery, to suppress evidence, for forensic testing, etc.), etc. It is even possible that this statute would conflict with existing statutory and constitutional provisions which exclude witnesses from various proceedings under the Witness Exclusionary Rule. Also, it is occasionally necessary for the Court to conduct proceedings from which the public is excluded and it should not be mandated by statute that certain members of the public be allowed to be present based upon their classification as a victim.

Likewise, we object to the provision in subsection (a)(5) for victims and surviving family members to be <u>heard</u> at "any proceeding involving a post-arrest release decision, a negotiated plea, or sentencing".

First of all, regarding sentencing, victims already have a right to be heard at sentencing in all felony cases pursuant to HRS 706-604(3):

> In all circuit court cases, the court <u>shall</u> afford a fair opportunity to the victim to be heard on the issue of the defendant's disposition, before imposing sentence.

That right has always been extended to surviving family members because they are recognized by the court to be victims as well.

Additionally, a victim or surviving family member currently has the right to provide information which must be included in the pre-sentence diagnosis and report prepared by the Adult Probation Division and given to the judge and parties prior to sentencing, pursuant to HRS 706-602(1)(c):

> (1) The pre-sentence diagnosis and report ... <u>shall</u> include:
>
> (c) Information made available by the victim or other source concerning the effect that the crime committed by the defendant has had upon said victim, including but not limited to, any physical or psychological harm or financial loss suffered.

As is apparent, victims and surviving family members already have the right to be heard at sentencing in felony cases either in writing, in person, or both.

Regarding the proposed right to be heard at any "post-arrest release decision" or "negotiated plea", this would be very problematic. First of all, these events are not always scheduled ahead of time. The parties may be present for a proceeding which becomes entry of a plea and an oral motion for supervised release. Would our already overburdened justice system have to delay such proceedings because victims and family members had not been notified in advance, such that they could exercise this new right to be heard?

Also, the current practice in the First Circuit requires defense attorneys to file motions for 8-hour passes so that defendants can be temporarily released to go to one of a number of substance-abuse treatment facilities for assessment, prior to scheduling of a pre-trial release motion. Under this proposal, victims and family members would have the right to notice and to be heard on such an 8-hour pass motion.

Regarding "negotiated pleas", these are often discussed at pre-trial conferences, trial status conferences, trial calls, etc., among the prosecutor, defense attorney and judge. Many of these proceedings, such as pre-trial conferences, are calendared but not held on the record, rather they take place in the judges' chambers without the presence of the defendant. Under the proposal in this bill, victims and family members would have the right to be "heard" at such proceedings.

Our current law already mandates at section 801D4(a)(1):

> "the victim or a surviving immediate family member shall also be consulted and advised about plea bargaining by the prosecuting attorney".

We believe that this is reasonable and sufficient. While providing rights and services to the victim is an important component of the criminal justice system, it must be recognized that the victim is not a party to the proceedings. To accord them the right to be heard at any negotiated plea proceeding treats them as a party when they are not.

We believe the proposal for HRS 801D-4 (a) (11) "to receive prompt restitution from the person or persons convicted of the crime that resulted in the victim's or surviving immediate family member's loss or injury" is unnecessary and could cause unintended consequences. Firstly, HRS Chapter 706 already provides for the payment of restitution. Additionally, section 706-646 specifically provides that payment of victim restitution shall have priority over all other monetary assessments that may have been ordered by the court.

However, section 706-646 does reference "reasonable and verified losses" suffered by victims. To the contrary, this bill does not define or qualify the terms "loss" or "injury". This bill may give rise to further litigation regarding items that victims claim fall into those undefined categories.

We object to the proposed subsection (a) (12) that victims are to "have available pre-sentence reports relating to the crime when they are available to the defendant". These reports include intimate personal information regarding defendants that is not necessary for the victim to know,

including personal medical and psychiatric information, information regarding relatives of the defendant, and sometimes, assessment information by various court or other personnel. These reports are for counsel and the court. Again, the victim is not a party and should not be entitled to see these reports.

Finally, we object to the proposed right to be heard "at any proceeding when any post-conviction release from confinement is being considered". Currently, the Hawai`i Paroling Authority (HPA) hears from victims who choose to be present at the minimum hearing for a defendant. Further hearings regarding release may take place years later, sometimes a decade or more later. Who is going to be responsible for tracking down a victim or surviving family member when that time comes so many years later? What about the additional logistical problems if the victim is no longer in Hawaii? Nothing currently prevents a victim from writing to HPA regarding the release of an inmate. However, to legislate a right to be "heard" brings logistical costs which must be considered.

Regarding other proposed changes in the bill, we have no objection to the proposal in Section 1 to delete the requirement that a victim has the rights and is eligible for services under this chapter "only if the victim reported the crime to police within three months of its occurrence or discovery unless the victim had justification to do otherwise." We note that we believe the current language already allows for provision of these rights and services to persons who are outside the three month window by the language "unless the victim had justification to do otherwise" but if proponents of this bill see that language as too burdensome, deletion of the provision is fine.

Section 2 proposes to amend subsection (a) of HRS 801D-4 to include "witnesses" in the provision of some of the rights and services. The bill puts into the overall provision of (a) the language, "where specifically provided below, a witness shall have the following rights". However, the only provision included in subsection (a) (1) through (14) that references a "witness" is subsection (6): "to be notified by the prosecuting attorney if a court proceeding to which a victim, surviving immediate family member, or witness has been subpoenaed will not proceed as scheduled". As far as we know, prosecutors already make attempts to notify anyone under subpoena for their case when the person's presence is not needed at court. We do not see the need to provide statutorily for witnesses to be so notified. Also, to the extent it is necessary to provide for such notification in a statute, for legislative drafting purposes, it should not be included in subsection (a) but in its own distinct subsection.

Finally, we would note that the provision that victims and surviving family members should be treated with "fairness, respect, and dignity, and to be free from intimidation, harassment, or abuse, throughout the criminal justice process" is a provision that should not be unique to victims. Everyone involved in the criminal justice system should be treated that way. We question the propriety of singling out victims and surviving family members in this way as it suggests that they are uniquely entitled to such treatment, to the exclusion of others.

Thank for the opportunity to comment on this measure.