



**TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
TWENTY-SEVENTH LEGISLATURE, 2013**

LATE TESTIMONY

ON THE FOLLOWING MEASURE:

S.B. NO. 509, PROPOSING AN AMENDMENT TO ARTICLE I OF THE CONSTITUTION OF THE STATE OF HAWAII RELATING TO RIGHTS OF CRIME VICTIMS.

BEFORE THE:

SENATE COMMITTEE ON JUDICIARY AND LABOR

DATE: Thursday, February 7, 2013 **TIME:** 10:00 a.m.

LOCATION: State Capitol, Room 016

TESTIFIER(S): David M. Louie, Attorney General, or
Lance M. Goto, Deputy Attorney General.

Chair Hee and Members of the Committee:

The Department of the Attorney General has great concerns about this bill and submits the following comments.

While the Department is sympathetic to crime victims and supportive of them, it is very concerned about this proposed constitutional amendment to establish constitutional rights for crime victims. Unlike the constitutional amendments adopted by other states, this amendment confers very broad rights upon crime victims that may adversely impact the criminal justice process.

The Department's three main concerns are that the rights conferred in the bill: (1) will likely conflict with the constitutional rights of defendants potentially creating issues that may (and in our judgment are likely to) result in making it more difficult to obtain convictions, because the criminal justice process will become more complicated and defendants will have more opportunities to create error in the process; (2) will likely create new liabilities for the State; and (3) may allow victims to participate in a criminal case at inappropriate times.

Conflicting Constitutional Rights

Some of the constitutional rights conferred on victims may conflict with a defendant's state and federal constitutional rights. Right (1) at page 2, lines 16-18, which requires a victim to be treated with "courtesy, fairness, and respect for their dignity and privacy throughout the criminal justice process," could, if applied **while the victim is on the witness stand**, easily

interfere with a criminal defendant's right to cross-examine, and otherwise vigorously defend him or her self. Right (4) at page 3, line 1, the **victim's** right to "speedy trial or disposition of their case," could conflict with a defendant's right to prepare his or her own defense. It could also interfere with the prosecutor's need to prepare its case as well.

Some states have included a limitation that the rights of victims not interfere with the constitutional rights of the accused.

New State Liabilities

These constitutional rights may create new liabilities for the State. They appear to create causes of action for victims for injunctive relief and possibly damages against government authorities involved in the criminal justice process. These new liability issues could adversely impact prosecutions. If a victim perceives that the prosecutor is not treating the victim "with courtesy . . . and respect," the victim may sue the prosecutor. This could occur, even though the prosecutor was acting appropriately. The prosecutor, already fully engaged with the criminal prosecution of the case, would also have to also deal with the victim's civil actions.

Some states have addressed this concern by including a provision that nothing in the constitutional amendment or any enabling statute adopted pursuant to the amendment shall be construed to create a cause of action against the state or any of its agencies, officials, employees, or political subdivisions. The present proposal does not do that.

Inappropriate Participation

It should also be noted that some of the rights conferred in this bill may allow victims to interfere with the criminal justice process. A victim is not a third party to a criminal case. Right (6) at page 3, lines 5-7, the right to be present "at all public court proceedings related to the offense unless the court determines that the victim's presence would materially affect the victim's testimony," could conflict with the witness exclusion rule. Although it purports to make an exception for that, the exception may not be broad enough.

Rights (8) and (9) at page 3, lines 10-18, conferring on victims the rights to be notified, heard, and **participate in any process or deliberation that may result** in a post-arrest release decision, a negotiated plea, sentencing, or post-conviction release, could adversely impact the

criminal justice process. These rights seem to suggest that a victim is entitled to participate in any process or deliberation, including internal deliberations of the prosecutor's office or the Department of Public Safety, as well as discussions between those offices and the defendant's attorney, and conferences with the court. Victim participation at these points in the process may not be appropriate.

Right (10) at page 4, lines 19-21, and page 5 lines 1-2, requiring a victim to be notified and heard regarding "**any developments relating** to the release, discharge, commitment, or unauthorized absence of the offender who was committed or involuntarily hospitalized," is extremely broad. The administration at the State Hospital may engage in regular reviews and assessments of a defendant's medical condition, and work on developing or revising treatment plans. It may not be appropriate for a victim to participate in these processes.

We believe that these proposed constitutional rights are **not** simply aspirational, that confirm no enforceable rights until actually legislated into law. As currently drafted, the amendment granting these rights appears self-executing. The provision saying, "The legislature shall have the power to enact laws to define, implement, and preserve the rights guaranteed by this section," does not appear to change the self-executing nature of the amendment. The amendment is intended to create strong, enforceable rights for victims.

Furthermore, government authorities, including the police, prosecutors, prisons, parole, the Department of Health, and the courts, may need additional resources to fully comply with the broad rights for crime victims and to respond to any court actions filed by victims who are not satisfied with the efforts of government authorities. For example, right (2), broadly requires that a victim "receive protection from threats of harm." It does not specify a time period for this right, nor limit it to threats by the defendant or agents acting on behalf of the defendant. And it does not specify the type of protection. A victim could expect very broad protections and file actions to enforce this right. Other states have adopted more specific and clear rights of protection. For example, one state established a right to be reasonably protected from the accused through the imposition of appropriate bail or conditions of release by the court. Another state established a right to be reasonably protected from the accused throughout the criminal justice process. The present proposal is vague.

The Victims' Bill of Rights, in chapter 801D, Hawaii Revised Statutes, should be adequate to properly address victims' rights. Chapter 801D provides for enforcement of its provisions. Section 801D-5(a) provides:

Each county is responsible for the enforcement of rights under section 801D-4. The courts shall fashion all decisions and orders to enhance the recognition of these rights and the provision of these services, to the extent that they will not conflict with the constitutional rights of the defendant.

The entities that participate in the criminal justice process, including law enforcement, prosecutors, the courts, and corrections, are supportive of victims and very cognizant of their rights under chapter 801D.

NEIL ABERCROMBIE
GOVERNOR



STATE OF HAWAII
**CRIME VICTIM COMPENSATION
COMMISSION**

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LATE TESTIMONY

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Commissioner

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Commissioner

PAMELA FERGUSON-BREY
Executive Director

TESTIMONY IN SUPPORT OF
SENATE BILL 509
A BILL PROPOSING AN AMENDMENT TO
ARTICLE I OF THE CONSTITUTION OF THE STATE OF HAWAII
RELATING TO RIGHTS OF CRIME VICTIMS

Pamela Ferguson-Brey, Executive Director
Crime Victim Compensation Commission

Senate Committee on Judiciary and Labor
Senator Clayton Hee, Chair
Senator Maile S. L. Shimabukuro, Vice Chair

Chair Hee, Vice Chair Shimabukuro, and Members of the Senate Committee on Judiciary and Labor:

Thank you for providing the Crime Victim Compensation Commission ("Commission") with the opportunity to testify in support of Senate Bill 509, proposing an amendment to Article I of the Constitution of the State of Hawai'i relating to Rights of Crime Victims. The Commission is dedicated to helping provide compensation to crime victims and promoting the rights of crime victims in general.

Over the years, the legislature has shown commitment to improving the status of crime victims by creating statutes that enable crime victims to receive restitution (HRS § 706-646), requiring that crime victim statements be included in the Presentence Report (HRS § 706-602), allowing crime victims to speak prior to sentencing (HRS§ 706-604), and setting forth basic crime victim rights (HRS ch. 801D). The intent has always been "that all victims and witnesses of crimes are treated with dignity, respect, courtesy, and sensitivity and that the rights extended in this chapter to victims and witnesses of crime are honored and protected by law enforcement agencies, prosecutors, and judges in a manner no less vigorous than the protections afforded criminal defendants." HRS § 801-D-1. That intent cannot be truly realized until crime victims have their own constitutional bill of rights.

A constitutional amendment is necessary because "[r]ules to assist victims frequently fail to provide meaningful protection whenever they come into conflict with bureaucratic habit, traditional indifference, sheer inertia or the mere mention of an accused's right – even when those rights are not genuinely threatened." Lawrence H. Tribe and Paul G. Cassell, Let's Protect Victims' Rights, www.nvcap.org/docs/cassell/9807_cassell_tribe.html.

In criminal cases, the Hawai'i constitution provides rights to everyone involved (defendant, media and the public) EXCEPT the crime victim. Yet, the crime victim has more at stake than the media and the public and just as much interest in the outcome of the case as the defendant. While HRS § 801D-4 was intended to provide a basic bill of rights for victims and witnesses, it does not establish permanent, enforceable rights for crime victims guaranteed by the constitution. As a result, HRS § 801D-4 can and has been ignored.

The crime victim's bill of rights seeks to create a balance in which the rights of a defendant are protected while at the same time allowing the crime victim meaningful participation in the criminal system. A crime victim's bill of rights in no way diminishes a criminal defendant's constitutional rights. Requiring a crime victim to be advised of proceedings, to be consulted on plea agreements, and to be heard at proceedings does not infringe on a defendant's constitutional rights. Nor does requiring a defendant to pay restitution infringe on a defendant's constitution rights. To the contrary, being ordered to pay restitution can have a positive effect on a defendant's rehabilitation as the defendant is making a positive contribution to his or her victim's recovery. The crime victim's bill of rights seeks to ensure speedy trial just as the constitution guarantees a speedy trial to the defendant. In instances where a defendant seeks a long delay of trial, the court can and should balance the defendant's need for the continuance against the desire of a crime victim for a speedy trial. A crime victim's right to a speedy trial would not trump a defendant's right to develop his or her case, but rather it allows the courts to consider the competing needs of the defendant and the victim.

The bill would not create a danger of a victim interfering in the prosecution of the case. The proposed bill provides victims with the opportunity to be heard, kept informed, to receive restitution, and the return of their property. Consulting victims before making plea agreements does not provide victims with the right to refuse the plea agreement. It does, however, provide an opportunity for the prosecutor to learn information that may be pertinent to the plea negotiations. The bill does not require the prosecutor to consult with victims regarding the technical or tactical aspects of prosecuting the case.

Moreover, HRS § 801D-4 requires the crime victim to make a written request to be informed of the disposition of the case and to be consulted about any plea bargain without requiring anyone to inform the victim that he or she has the right to make the request. Even if a crime victim makes a request, the rights set forth in HRS § 801D-4 are not enforceable by the victim. Without standing, enforceability, and the force of the constitution, the rights enumerated in HRS § 801D-4 have little meaning. Courts, prosecutors, and defense attorneys have continually disregarded the rights of crime victims.

The crime victims' right to restitution has not been adequately protected by HRS § 801D-4 or by the 2006 amendment to HRS § 706-646 which made restitution mandatory. In 2003, the Commission began a pilot project to distribute restitution payments collected from inmates and parolee to their crime victims. Since the inception of the project, the Commission has opened over 4,000 restitution files and collected over 1.8 million dollars in restitution. Through this project, the Commission has become familiar with the institutional barriers to the ordering and

collection of restitution. Some of these barriers were brought to the public's attention in a series of articles in the Honolulu Star Advertiser which ran on June 2011.

In 2012, the legislature and the governor made restitution a key component of the Justice Reinvestment Initiative. As a result, HRS § 353-22.6 was amended to require the collection of 25% of all inmate earnings, deposits, and credits. The amendment became effective July 1, 2012. The Commission continues to receive judgments that fail to reflect the amendment to HRS § 353-22.6.

Another example of the failure of HRS § 801D-4 to protect victims' rights made the news on December 28, 2008. Rita Makekau was accused of assaulting her five nieces and nephews by, among other things, breaking their teeth with a hammer, forcing them to eat dog food, pushing them down stairs, and holding them underwater. Ms. Makekau made a conditional plea in which she pled no contest to the charges but was allowed to appeal whether a Hawai'i court had jurisdiction over a self-proclaimed member of the Hawaiian sovereignty. At her sentencing, her nieces and nephew were present and so was their court-appointed Guardian ad litem and social worker. At the sentencing, Ms. Makekau requested being allowed to remain on bail pending her appeal. The court set a hearing on the issue. The children's Guardian ad litem and social worker intended to be present at the hearing to represent the children's interest. When they arrived at court at the scheduled time, they found out that the attorneys and court held a status conference in chambers at least fifteen minutes prior to the scheduled hearing time. The parties then held and concluded the hearing prior to the Guardian ad litem's arrival. The Guardian ad litem had not been informed of the advanced hearing time. The court granted Ms. Makekau's request to remain free. When told, the Guardian ad litem said that the children "yelled. They were angry and disappointed." Without standing, the Guardian ad litem and the children could not protest being excluded from the hearing. It was fortunate for the children that the case was high profile and the prosecutor's office sought reconsideration of the court's ruling.

Making victims' rights enforceable will not result in an avalanche of lawsuits by victims. In 1982, California became the first state to have a victims' rights constitutional amendment. There are currently thirty two states that have ratified a victims' rights constitution amendment. The Commission is unaware of any state with a constitutional amendment that has had an onslaught of lawsuits filed as a result of the constitutional amendment.

Every day, victims are thrust into the criminal justice system and asked to navigate its complexities in the midst of their trauma. Sadly, this means that victims' rights are often forgotten or ignored. Crime victims deserve to have permanent, constitutional, and enforceable rights

Thank you for allowing the Commission the opportunity to testify in support of Senate Bill 509.

HAWAII
STATE
COMMISSION
ON THE
STATUS
OF
WOMEN



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LATE TESTIMONY

February 6, 2013

Testimony in Support of SB 509, Proposing an Amendment to Article I of the Constitution of the State of Hawaii Relating to Rights of Crime Victims

To: Senator Clayton Hee, Chair
Senator Maile S.L. Shimabukuro, Vice-Chair
Members of the Senate Committee on Judiciary and Labor

From: Cathy Betts, Executive Director, Hawai'i State Commission on the Status of Women

Re: Testimony in Support of SB 509

On behalf of the Hawai'i State Commission on the Status of Women, I would like to thank the committee for this opportunity to provide testimony. The Commission supports SB 509. SB 509 would amend Article I of the Hawaii State Constitution to ensure that crime victims are afforded some basic rights throughout the criminal justice system. Specifically, crime victims should be notified and informed about major developments in their case, have input on plea negotiations and resulting deals, to be afforded restitution and to have knowledge of their offender's whereabouts within the system. It is clear that these basic safeguards are not consistently being provided to victims of crime. The Commission strongly believes that affording victims certain basic rights does not detract, or take away from, basic rights afforded to the accused. In reality, a balance can and must be struck to ensure that victims are treated with dignity and respect.

Sincerely,

Cathy Betts
Executive Director
Hawai'i State Commission on the Status of Women

LATE TESTIMONY

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OFFICE OF THE PROSECUTING ATTORNEY

TESTIMONY IN SUPPORT OF SENATE BILL 509 A BILL FOR AN ACT PROPOSING AN AMENDMENT TO ARTICLE I OF THE HAWAII CONSTITUTION TO ESTABLISH CRIME VICTIM RIGHTS

February 6, 2013

Senator Clayton Hee, Vice Chair Maile S.L. Shimabukuro, and Members

Thank you for the opportunity to provide testimony in support of Senate Bill 509, proposing an amendment to Article I of the State of Hawaii Constitution to establish crime victim rights. Over the years, the Hawaii State legislature has created various statutes to address victim rights. While this office is committed to enforcing these statutes, many in the community perceive that these rights are not upheld unless there is a state constitutional amendment. This debate has been ongoing for many years and we believe the time is ripe for a constitutional amendment which provides victims certain basic rights. We support this Legislature's efforts to draft such a constitutional amendment.

The criminal justice system functions effectively because of the cooperation of victims and witnesses, yet these same individuals are afforded no constitutional rights in the process. Currently the Hawaii constitution provides rights to the defendant, the public, and even the media. There are no provisions for crime victims. Concerns and opposition from prosecutors historically stemmed from proposed language that could be interpreted to allow victims to interfere with plea negotiations or place an inordinate burden on the prosecutor. This amendment gives victims the right among others to address their concerns and to be kept informed as to the status of the case while recognizing that the prosecutor retains control and ultimate responsibility for plea negotiations and agreements. While the state and victim may not agree on a plea or the direction the state takes in prosecuting or not prosecuting a case, the victim still has a right to know and hear about it in a timely way, and in turn it is important that the state hear from the victim.

The criminal justice system is just that, a system of justice. Does a victim of crime receive justice from a system that doesn't recognize his or her rights? Thirty two states have recognized the importance of victim rights by passing constitutional amendments. It is time for Hawaii to join them. The Hawaii County Office of the Prosecuting Attorney supports the passage of Senate Bill 509.

Mahalo for the opportunity to testify.

A handwritten signature in black ink, appearing to read "Mitchell D. Roth".

Mitchell D. Roth
Prosecuting Attorney

From: mailinglist@capitol.hawaii.gov
Sent: Thursday, February 07, 2013 8:17 AM
To: JDLTestimony
Cc: Karibenes@gmail.com
Subject: *Submitted testimony for SB509 on Feb 7, 2013 10:00AM*

SB509

Submitted on: 2/7/2013

Testimony for JDL on Feb 7, 2013 10:00AM in Conference Room 016

Submitted By	Organization	Testifier Position	Present at Hearing
Kari Benes	Individual	Support	No

Comments:

Please note that testimony submitted less than 24 hours prior to the hearing, improperly identified, or directed to the incorrect office, may not be posted online or distributed to the committee prior to the convening of the public hearing.

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