



The Judiciary, State of Hawaii

Testimony to the House Committee on Judiciary

Tuesday, March 19, 2013, 2:00 p.m.

State Capitol, Conference Room 325

By

Janice Yamada

Deputy Chief Court Administrator, First Circuit

Bill No. and Title: Senate Bill No. 873, S.D. 2, RELATING TO COLLECTION OF RESTITUTION FOR CRIME VICTIMS.

Purpose: Creates standards and procedures for income-withholding, for purposes of enforcing restitution orders. Amends the definition of "debt" relating to the recovery of money owed to the State to include court-ordered restitution subject to civil enforcement. Provides priority of income withholding orders. Removes court's authority to revoke restitution once ordered. Extends victims' access to adult probation records, to include access to payment compliance records, for purposes of enforcing restitution orders. Requires that any bail posted by a defendant be applied toward payment of any court-ordered restitution in the same case. Makes an unspecified appropriation to the judiciary for the purpose of enhancing restitution collection.

Judiciary's Position:

The Judiciary supports the underlying intent of this bill which is to improve the collection of restitution for crime victims; however, the Judiciary has concerns that this bill potentially will have an adverse impact on Judiciary operations.

By design, the bill is to help ensure that the offender satisfies his restitution obligations to his/her victims by requiring employers to withhold income for payment of restitution. While the Judiciary believes that it is important for offenders to comply with their restitution payments there are several challenges regarding resources to carry these recommendations forward.

It appears that this provision applies to all offenders who have received a judgment/order of a restitution obligation. There are many cases in which restitution will be ordered for a defendant who is not on probation and may not be under the supervision of any criminal justice



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entity. In these situations, the court will have no means of obtaining the necessary information as to the defendants' current and future employers. For the defendants that are currently unsupervised by the Judiciary but would require tracking oversight, it is recommended that the Victim Witness Program administered out of the Prosecutors Office, be responsible for these cases.

The bill requires stringent deadlines by which the employer must remit the amounts withheld to the clerk of the court and by which the fiscal office must disburse the amount to the victim. The employer must remit amounts withheld within five days and the court's fiscal office must disburse the amount to the victim within two days of receipt of amounts withheld. Currently the Judiciary Fiscal Office only accepts cash, a cashier's check or money orders for payments to ensure payment collection. The current bill does not allow adequate time for a check to clear and in the event a business may have insufficient funds in their account, the check could bounce and the Judiciary would sustain the loss.

The mandatory minimum of \$50 per month in restitution payment plus the \$2 per month administrative fee may be prohibitive for some defendants. There is no flexibility in the bill for the minimum amount to be adjusted by the court.

Although the bill determines that discrimination in the hiring or retention of a defendant based on the income withholding order to be a misdemeanor offense, this may make employers reluctant in hiring offenders which could adversely affect an offender from obtaining employment and adversely contributing to his/her ability to pay restitution.

The bill allows access to the adult probation records by the victim to determine the compliance record of the defendant with court-ordered payments, the amounts paid by the defendant, the dates of the payments made by the defendant, the payee of payments made by the defendant, and the balance unpaid. In order to accommodate these requests the already significant workload of the probation staff will increase.

It is unclear who would be responsible to ensure service of the initial order upon the employer. Also, it would be impractical and unrealistic for the "clerk of the court" to be responsible to notify new employers should the defendant change jobs without additional staffing and without access to the necessary information regarding the defendants' employment status. If Senate Bill No. 873 is enacted, the Judiciary will face a significant increase in the court's workload. In order to administer/implement procedures to accommodate the provisions in this bill, it is estimated to cost \$866,360.68 annually for the existing population that is supervised by probation. The estimated cost is inclusive of the projected staffing requirements needed statewide. The positions include 2 Social Worker (SW) IVs, 2 Judicial Clerk III's, and 1



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Accountant I for Oahu, 1 SW IV, 1 Judicial Clerk III, and 1 Accountant I for Maui, 2 SW IV's, 2 Judicial Clerk III's, and 1 Accountant I for Hawaii and 1 SW IV, 1 Judicial Clerk III, and 1 Accountant I for Kauai. Collectively, this is 6 SW IV's, 6 Judicial Clerk III's and 4 Accountant I's, to service statewide.

Lastly, the bill states that all money deposited by the defendant as bail or bond, in any criminal proceeding before any court, that has not been declared forfeited shall be applied toward payment of any restitution; however, the primary purpose of bail is to ensure that an offender appears for his/her court hearing. Thus the bail posted for a defendant's release may have been money provided by family members or friends and does not belong to the defendant.

Thank you for the opportunity to testify on Senate Bill No. 873, S. D. 2.

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**THE HONORABLE KARL RHOADS, CHAIR
HOUSE COMMITTEE ON JUDICIARY
Twenty-Seventh State Legislature
Regular Session of 2013
State of Hawai'i**

March 19, 2013

RE: S.B. 873, S.D. 2; RELATING TO COLLECTION OF RESTITUTION FOR CRIME VICTIMS.

Chair Rhoads, Vice-Chair Har and members of the House Committee on Judiciary, the Department of the Prosecuting Attorney of the City and County of Honolulu submits the following testimony in strong support of S.B. 873, S.D. 2.

The purpose of this bill is to support, encourage and facilitate payment of restitution to victims of crime. While restitution is ordered by courts in many criminal cases today, it is not strictly enforced, and victims are often left to "fend for themselves" via private civil action against a defendant. In this sense, the current system greatly decreases the chances that victims will ever receive the restitution payments promised to them, and further demoralizes or "re-victimizes" these victims of crime, discounting the very benefits that restitution is intended to provide.

To more effectively facilitate and enforce payment of restitution by offenders, S.B. 873, S.D. 2, provides for the following methods (with additional comments in parentheses):

1. Creates standards and procedures for income-withholding, similar to those used for outstanding child support payments (child support withholdings would receive first priority, to comply with federal regulations);
2. Includes unpaid restitution as valid "debt," for purposes of withholding State income tax refunds (similar to outstanding child support payments or judgments owed to the State);
3. Removes a court's ability to revoke restitution once ordered as part of a defendant's sentencing (this would not affect the ability to appeal and/or reverse a conviction);
4. Requires that any money deposited by way of bail or bond be applied to any restitution, fines, or fees ordered by the court, before any balance is returned to a defendant;

5. Extends victims' access to adult probation records, to include access to payment compliance records, for purposes of enforcing restitution orders civilly (this provision may not be necessary, as the Judiciary is currently working to coordinate alternative methods of providing this information to the appropriate agencies); and
6. Provides additional funding to the Judiciary, to facilitate income-withholding once ordered by the courts (it is our understanding that the Judiciary anticipates an additional expense of \$850,000 to implement this function statewide, for all supervised offenders).

After working with a number of other agencies on these measures, the Department believes that S.B. 873, S.D. 2, presents a comprehensive and effective approach to restitution collection. Not only would this directly address criticisms of the current process as providing only "hollow promises" to victims, but more importantly, this would truly transform Hawai'i's restitution process into an effective tool for victim restoration, offender rehabilitation, and public faith.

Victim restitution is perhaps the *only* core victims' right that addresses such a wide range of the--often devastating--effects of crime, including physical, emotional, psychological, financial *and* social impacts. As stated by the House Judiciary Committee, upon passing the language that later became Section 706-605, Hawaii Revised Statutes:

Reparation and/or restitution by wrongdoers to their victims is basic to justice and fair play...[B]y imposing the requirement that a criminal repay not only "society" but the person injured by the criminal acts, society benefits not once, but twice. The victim of the crime not only receives reparation and restitution, but the criminal should develop or regain a degree of self respect and pride in knowing that he or she righted, to as great a degree as possible, the wrong that he or she has committed.

House Stand. Comm. Rep. No. 425, in 1975 House Journal.

For the foregoing reasons, the Department of the Prosecuting Attorney of the City and County of Honolulu strongly supports the passage of S.B. 873, S.D. 2. Thank you for the opportunity to testify on this matter.



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

ON THE FOLLOWING MEASURE:

S.B. NO. 873, S.D. 2, RELATING TO COLLECTION OF RESTITUTION FOR CRIME VICTIMS.

BEFORE THE:

HOUSE COMMITTEE ON JUDICIARY

DATE: Tuesday, March 19, 2013

TIME: 2:00 p.m.

LOCATION: State Capitol, Room 325

TESTIFIER(S): David M. Louie, Attorney General, or
Garry L. Kemp, Administrator, Child Support Enforcement Agency

Chair Rhoads and Members of the Committee:

The Department of the Attorney General wishes to provide comments on this bill.

The provisions of this bill seek to address court-ordered restitution and the civil enforcement of such orders.

Prior to its amendment, this bill provided that income withholding orders for restitution have priority over any other orders. In testimony presented to the Senate Committee on Judiciary and Labor, it was explained that currently, the State of Hawaii is in compliance with section 466(b)(7) of the Social Security Act (42 U.S.C. §666(b)(7)) that specifically requires withholding for support collection be given priority over any other legal process under state law, against the same income. The provision giving income withholding orders for court-ordered restitution priority over other income withholding orders conflicts with sections 571-52(b), 571-52.2(f), 571-52.3, 576D-14(i), and 576E-16(c), Hawaii Revised Statutes (HRS), and would cause the State to be out of compliance with existing federal law. If the State is found to be out of compliance, it will jeopardize federal welfare funding and federal funding of the child support enforcement programs.

In passing Senate Draft 2, the Senate Committee on Ways and Means amended the sentence beginning on page 2, line 22, and ending on page 3, line 4 to give orders made pursuant to chapters 571, 576D, and 576E, HRS, priority over income withholding for court-ordered restitution. Although this amendment addresses income withholding orders issued in this State, it does not address income withholding orders for child support issued by other states and are

required to be enforced under chapter 576B, HRS. This measure could still cause the State to be out of compliance with existing federal law and jeopardize federal welfare funding and federal funding of the child support enforcement programs.

We respectfully request that the Committee amend the sentence beginning on page 2, line 22, and ending on page 3, line 4, to also include orders being enforced pursuant to chapter 576B, HRS, as having priority over income withholding orders for court-ordered restitution. The sentence should be amended to read, “Any income withholding order shall have priority as against any garnishment, attachment, execution, or other income withholding order, or any other order, except for any order made or being enforced pursuant to chapters 571, 576B, 576D, and 576E, which shall have first priority.”

We respectfully request that the members of the Committee consider the above-proposed amendment if this bill is to be passed.

NEIL ABERCROMBIE
GOVERNOR



STATE OF HAWAII
**CRIME VICTIM COMPENSATION
COMMISSION**

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TESTIMONY IN SUPPORT OF SENATE BILL 873, SD2
A BILL FOR AN ACT RELATING TO
COLLECTION OF RESTITUTION FOR CRIME VICTIMS

Pamela Ferguson-Brey, Executive Director
Crime Victim Compensation Commission

House Committee on Judiciary
Representative Karl Rhoads, Chair
Representative Sharon E. Har, Vice Chair

Tuesday, March 19, 2013; 2:00 PM
State Capitol, Conference Room 325

Chair Rhoads, Vice Chair Har, and Members of the House Committee on Judiciary:

Thank you for providing the Crime Victim Compensation Commission ("Commission") with the opportunity to testify in support of Senate Bill 873, SD2, Relating to Collection of Restitution for Crime Victims. Senate Bill 873, SD2, creates a number of tools to enhance restitution collection: 1) Requires orders of income withholding for the collection of restitution; 2) Allows tax refund intercepts for the collection of restitution; 3) Eliminates the court's authority to revoke restitution; 4) Allows money deposited for bail or bond to be used to satisfy restitution, fines, or fees; and 5) Provides crime victims with limited access to Adult Probation records for information relating to court-ordered payments.

The Commission was established in 1967 to mitigate the suffering and financial impact experienced by victims of violent crime by providing compensation to pay un-reimbursed crime-related expenses. In 2003, the Commission began a pilot project to distribute restitution payments collected from inmates to their crime victims. Since the inception of the project, the Commission has opened over 4,000 restitution files. Through the project, the Commission identified a number of challenges in the collection of restitution.

While there has been progress in addressing some of the issues that prevent Hawai'i crime victims in recovering their crime-related losses from court-ordered restitution, significant problems remain. Some of the institutional barriers are highlighted in a series of articles published in the Honolulu Star-Advertiser in June 2011. The failure to collect court-ordered restitution while an offender is "on status" (incarcerated, on parole or on probation) was

recognized as a long-standing problem that hurt crime victims, and tools such as tax refund intercepts were identified as possible solutions. Through its own project and through discussion with Victim Witness Counselors throughout the State, the Commission found that crime victims have no effective means to collect restitution once the offender is “off status” (no longer incarcerated, on parole or on probation). Once an offender is “off status,” the crime victim must pursue enforcement of the free-standing restitution order through the civil courts. The only tool currently available to crime victims is civil enforcement. Such enforcement is only possible if the offender has significant assets and the crime victim has the money to hire an attorney. The tools set forth in House Bill 234 are necessary to increase collection of court-ordered restitution.

ORDERS OF INCOME WITHHOLDING

Orders of Income Withholding are an effective tool for collecting restitution payments from working offenders. The Order of Income Withholding directs an employer to withhold a set amount from an offender’s wages. The amount is set by the court who can adjust the amount based on the offender’s ability to pay. This ensures that the offender pays his restitution. The Order of Income Withholding remains in place until the restitution is paid in full.

This bill mirrors Hawai‘i Revised Statute (HRS) § 571-52 which provides for orders of income withholding for the collection of child support. Orders of income withholding are well-established means for the collection of child support.

TAX REFUND INTERCEPTS

Likewise, the use of tax refund intercepts, which is also used in the collection of child support, will also be an effective means to collect restitution for offenders who are both “on status” and “off status”.

PREVENTING THE REVOCATION OF RESTITUTION

The amendment to HRS § 706-645 is necessary to eliminate confusion and conflict in the statutes and to reiterate the importance of restitution. Currently, HRS § 706-645 allows the court to revoke restitution if the circumstances that warranted ordering restitution change. HRS § 706-644(4) allows a court to revoke fines or fees but specifically states that restitution must be paid in full. HRS § 706-646 makes restitution mandatory regardless of ability to pay. Both HRS § 706-644(4) and HRS § 706-646 reflect that crime victims deserve to have restitution in the full amount.

ACCESS TO ADULT PROBATION RECORDS

The Commission supports providing crime victims with access to Adult Probation records. Crime victims should be able to track restitution payments, outstanding balances, and dates of compliance. Such information is currently unavailable to crime victims.

PROPOSED AMENDMENT TO ALLOW THE COMMISSION ACCESS TO ADULT PROBATION RECORDS

The Commission requests that HRS §806-73(4) be amended to allow the Commission to access the Adult Probation Records for the limited purpose of facilitating the monitoring and payment of restitution. This will allow the Commission to fulfill its obligation to efficiently distribute restitution collected by inmates.

The Commission disburses restitution collected from inmates and parolees to their crime victims. To do this, the Commission must determine who the restitution is to be paid to, whether a restitution order is the responsibility of one or more person (joint and several liability), and whether the restitution order has been paid in full. The Adult Probation records are a definitive source of the necessary information.

Thank you for providing the Commission with an opportunity to testify in favor of this important measure. The Commission urges you to pass Senate Bill 873, SD2, because the bill is necessary to ensure that crime victims receive court-ordered restitution.

To: HOUSE Judiciary Committee
Karl Rhoads, Chair, Sharon E. Har, Vice-Chair

Re: SB 873, SD 2

Date: March 19, 2013, 2:00 p.m.

From: Richard Paul McClellan III

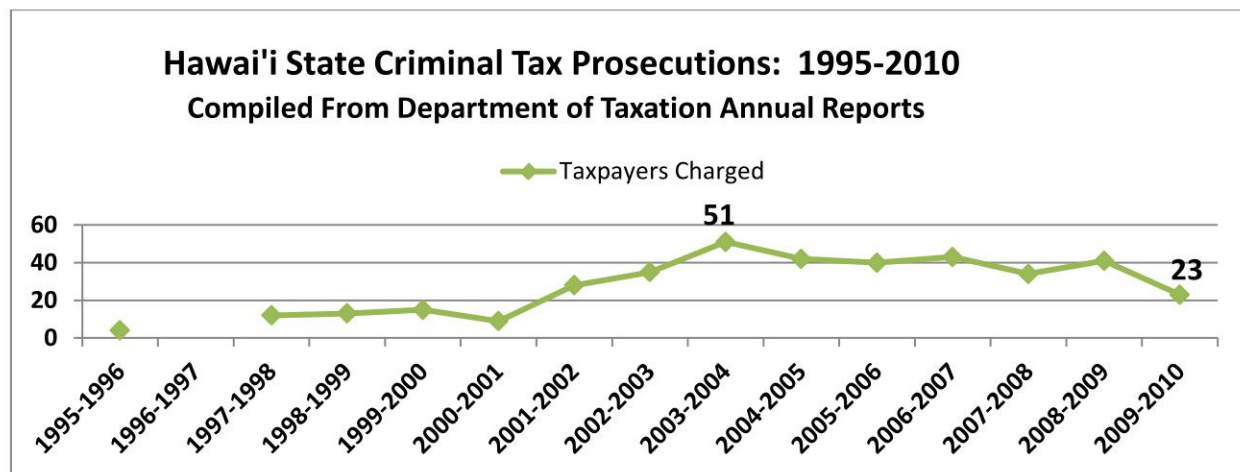
Honorable Representatives:

I am an [attorney](#) in local practice and routinely defend persons accused of tax crimes in our State and federal courts. I have written about tax and the criminal tax system ([articles here](#).)

SB 873 is a major reworking of the restorative aspects of Hawaii's criminal justice system. The merits of transforming the Judiciary into a debt collector are squarely before you.

SB 873's impacts in tax cases have not been fully considered and believe that you should amend SB 873 to exclude tax crimes (HRS Sections 231-34 through 231-40.) SB 873 fails to consider the nature of restitution in tax cases, how it is presently collected, and has other failings.

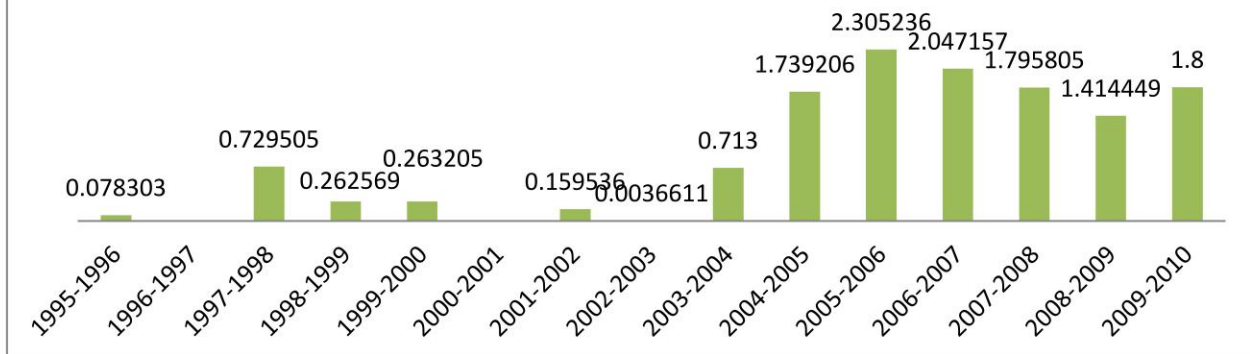
By way of background, the State of Hawaii prosecutes approximately three dozen tax crimes per year and, since 2003, collects between \$700,000 and \$1,800,000 per year in "restitution."



And,

Collections By Hawai'i Criminal Collector 1995-2010 (In Millions)

Compiled From Department of Taxation Annual Reports



The Department of Taxation collects its restitution via a specialized criminal tax collector that monitors court-ordered payments and writes reports to the Adult Services Branch (probation) regarding payments and compliance.

Tax Restitution:

"Restitution" in tax cases is the amount of tax generally not paid or due and owing as a result of the offense. Very typically, the amount of restitution is unknown at time of sentencing and a "rough and ready" calculation is used.

Should SB 873 become law, attorneys and the Department of Taxation will have to litigate the amount of restitution at the time of sentencing (whether trial or plea.) Because, under the new provisions of SB 873, the Court cannot modify restitution later, tax cases will have to have trials on the amount of tax due and owing.

The Department of Taxation cannot risk becoming stuck with a figure too low, and the defendant cannot risk being ordered to pay more than legitimately owed. Criminal tax cases routinely have hundreds of thousands or even millions of dollars in gross receipts. Frequently criminal investigators are uncertain of whether a number of transactions are gross income and ignore those transactions for the "rough and ready computations."

Our District Court, wherein misdemeanor failure to file cases are brought, or Circuit Courts, are unlikely to have the expertise or resources to take on contested tax trials as to amount of

restitution. As members of the Legislature are well aware, Hawaii's general excise tax is complicated in application and design, with exceptions seemingly added and eliminated every year. The Legislature has created a special Court, the Tax Appeals Court, for civil tax cases, yet proposes via SB 873 to have regular Courts learn the civil tax code in order to determine restitution.

Inability To Pay:

Tax defendants are frequently unable to pay within a reasonable period (1-3 years after sentencing.) Hawaii has a relatively high tax rate. Small businesses and individuals that do not file (and pay) GE and Net Income for multiple years often have "restitution" amounts that are multiples of their annual net income. Tax offenders frequently do not have any assets beyond their income, as they did not file their tax returns because they did not have the money to pay the tax. These offenders are typically capable of repaying approximately 10% of their net income towards restitution. This contemplates a restitution payment plan of approximately 8-10 years.

SB 873 presents a situation where after a reasonable period of time, the District Court can not dismiss a case from its jurisdiction. Cases will go on for prolonged periods as restitution can not be paid and can not be discharged in bankruptcy. Please keep in mind, under Hawaii law, restitution must be paid before any fines or court costs can be collected.

Present practice is that after several years, and an appropriate showing of inability to pay, the District Court dismisses restitution as a condition of probation. *Restitution still remains as a free-standing order, and the Department of Taxation uses its considerable civil powers to collect the tax, penalty, and interest outstanding.* The Court does not have to monitor the case, however.

SB 873 proposes to do away with this system in favor of a Judiciary-operated employment-based debt collection program.

Philosophical And Constitutional Concerns:

In 2006, "restitution" was modified from the amount a defendant could afford to pay to the amount of reasonable and verified losses suffered by the victim, via Act 230 of 2006. In my view, this was a step back towards the notorious debtor's prisons of the 18th century.

SB 873 takes the further step of transforming the Judiciary into a debt collector. SB 873 even proposes to set a minimum monthly payment without consideration of the resources of the defendant to pay. It is highly unlikely the Constitution will countenance this situation; and, even if would, we should ask ourselves whether this is an appropriate system.

SB 873 has extremely short deadlines that even the most efficient enterprise would be hard-pressed to comply with. For example, the proposed legislation gives the Judiciary two business days to remit a received payment to the obligee (victim).

Absence of Potentially Interested Stakeholders:

I do not see any testimony from Department of Taxation about the proposed reworking of the criminal tax system of restitution or any input from them.

With all due respect to the Judiciary, I do not believe that tax restitution can be as effectively and cost-efficiently collected by the Judiciary as by the Department of Taxation.

The major proponent of SB 873 appears to be the City & County of Honolulu Prosecutor's Office. Tax cases are not prosecuted by this entity. Tax cases are prosecuted by the Attorney General's Office, which has submitted general testimony in opposition to this bill but has not identified the specific problems for tax cases.

Conclusion:

SB 873 should be held, or modified to exclude Chapter 14 (HRS 231-34 through -40 tax crimes.)