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TESTIMONY ON SENATE BILL 230 HD 1
RELATING TO RESTITUTION FOR VICTIMS OF CRIME

Pamela Ferguson-Brey, Executive Director
Crime Victim Compensation Commission

House Committee on Finance
Representative Sylvia Luke, Chair
Representative Scott Y. Nishimura, Vice Chair

Tuesday, April 7, 2015; 2:30 PM
State Capitol, Conference Room 308

Chair Luke, Vice Chair Nishimura, and Members of the House Committee on Finance:

Thank you for providing the Crime Victim Compensation Commission (“Commission”) with the opportunity to testify before you today. The Commission strongly supports this bill which clarifies that lost earnings and mental health treatment, therapy, and counseling are expenses that can be ordered for restitution. The bill also clarifies that restitution while a defendant is incarcerated should be payable pursuant to Hawai`i Revised Statutes § 353-22.6

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. Many victims of violent crime could not afford to pay their medical bills, receive needed mental health or rehabilitative services, or bury a loved one if compensation were not available.

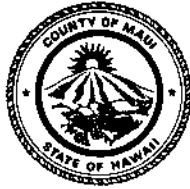
Restitution for a crime victim’s financial loss from a crime is crucial to repairing the damage caused by the offender. Restitution also demonstrates that the offender and the state recognize the harm that the crime victim suffered and the offender’s obligation to make amends. When an

offender is ordered to pay restitution, “[t]he victim of the crime not only receives reparation and restitution but the [offender] should develop or regain a degree of self-respect and pride knowing that he or she righted, to as great a degree as possible, the wrong that he or she has committed.” House Standing Committee Report No. 425 (1975).

The amendment proposed in this bill is necessary to make clear that reasonable and verifiable lost earnings and therapy expenses should be ordered as restitution in criminal cases. While the Hawai`i Revised Statutes § 706-646(3) does not expressly prohibit lost earnings and therapy expenses from being ordered as restitution, the Intermediate Court of Appeals in State v. DeMello, 310 P.3d 1033 (Haw. Ct. App. August 27, 2013), held that lost earnings were not expenses that could be ordered as restitution. The Supreme Court took certiorari in January 2014 but has not yet issued its opinion. If the Intermediate Court of Appeals is upheld, the holding in DeMello could be applied to also exclude therapy expenses from restitution.

Since August 27, 2013, victims who suffered lost earnings as a result of the crime committed against them have not been able to get restitution for those lost earnings. Victims who are salaried or hourly employees whose lost wages are readily calculated, are not being fully compensated for their losses. Until the DeMello holding, both lost earnings and therapy expenses were normally ordered as restitution. This bill is necessary to ensure that victims receive just compensation for their losses and to hold defendants accountable for the harm that they caused.

Thank you for providing the Commission with the opportunity to testify in strong support of this bill.



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TESTIMONY
ON
SB 230, HD 1 - RELATING TO
RESTITUTION FOR VICTIMS OF CRIME

April 7, 2015

The Honorable Sylvia Luke
Chair
The Honorable Scott Y. Nishimoto
Vice Chair
and Members of the House Committee on Finance

Chair Luke, Vice Chair Nishimoto, and Members of the Committee:

The Department of the Prosecuting Attorney, County of Maui, **STRONGLY SUPPORTS** SB 230, HD 1 - Relating to Restitution For Victims of Crime. The bill clarifies that reimbursement to crime victims includes lost wages and mental health treatment, counseling, and therapy.

Recently, the Hawai'i Intermediate Court of Appeals (ICA) in State v. DeMello, 310 P.3d 1033 (Haw. Ct. App. 2013), determined that Hawai'i Revised Statutes, Section 706-646 does not permit an award of restitution for "lost wages." The ICA's decision is currently being reviewed by the Hawai'i Supreme Court.

SB 230, HD 1 would make it clear that a sentencing court has the authority to award restitution involving: 1) lost earnings; and 2) medical expenses pertaining to mental health treatment, counseling, and therapy. Indeed, these types of losses are in fact real, and but for the criminal act(s) of the defendant, the victim would not have suffered these types of losses. Thus, these expenses should be compensable as restitution.

Furthermore, there are safeguards written into the statute HRS § 706-646, which prevents a sentencing court from simply "rubber stamping" a restitution request. Specifically, HRS § 706-

646(2) mandates that the losses involved in the restitution request be “reasonable and verified.” The losses suffered by the victim must be the result of the defendant’s offense in order for restitution to be awarded.

Finally, as indicated in DeMello, the prosecution has the burden of proving the causal connection between the offense and the loss and the amount of loss by a preponderance of the evidence. Therefore, there is no automatic right to restitution unless the sentencing court is satisfied that the prosecution has met its burden of proof as it relates to the restitution request.

Accordingly, the Department of the Prosecuting Attorney, County of Maui, STRONGLY SUPPORTS the passage of this bill. We ask that the committee PASS SB 230, HD 1 as an HD 2 to correct the effective date.

Thank you very much for the opportunity to provide testimony on this bill.

Justin F. Kollar
Prosecuting Attorney

Kevin K. Takata
First Deputy



Rebecca A. Vogt
Second Deputy

Diana Gausepohl-White
Victim/Witness Program Director

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TESTIMONY IN STRONG SUPPORT OF
SB230 – RELATING TO RESTITUTION FOR VICTIMS OF CRIME

Justin F. Kollar, Prosecuting Attorney
County of Kaua'i

House Committee on Finance
April 7, 2015, 2:30 p.m., Conference Room 308

Chair Luke, Vice Chair Nishimoto, and Members of the Committee:

The County of Kaua'i, Office of the Prosecuting Attorney, submits this testimony in STRONG SUPPORT of SB230 – Relating to Restitution for Victims of Crime. This Bill clarifies that reimbursement to crime victims includes lost wages and mental health treatment, counseling and therapy.

Historically, such types of expenses were considered as eligible for restitution; however, a 2013 decision of the Intermediate Court of Appeals held that because Section 706-646 of the Hawai'i Revised Statutes did not explicitly provide for these types of restitution, it was not legal to order them. Many victims of crimes suffer injuries that result in lost wages and require them to seek mental health treatment, counseling and therapy. There exists no compelling public policy reason to deny crime victims compensation for these expenses; quite the contrary. Further, there is no reason to allow violent offenders to benefit from the existing loophole in the statute.

Accordingly, we are in STRONG SUPPORT of SB230. We ask that your Committee PASS the Bill.

Thank you very much for the opportunity to provide testimony on this Bill.



THE SEX ABUSE TREATMENT CENTER

A Program of Kapi'olani Medical Center for Women & Children

Executive Director
Adriana Ramelli

DATE: April 7, 2015

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TO: The Honorable Sylvia Luke, Chair
The Honorable Scott Nishimoto, Vice Chair
House Committee on Finance

FROM: Adriana Ramelli, Executive Director
The Sex Abuse Treatment Center

RE: Testimony in Support of S.B. 230, H.D. 1
Relating to Restitution for Victims of Crime

I would like to thank the Committee for this opportunity to provide testimony on behalf of The Sex Abuse Treatment Center (the SATC), a program of Kapi'olani Medical Center for Women & Children, in support of Senate Bill 230, House Draft 1 (S.B. 230, H.D. 1).

S.B. 230, H.D. 1 specifies that crime victims may seek restitution for reasonable and verifiable costs of lost wages and mental health treatment, counseling, and therapy (collectively "mental health services," or "MHS"). S.B. 230, H.D. 1 also includes a findings section that clarifies an understanding that the list of example items for which crime victims may seek restitution is illustrative, but non-exhaustive.

A recent Hawai'i appeals court determination, *State v. Demello*, denied restitution to a crime victim for lost wages, on the basis that HRS §706-646 did not explicitly include lost wages in a list of specific costs resulting from crime for which restitution could be sought. This finding was in spite of plain language in the statute stating that reasonable and verifiable costs for which restitution could be sought "include[ed] but [were] not limited to" the specifically listed items, indicating that the list was non-exhaustive. To reach this conclusion, the court relied on legislative reports from 1998 indicating a belief, at the time, that costs for wage loss and MHS were immeasurable and could not be determined with specificity. This suggested that, in addition to lost wages, the court would also deny restitution coverage for MHS costs.

The statement that the costs of MHS are immeasurable and cannot be determined with specificity is not consistent with a more current, accurate understanding of these services. Allowing the *Demello* court's determination to stand as the law of the land in Hawai'i would deny many victims of serious crimes, including sexual assault, the means to pay for MHS that are appropriate and necessary to their recovery. MHS are comparable to other medical services with respect to determinations of reasonable and verifiable costs. As is the case with other medical treatments and therapies, MHS are delivered by licensed professionals who undergo rigorous courses of education and training, with methodologies that are grounded in evidence-based

science. Courses of treatment, expected outcomes, and evaluation of progress are based on clinical observation and professional judgment. Moreover, documentation standards required by state and federal laws, and the professional organizations of mental health care providers, are as strict as those applicable to other medical professionals.

It should also be noted that the medical payor industry has long-recognized that MHS are quantifiable and can be valued on a fee-for-service basis. For both private and government insurance plan billing purposes, MHS are subject to the same code-based billing system and pricing considerations as other medical services. Moreover, management of claims for payment of MHS occurs through comparable third-party liability, service audit, and utilization review processes as other medical services.

Finally, the everyday experiences of other US jurisdictions support that MHS costs can be easily determined to be reasonable and verifiable, and therefore subject to coverage by victim restitution. For example, the federal government's Restitution Process for Victims of Federal Crimes allows crime victims the opportunity to provide proofs of MHS costs resulting from federal offenses to trial judges for the purpose of determining restitution amounts. Likewise, various states with restitution statutes that are similar to Hawai'i's, including Washington, California, and Utah, also mandate that victims receive restitution for their MHS costs.

By recognizing that the costs of mental health services that result from crime are reasonable and verifiable, and therefore can be covered by judge-ordered restitution in the State of Hawai'i, your support of S.B. 230, H.D. 1 ensures that many survivors of serious crimes in Hawai'i will be able to afford these critical services that are needed for their healing and recovery.

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**THE HONORABLE SYLVIA LUKE, CHAIR
HOUSE COMMITTEE ON FINANCE**

**Twenty-Eighth State Legislature
Regular Session of 2015
State of Hawai`i**

April 7, 2015

RE: S.B. 230, H.D. 1; RELATING TO RESTITUTION FOR VICTIMS OF CRIME.

Chair Luke, Vice-Chair Nishimoto, and members of the House Committee on Finance, the Department of the Prosecuting Attorney of the City and County of Honolulu submits the following testimony in **support** of Senate Bill 230, H.D. 1.

The purpose of Senate Bill 230, H.D. 1 is to amend H.R.S. Section 706-646 to clarify that the Legislature intends that restitution ordered by a criminal court includes under the phrase “including but not limited to” includes both wages lost as a result of the crime as well as the “mental health treatment, counseling, and therapy counseling” required to address the psychological and emotional injuries inflicted by the crime.

It is well established that crime victimization causes substantial injuries of many types. Crime can have powerful, life changing repercussions for the health, well-being and financial stability of victims. Mental illness, suicide, and drug and alcohol abuse can result from untreated trauma caused by crime. The trauma from victimization can result in a range of reactions, from an immediate crisis response to long term psychological and emotional consequences. Research suggests that victims of violent crime are at greater risk of developing Posttraumatic Stress Disorder (PTSD) than victims of non-criminal traumatic events such as natural disaster. In response to these stark realities we believe that it critically important that Legislature re-affirm with great clarity that it intends that mental health treatment, counseling, and therapy are among the multitude of crime related expenses that the Legislature intends that Section 706-646 cover.

About 1.4 million violent and non-violent crime victimizations led to missed work days in 2002. Of the nearly 400,000 violent crimes that resulted in lost work days, nine percent involved between six and 10 missed days; 14 percent involved 11 or more days; and over half involved an absence of one to five days. While more non-violent crimes resulted in missed work days, the

time lost tended to be shorter. Among non-violent crimes resulting in missed work days, 46 percent involved an absence of one to five days, and 44 percent involved missing less than one day. According to a recent study, victims of intimate partner violence, including rape, physical assault, and stalking, experience substantial lost time in employment and household work. Annually, domestic violence victims miss nearly eight million days of paid work because of the violence in their lives—equal to 30,000 fulltime jobs. This violence also results in an annual loss of over five million days in household work. In the face of these staggering numbers it should not be the victim, their employers, or taxpayers that should be responsible for recovering the substantial financial damage caused by crime. It is the criminal that has caused these losses and it is the criminal who should bear the responsibility of repaying them.

Our restitution statute means very little if it fails to address this basic and significant cost. After the Intermediate Court of Appeals, in *State v. DeMello*, struck down the awarding of lost earnings as part of a restitution order due to lack of an explicit provision in the statute permitting restitution for that purpose, it is incumbent upon the Legislature to clarify this issue by passing the measure before you today.

For the foregoing reasons, the Department of the Prosecuting Attorney of the City and County of Honolulu **supports the passage of S.B. 230, H. D. 1**. Thank you for the opportunity to testify on this matter.