



**WRITTEN TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
THIRTIETH LEGISLATURE, 2020**

ON THE FOLLOWING MEASURE:

H.B. NO. 2610, H.D. 1, RELATING TO DOMESTIC VIOLENCE

BEFORE THE:

HOUSE COMMITTEE ON FINANCE

DATE: Tuesday, February 25, 2020 **TIME:** 11:00 a.m.

LOCATION: State Capitol, Room 308

TESTIFIER(S): Clare E. Connors, Attorney General, or
Kory W. Young, Deputy Attorney General

Chair Luke and Members of the Committee:

The Department of the Attorney General supports the bill, but recommends the following addition.

H.B. NO. 2610, H.D. 1 seeks to create a hearsay exception that would allow for out of court statements made by victims of domestic violence attacks to be admissible in court regardless of the availability of the victim as a witness, under specific circumstances.

There are constitutional concerns regarding this bill. Even assuming this hearsay exception does not violate the United States Constitution's right to confrontation, it is still possible that the Hawaii Supreme Court could determine that it violates the confrontation provision of the Hawaii State Constitution.

This hearsay exception is premised on the fact that the victim of a domestic violence attack is in a state of on-going emergency, as the perpetrator poses a continued threat of injury or even death to the victim. Once the defendant is taken into custody, any immediate threat of injury or death is greatly reduced, thereby ending the emergency, and the basis for the exception.

Adding the phrase “and made prior to the defendant being in custody” to subsection 24(A) on page 12, lines 1 through 6, would increase the bill’s likelihood of passing constitutional scrutiny. With this addition, subsection 24(A) would read:

(A) A statement that purports to narrate, describe, report, or explain an incident of domestic violence, as defined in section 321-471, made by a victim of that domestic violence within twenty-four hours after the incident occurred, and made prior to the defendant being in custody, if the statement:

The Department of the Prosecuting Attorney, City and County of Honolulu, recommended this same addition to subsection 24(A), in their written testimony submitted on January 30, 2020.

Thank you for the opportunity to provide comments on the bill.

DEPARTMENT OF THE PROSECUTING ATTORNEY
CITY AND COUNTY OF HONOLULU

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THE HONORABLE SYLVIA LUKE, CHAIR
HOUSE COMMITTEE ON FINANCE
Thirtieth State Legislature
Regular Session of 2020
State of Hawai'i

February 24, 2020

RE: H.B. 2610, H.D. 1; RELATING TO DOMESTIC VIOLENCE.

Chair Luke, Vice Chair Cullen, and members of the House Committee on Finance, my name is Scott Kessler, and I currently work as a legal consultant on domestic violence issues for the Department of the Prosecuting Attorney, City and County of Honolulu. The Department of the Prosecuting Attorney of the City and County of Honolulu ("Department") submits the following testimony in support of H.B. 2610, H.D. 1.

In terms of my background, I worked as an Assistant District Attorney for 30 years in New York City. For the last 20 years of my career, I was the Bureau Chief of the Domestic Violence Bureau of the Queens County District Attorney's office, where I supervised the prosecution of over 5,000 domestic violence arrests and prosecutions each year. In addition, I have been teaching law for over 24 years, first at St. Johns University Law School, and more recently at Columbia Law School, where I am currently employed as an adjunct professor. I have been teaching at Columbia Law School for 10 years. I also have been speaking at national conferences on domestic violence for over 15 years and have trained numerous jurisdictions, police and prosecutors offices throughout the country on best practices, policies and procedures, and evidence-based prosecution.

Last August, I was hired by the current Acting Prosecuting Attorney to assist the Department in its handling of domestic violence cases, with the goal of trying to keep victims safe and holding batterers accountable for their actions. I first began my new position by gaining access to the body worn camera footage available to prosecutors, and I reviewed hundreds of hours of footage. In addition, I have met with victims' advocates, had meetings with and discussed new policies and procedures with the Honolulu Police Department, and lastly spent days talking to domestic violence prosecutors in Hawaii—as well as public defenders—on the current criminal justice and court system in place.

H.B. 2610, H.D. 1, addresses a concern occurring every day in the courts in Hawaii. Domestic violence offenders—almost always after their arrest—put pressure on victims to not appear in court, to recant and not cooperate with prosecutors. The defendants’ strategy of convincing their victims to recant, or to not appear in court, is working; each year hundreds of cases are dismissed for these very reasons. The pressure by domestic violence defendants to have victims recant and or not appear in court can often be heard in recordings from jail, where every day domestic violence defendants threaten, sweet-talk and often coerce victims not to appear or to testify untruthfully.

The current proposed bill—with a minor change of adding the phrase “and prior to the defendants being arrested regardless of the availability of the declarant,” after the phrase “made by a victim of that domestic violence within twenty-four hours after the incident occurred” (page 12, lines 3-5)—will make this important bill constitutional, balancing the defendant’s requirement of a fair trial with the public policy of attempting to keep victims safe, and hold batterers accountable for their actions.

The Department believes that when the police respond to a call for domestic violence, and the perpetrator is not on the scene, the primary purpose for both the questions to the victim and the responses to those questions (to law enforcement) are made in response to an ongoing emergency and are therefore non-testimonial. Police officers ask questions to the victim in order to gather facts as to what happened, what medical attention may be needed, who did this and where are they, in order to arrest the individual quickly, thereby keeping the victim and their family safe. In domestic violence cases, the perpetrator who is not in custody is still a danger to the victim and their family. For example, the defendant may have keys to the home, knows what time the victim leaves their house, the route taken, knows the family and friends of the victim, where the victim might flee to if they don’t feel safe in their home, and a lot of other information that puts the victim in danger while the perpetrator is still loose.

This questioning, and the answers to those questions, passes the ongoing emergency test standard that the U.S. Supreme Court discussed in its most recent case related to this issue, Michigan v. Bryant, 562 U.S 364 (2011). Prior to arrest of the defendant in a domestic violence case, it is clear that there is an ongoing emergency, such that the primary purpose of the police officers’ questions, and the victim’s answers about what exactly happened and by whom, is to gather important, potentially lifesaving facts. As the court clearly stated in Michigan v. Bryant, the existence of an “ongoing emergency” at the time of the encounter is among the most important circumstances informing the interrogation’s “primary purpose.”

It is undisputed that victims of domestic violence and their children are in the most danger right after breaking up with the batterer and/or reporting the batterer to the police. Most victims of domestic violence homicide are killed right after the breakup and/or reporting, due to the anger and outrage the batterer feels. Killings in domestic violence cases are often especially brutal, involving close encounters such as stabbings, beatings and strangulation. Having been to the scene of these horrific crimes, I can attest to the extreme violence and anger used by these intimate partners, often right after the breakup and/or report to the police. The New York City Police Department (“NYPD”)—having recognized the “ongoing emergency” and danger that occurs right after a victim of domestic violence reports her intimate partner to the authorities—years ago instituted protocols to deal with this important emergency. NYPD follows up with home-visits right after reports of domestic violence, in order to keep the victim and her family safe during this too-often hectic time. Officers will do home visits on domestic violence cases within 24 to 48 hours of arrest, to check on

victims' safety, notify them about services, and check on any other acts of violence or threats that may have occurred after the reported assault.

The Washington Post recently did a study on domestic violence in major cities and found:

In a close analysis of homicides in five of the cities, The Post found that more than one-third of all men who killed a current or former intimate partner were publicly known to be a potential threat to their loved one ahead of the attack.

Nationwide, statistics show that 44.8 percent of women killed from 2007 to 2016 were killed by an intimate partner. Other news articles and studies are also alarming, and discuss the ongoing emergency right after a victim reports a case of intimate partner violence. "The statistics are that women in abusive relationships are about 500 many times more at risk when they leave," said Wendy Mahoney, executive director for the Mississippi Coalition Against Domestic Violence. "Domestic violence is all about power and control, and when a woman leaves, a man has lost his power and control."

The primary purpose of H.B. 2610, H.D. 1, is to address the ongoing emergency of how the criminal justice system in Hawaii handles the prosecution of domestic violence cases, and the proposed bill has constitutional safeguards in place that would entitle the defendant to a fair trial, only allowing statements that have a sufficient indicia of reliability after a judicial review, which would also be constitutionally valid.

For all of the foregoing reasons, the Department of the Prosecuting Attorney of the City and County of Honolulu supports the passage of H.B. 2610, H.D. 1. Thank you for the opportunity to testify on this matter.

STATE OF HAWAI‘I
OFFICE OF THE PUBLIC DEFENDER

**Testimony of the Office of the Public Defender,
State of Hawai‘i to the House Committee on Finance**

February 25, 2020

H.B. No. 2610 HD1: RELATING TO DOMESTIC VIOLENCE

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

The Office of the Public Defender respectfully opposes H.B. No. 2610, which would create an exception to the hearsay rule that will be unconstitutional as a violation of an accused’s right to confrontation of witnesses against him/her under article I, section 14 of the Hawai‘i Constitution.

H.B. No. 2610 states,

[T]he purpose of this Act is to allow a narrow hearsay exception for statements made by a domestic violence victim to a government official within twenty-four hours of a domestic violence attack, *even if the statement is testimonial in nature*, as long as the statement bears sufficient indicia of reliability.

(Page 3, line 18 to page 4, line 2) (emphasis added).

Because any out-of-court statement to the government official (presumably, a police officer) relating to the alleged domestic attack will be deemed *testimonial*, the statement will only be admissible if the witness is unavailable and the accused had the opportunity for cross-examination, as the Hawai‘i Supreme Court in State v. Fields, 115 Hawai‘i 503, 565, 168 P.3d 955, 1017 (2007), clearly held,

Under Hawai‘i’s confrontation clause, if an out-of-court statement is testimonial, it is subject to the [Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004)] analysis, which mandates that (1) the witness be “unavailable,” and (2) the accused had a prior opportunity for cross-examination.

Therefore, if the alleged domestic violence victim is not available to testify, any attempt to introduce his/her statement made within twenty-four hours of an alleged domestic violence incident will be deemed inadmissible as a violation of the Hawai‘i Constitution. Likewise, if the alleged victim is available to testify, his/her out-of-court statement will be inadmissible.

The proponents of this bill significantly rely on the Oregon domestic violence hearsay exception and an article written in the Boston College Journal of Law and Social Justice, “A Call for Change: The Detrimental Impacts of Crawford v. Washington.” The proponents, however, fail to take into account that the article and the Oregon law based their analysis on *only* the sixth amendment to

the United States Constitution. Although the sixth amendment to the federal constitution and article I, section 14 are textually similar, the Hawai'i Constitution affords the people in our state more protection than required by the federal constitution when the United States Supreme Court's interpretation of a provision present in both the United States and Hawai'i Constitutions does not adequately preserve the rights and interests sought to be protected.

The Oregon appellate court, in State v. Haggeboon, 208 P.3d 1033 (Ore. App. 2009), held that the admission of the alleged victim's out-of-court recorded statement to the police pursuant to the domestic violence hearsay exception (Oregon Evidence Code 803(26)(a)) violated the defendant's confrontation right. (It should also be pointed out that the prosecutor, on appeal, conceded that the defendant's confrontation right was violated). The Oregon court ordered the conviction reversed and remanded the case for a new trial.

We also question several assertions set forth in the article and the proponents' justification for passage of the bill. First, is there any data to establish or support the assertion that "victim statements made within twenty-four hours of an incident are the most reliable"? We are also concerned how the proponents of this measure (and the Oregon legislature) determined that the time limit of "24 hours." It appears that the "24 hour" period was determined arbitrarily. Are statements made 25 hours after an alleged incident not reliable while statements uttered 23 hours after an incident reliable? Second, the proponents assert that "statistics showing that incidents of domestic violence tend to escalate over time and sometimes culminate in the victim's death." Although we do not have hard data to contradict the "statistics" (referred to by the proponents), the majority of the defendants charged with domestic violence in the family court are first-time offenders.

The confrontation clause was intended to prevent the conviction of a defendant without the opportunity to face his or her accusers and to put their honesty and truthfulness to test before the trier of fact. In Mattox v. United States, 156 U.S. 237 (1895), the United States Supreme Court enunciated the three fundamental purposes that the Confrontation Clause was meant to serve:

- To ensure that witnesses would testify under oath and understand the serious nature of the trial process;
- To allow the accused to cross-examine witnesses who testify against him; and
- To allow jurors to assess the credibility of a witness by observing that witness's behavior.

The proposed exception to the hearsay rule simply undermines the purpose of the Confrontation Clause. The exception will allow unfettered narrative statements to be received in evidence without the accused having the opportunity to test the credibility and veracity of the accuser's statement. Alleged domestic violence victims will no longer need to testify under oath and be made to understand the seriousness of the trial process. Jurors will no longer be able to assess the credibility of the accuser by observing his/her behavior.

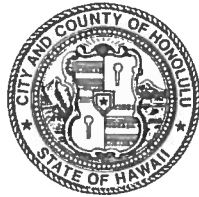
We are also concerned how the proponents of this measure (and the Oregon legislature) determined that the time limit of "24 hours." Without any data or statistics to support the assertion that out-of-court statements made by alleged victims of domestic violence are reliable within 24 hours are

reliable, the “24 hour” period appears arbitrary. Are statements made 25 hours after an alleged incident not reliable while statements uttered 23 hours after an incident reliable?

For the foregoing reasons, we strongly opposed H.B. No. 2610 HD1. Thank you for the opportunity to comment on this measure.

POLICE DEPARTMENT
CITY AND COUNTY OF HONOLULU

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OUR REFERENCE **WO-KK**

February 25, 2020

The Honorable Sylvia Luke, Chair
and Members
Committee on Finance
House of Representatives
Hawaii State Capitol
415 South Beretania Street, Room 308
Honolulu, Hawaii 96813

Dear Chair Luke and Members:

SUBJECT: House Bill No. 2610, H.D. 1, Relating to Domestic Violence

I am Walter Ozeki, Major of the Criminal Investigation Division of the Honolulu Police Department (HPD), City and County of Honolulu.

The HPD supports the intent of House Bill No. 2610, H.D. 1, Relating to Domestic Violence, and offers the following concerns.

The HPD agrees wholeheartedly with the legislature that allowing a limited hearsay exception for a statement made by a victim of domestic violence would be a valuable tool for the prosecution of domestic violence cases, as the instances where victims become uncooperative over time and are reluctant or refuse to testify at trial is a continuing and all too common occurrence in domestic violence cases.

Our concern with this piece of legislation is that the admissibility of such evidence brings into question broader constitutional issues, which should be specifically addressed by the county prosecutor's offices and the Judiciary, as law enforcement's use of such evidence rests for the most part on both prosecutorial digression and judicial interpretation of the state constitution. As law enforcement, we support the creation of new legislation that would provide law enforcement additional tools to assist in protecting the public, but we are concerned that these tools will ultimately not be made available to us as we have experienced previously with the introduction of prior legislation that tested the lines of constitutional protections.

The Honorable Sylvia Luke, Chair
and Members
February 25, 2020
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The HPD urges you to support House Bill No. 2610, H.D. 1, Relating to Domestic Violence, with due regard to the concerns that have been provided in our testimony.

Thank you for the opportunity to testify.

Sincerely,



Walter Ozeki, Major
Criminal Investigation Division

APPROVED:



Susan Ballard
Chief of Police



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

FROM: Ryan Kusumoto, President & CEO of Parents And Children Together (PACT)

DATE/LOCATION: February 24, 2020; 11:00 a.m., Conference Room 308

RE: TESTIMONY IN SUPPORT OF HB 2610– RELATING TO DOMESTIC VIOLENCE

We ask you to support HB 2610 which allows a narrow hearsay exception for statements made by domestic violence victims to certain government officials within 24 hours of an incident of domestic violence, even if the statement is testimonial in nature, as long as the statement bears sufficient indicia of reliability.

Sadly, domestic abuse continues to be a significant crime in our community that highlights the difficulties in how our criminal justice system handles the prosecution of domestic violence cases. The proposed statute would support successful prosecution, in line with other hearsay laws, and hold defendants accountable. As a provider of domestic violence prevention and support services, we thank the legislature for continuing to craft legislation that supports survivors on their quest for justice and we encourage continued conversations to ensure that laws appropriately reflect the needs and improve our systems.

Founded in 1968, Parents And Children Together (PACT) is one of Hawaii's not-for-profit organizations providing a wide array of innovative and educational social services to families in need. Assisting more than 15,000 people across the state annually, PACT helps families identify, address and successfully resolve challenges through its 18 programs. Among its services are: early education programs, domestic violence prevention and intervention programs, child abuse prevention and intervention programs, childhood sexual abuse supportive group services, child and adolescent behavioral health programs, sex trafficking intervention, and community building programs.

Thank you for the opportunity to testify in **support of HB 2610**, please contact me at (808) 847-3285 or rkusumoto@pacthawaii.org if you have any questions.

HB-2610-HD-1

Submitted on: 2/21/2020 12:35:03 PM

Testimony for FIN on 2/25/2020 11:00:00 AM

Submitted By	Organization	Testifier Position	Present at Hearing
	Domestic Violence Action Center	Support	No

Comments:

Please accept this supportive position by the Domestic Violence Action Center. In the previous Hearing, the testimony provided in support of this Measure capture this agency's position and experience working with many, many survivors of domestic violence.

HB 2610 will provide a remedy - one remedy- to ameliorate some of the barriers to accountability, and ultimately, safety.

thank you

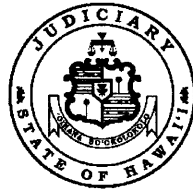
HB-2610-HD-1

Submitted on: 2/21/2020 8:46:13 PM

Testimony for FIN on 2/25/2020 11:00:00 AM

Submitted By	Organization	Testifier Position	Present at Hearing
J Ashman	Individual	Support	No

Comments:



LATE


The Judiciary, State of Hawai'i

Testimony to the House Committee on Finance

Representative Sylvia Luke, Chair
Representative Ty J.K. Cullen, Vice Chair

Tuesday, February 25, 2020 at 11:00 am
State Capitol, Conference Room 308

WRITTEN TESTIMONY ONLY

By 
Catherine H. Remigio, Chair
Hawai'i Supreme Court Standing Committee
On the Hawai'i Rules of Evidence

Bill No. and Title: House Bill No. 2610, H.D.1 - Relating to Domestic Violence

Purpose: Allows a hearsay exception for statements made by a victim of domestic violence within twenty-four hours of a domestic violence incident, provided the statement was recorded or made to a law enforcement officer and is found to have sufficient indicia of reliability.

Judiciary's Position:

The Hawai'i Supreme Court's Standing Committee on Rules of Evidence respectfully opposes House Bill No. 2610, H.D.1 to the extent that it violates the right to confrontation guaranteed under the Sixth Amendment of the United States Constitution, and Article 1, section 14 of the Hawai'i Constitution.

Hawai'i Rules of Evidence ("HRE") 802.1 provides a hearsay exception for "prior statements by witnesses." Most notably, regardless of whether the statement is consistent, or inconsistent, HRE 802.1(a) and (b) both first require that the declarant be "subject to cross examination concerning the subject matter of the declarant's statement." Thus the declarant must be available to testify, the accused may question the declarant about the statement, and the trier of fact can determine where the truth lies.

The Sixth Amendment of the United States Constitution, and Article 1, section 14 of the Hawai'i Constitution provide that "the accused shall enjoy the right ... to be confronted with the witnesses against the accused[.]" Prior to Crawford v. Washington, 541 U.S. 36,



124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), federal courts declined to embrace an absolute bar on the admission of hearsay statements uttered by unavailable declarants – as long as the declarant was shown to be unavailable, and the statement bore “adequate indicia of reliability.” Ohio v. Roberts, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980).

Crawford limited Roberts “sufficient indicia of reliability” test to hearsay statements that are “non-testimonial.” A statement is non-testimonial if its primary purpose is to “enable police assistance to meet an ongoing emergency.” Davis v. Washington, 547 U.S. 813, 822, 126 S.Ct. 2266, 2273-2274, 165 L.Ed.2d 224 (2006). Non-testimonial statements are not subject to the Confrontation Clause, but still subject to the Roberts “sufficient indicia of reliability” test.

A statement is testimonial when “circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.” Id. ***Testimonial statements are subject to the Confrontation Clause.***

The Hawai‘i Supreme Court has ruled:

We read Crawford to unequivocally require that the admissibility of testimonial hearsay be governed by the following standard: where a hearsay declarant’s unavailability has been shown, the testimonial statement is admissible for the truth of the matter asserted only if the defendant was afforded a prior opportunity to cross-examine the absent declarant about the statement.

State v. Fields, 115 Haw. 503, 516, 168 P.3d 955, 968 (2007). The Court also reiterated “it is fundamental that, when interpreting our own constitution, our divergence from federal interpretations of the United States Constitution may not convey less protection than the federal standard.” Fields at 115 Haw. 517, 168 P.2d at 969.

Given the above, House Bill No. 2610, H.D.1 runs afoul of a Defendant’s right to confrontation as guaranteed by the Sixth Amendment of the United States Constitution, and Article 1, section 14 of the Hawai‘i Constitution.

Furthermore, the implication that all statements made within “24 hours” of a domestic violence incident are more reliable, without further information, appears arbitrary. The proposed exception also implies that victims of other crimes who make statements within 24 hours of the criminal act are somehow less reliable than domestic violence victims similarly situated.

For these reasons, the Committee respectfully opposes House Bill No. 2610, H.D.1. Thank you for the opportunity to comment on this measure.

LATE

HB-2610-HD-1

Submitted on: 2/25/2020 10:35:13 AM

Testimony for FIN on 2/25/2020 11:00:00 AM

Submitted By	Organization	Testifier Position	Present at Hearing
Rayne	Individual	Support	No

Comments: