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GOVERNOR



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**DEPARTMENT OF PUBLIC SAFETY**  
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No. \_

TESTIMONY ON HOUSE BILL 620  
RELATING TO SENTENCING

By

Clayton A. Frank, Director  
Department of Public Safety

House Committee on Judiciary  
Representative Jon Riki Karamatsu, Chair  
Representative Ken Ito, Vice Chair

Tuesday, February 10, 2009; 2:00PM  
State Capitol, Conference Room 325

Representative Karamatsu, Representative Ito, and Members of the Committee:

The Department of Public Safety (PSD) sincerely appreciates the legislature's interest in addressing public safety concerns with regard to the tracking/monitoring of those convicted of sexual assault in the first degree. As written House Bill 620 provides the court discretion at the time of sentencing to require a person with three or more prior convictions under HRS section 707-730 to wear a global positioning system transmitter that transmits the person's location to the Hawaii Paroling Authority (HPA), PSD, or the County Police Department for up to ten years after the person's release from prison.

However, it should be noted that once an offender has completed his/her entire sentence, neither the HPA nor the PSD would have any jurisdiction over the offender. Thus, we (PSD and HPA) would be unable legally enforce any monitoring requirements or take any action against the offender for knowingly removing or disabling the transmitter. For these reasons, PSD is unable to support House Bill 620.

Thank you for the opportunity to provide testimony on this matter.

TESTIMONY BEFORE  
HOUSE COMMITTEE ON JUDICIARY

By Joseph P. Viola  
Associate General Counsel  
Hawaiian Electric Company, Inc.

**2:00 p.m., February 10, 2009**

**House Bill 1037**  
Relating to Civil Actions

Chair Karamatsu, Vice Chair Ito, and members of the Committee on Judiciary:

My testimony is presented on behalf of Hawaiian Electric Company (“HECO”) and its subsidiaries, Hawaii Electric Light Company (“HELCO”) and Maui Electric Company (MECO”). For ease of reference, I will refer to all three companies collectively as “HECO.”

I.

HECO cannot support HB 1037 unless it is amended. HECO utilizes the State and county highways to provide electricity to the public. If joint and several liability in highway cases is abolished for government entities, then, in fairness, it should be abolished for HECO and other public utilities as well. Otherwise, government will be protected at the potential great expense of public utilities. Therefore, we respectfully request that the Committee either:

1. Amend the Bill to provide similar protections to public utilities that locate their facilities within the public highways (as was done in 2005 in Act 185), or
2. Hold HB 1037 without further action.

II.

This Bill would impact HECO in highway motor vehicle accident cases involving utility poles. In those cases, plaintiffs often sue (a) HECO, (b) the State or county responsible for that highway, and (c) any joint owners of the pole.<sup>1</sup> Plaintiffs have argued that utility pole location is part of the highway design or maintenance, and, on that basis, seek to hold the government and utility companies jointly and severally liable for damages.<sup>2</sup> HECO and the government entities have also been sued as joint tortfeasors in slip and fall cases involving pull boxes or other utility facilities in the public sidewalks.

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<sup>1</sup> Other joint pole owners may include Hawaiian Telcom Company and the State or City and County.

<sup>2</sup> See Hawaii Revised Statutes (“HRS”) § 663-10.9(4) (joint and several liability preserved in tort actions relating to highway maintenance and design, which includes “utility poles” (text attached)).

However, under HB 1037, the State and counties could never be held jointly and severally liable for highway maintenance or design. That would shift undue risk to HECO.

Because of the way joint and several liability works, defendants who have the ability to pay -- such as the government and the public utilities -- are at risk to pay far more than any proportionate share of liability they may be assigned. Therefore, by limiting the government's liability, alone, the Bill would effectively shift greater liability exposure in highway cases to the other so-called "deep pockets" -- the public utilities. However, there is no justification for increasing the utilities' risk in these cases. Public utilities do not plan, design or build the highways. Indeed, governmental rules, regulations and design play a significant role in determining where utilities may locate their poles and facilities within the highways.

So, any reasons justifying abolishment of joint and several liability for the State and counties in highway cases should apply equally to the public utilities. The Legislature recognized that the government and public utilities deserve similar protection in highway cases when it passed Act 185 in 2005 (now codified as HRS § 264-20), which extended liability protection to the State, counties and public utilities with respect to flexibility in highway design. *See* § 264-20(b)(4) (text attached).

The same fair result can be accomplished by amending HB 1037 so that HRS section 663-10.5 would, instead, read as follows:

**"§663-10.5 Government entity as a tortfeasor; public utility as tortfeasor; abolition of joint and several liability.** Any other law to the contrary notwithstanding, including but not limited to sections 663-10.9, 663-11 to 663-13, 663-16, 663-17, and 663-31, in any case where a government entity is determined to be a tortfeasor along with one or more other tortfeasors, the government entity shall be liable for no more than that percentage share of the damages attributable to the government entity. [~~provided that joint and several liability shall be retained for tort claims relating to the maintenance and design of highways pursuant to section 663-10.9]~~ In any such case, where one of the other tortfeasors is a public utility, then, likewise, the public utility shall be liable for no more than that percentage share of the damages attributable to the public utility.

For purposes of this section, "government entity" means any unit of government in this State, including the State and any county or combination of counties, department, agency, institution, board, commission, district, council, bureau, office, governing authority, or other instrumentality of state or county

government, or corporation or other establishment owned, operated, or managed by or on behalf of this State or any county. For purposes of this section, "public utility" shall have the meaning set forth in section 269-1.

For purposes of this section, the liability of a government entity or public utility shall include its vicarious liability for the acts or omissions of its officers and employees."

Alternatively, the same result can be achieved by amending HB 1037 to add a new section 2 as follows:

SECTION 2. Chapter 663, Hawaii Revised Statutes, is amended by adding a new section to be appropriately designated and to read as follows:

**"§663- Liability of public utility companies limited in highway cases.** Notwithstanding section 663-10.9, public utility companies with facilities on or within public highways shall not be held jointly and severally liable for recovery of economic or non-economic damages in motor vehicle accidents involving tort actions relating to maintenance and design of highways."

Otherwise, this Bill should be held without further action.

Thank you for the opportunity to testify on this matter.

**Hawaii Revised Statutes § 663-10.9 (Underscore added):**

**§663-10.9 Abolition of joint and several liability; exceptions.** Joint and several liability for joint tortfeasors as defined in section 663-11 is abolished except in the following circumstances:

(1) For the recovery of economic damages against joint tortfeasors in actions involving injury or death to persons;

(2) For the recovery of economic and noneconomic damages against joint tortfeasors in actions involving:

(A) Intentional torts;

(B) Torts relating to environmental pollution;

(C) Toxic and asbestos-related torts;

(D) Torts relating to aircraft accidents;

(E) Strict and products liability torts; or

(F) Torts relating to motor vehicle accidents except as provided in paragraph (4);

(3) For the recovery of noneconomic damages in actions, other than those enumerated in paragraph (2), involving injury or death to persons against those tortfeasors whose individual degree of negligence is found to be twenty-five per cent or more under section 663-31. Where a tortfeasor's degree of negligence is less than twenty-five per cent, then the amount recoverable against that tortfeasor for noneconomic damages shall be in direct proportion to the degree of negligence assigned; and

(4) For recovery of noneconomic damages in motor vehicle accidents involving tort actions relating to the maintenance and design of highways including actions involving guardrails, utility poles, street and directional signs, and any other highway-related device upon a showing that the affected joint tortfeasor was given reasonable prior notice of a prior occurrence under similar circumstances to the occurrence upon which the tort claim is based. In actions in which the affected joint tortfeasor has not been shown to have had such reasonable prior notice, the recovery of noneconomic damages shall be as provided in paragraph (3).

(5) Provided, however, that joint and several liability for economic and noneconomic damages for claims against design professionals, as defined in chapter 672, and certified public accountants, as defined in chapter 466, is abolished in actions not involving physical injury or death to persons.

**Hawaii Revised Statutes §264-20 (underscore added):**

**§264-20 Flexibility in highway design; liability of State, counties, and public utilities.** (a) If a highway, including any bridge, principal and minor arterial road, collector and local road, or street, requires new construction, reconstruction, preservation, resurfacing (except for maintenance surfacing), restoration, or rehabilitation, the department of transportation with regard to a state highway, or a county with regard to a county highway, may select or apply flexible highway design guidelines consistent with practices used by the Federal Highway Administration and the American Association of State Highway and Transportation Officials. Flexibility in highway design shall consider, among other factors:

- (1) Safety, durability, and economy of maintenance;
- (2) The constructed and natural environment of the area;
- (3) Community development plans and relevant county ordinances;
- (4) Sites listed on the State or National Register of Historic Places;
- (5) The environmental, scenic, aesthetic, historic, community, and preservation impacts of the activity;
- (6) Access for other modes of transportation, including but not limited to bicycle and pedestrian transportation;
- (7) Access to and integration of sites deemed culturally and historically significant to the communities affected;
- (8) Acceptable engineering practices and standards; and
- (9) Safety studies and other pertinent research.

(b) Any other law to the contrary notwithstanding, any decision by the State, the department of transportation, a county, or any officers, employees, or agents of the State, the department of transportation, or a county to select or apply flexibility in highway design pursuant to this section and consistent with the practices used by the Federal Highway Administration and the American Association of State Highway and Transportation Officials shall not give rise to a cause of action or claim against:

- (1) The State;
- (2) The department of transportation;
- (3) The counties;
- (4) Any public utility regulated under chapter 269 that places its facilities within the highway right of way;  
or
- (5) Any officer, employee, or agent of an entity listed in paragraphs (1) to (4).

(c) The exception to liability provided in subsection (b) applies only to the decision to select or apply flexibility in highway design pursuant to this section and does not extend to design, construction, repair, correction, or maintenance inconsistent with subsection (a).

LINDA LINGLE  
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IN REPLY REFER TO:

LATE

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February 10, 2009

TESTIMONY OF THE DEPARTMENT OF TRANSPORTATION

HOUSE BILL NO. 1037

COMMITTEE ON JUDICIARY

**We support this bill.**

The Department of Transportation (DOT) strongly feels that justice is served when all parties are accountable for their share of court-determined negligence. The public and taxpayers who contribute to the State Highway Fund should not be held accountable for the negligence of others. The current law on joint and several liability puts a tremendous strain on our State Highway Fund and the Department's ability to improve our highways.

The DOT continues to address safety improvements of our State Highway System through a systematic analysis of accident rates and prioritization versus the occurrence of a single motor vehicle accident. Our ability to address safety will be enhanced using this methodology through passage of the bill.