

**QUESTION #
SB2846 SD1 HD2**

**PROPOSES TO AMEND ARTICLE I, SECTION 14, OF THE STATE CONSTITUTION
TO PERMIT THE LEGISLATURE TO PASS LEGISLATION TO PROVIDE FOR THE
INADMISSIBILITY OF PRIVILEGED CONFIDENTIAL COMMUNICATIONS
BETWEEN AN ALLEGED CRIME VICTIM AND THE ALLEGED VICTIM'S
PHYSICIAN, PSYCHOLOGIST, COUNSELOR OR
LICENSED MENTAL HEALTH PROFESSIONAL**

Constitutional Question

"Shall the Constitution of the State of Hawaii be amended to permit the legislature to provide by law for the inadmissibility of privileged confidential communications between an alleged crime victim and the alleged crime victim's physician, psychologist, counselor or licensed mental health professional?"

Description of Proposed Amendment

The proposed amendment modifies or limits the state constitutional right of an accused to confront witnesses against the accused by permitting the Legislature to enact laws that establish that confidential communications between an alleged crime victim and the alleged crime victim's physician, psychologist, counselor, or licensed mental health professional are privileged communications that are not admissible in a criminal prosecution against the accused.

Currently, the Hawaii Rules of Evidence (chapter 626 of the Hawaii Revised Statutes), establish that the following confidential communications are privileged communications, which are not admissible in court proceedings and are not required to be disclosed except under certain limited exceptions: lawyer-client privilege; physician-patient privilege; psychologist-client privilege; spousal privilege; victim-counselor privilege; and communications to clergy. Present state law also provides that communications between licensed clinical social workers and their clients are privileged in the same manner established for psychologist-client privilege under the Hawaii Rules of Evidence. Existing law does not provide for a specific privilege for confidential communications between an individual and a "licensed mental health professional."

Meaning of a "Yes" Vote

A "yes" vote means that the Legislature may provide by law that privileged confidential communications between an alleged crime victim and the alleged crime victim's physician, psychologist, counselor, or licensed mental health professional are not admissible in court proceedings.

Meaning of a "No" Vote

A "no" vote means that, in some circumstances, a defendant's state constitutional right to confront witnesses may override existing laws prohibiting the admission in court proceedings of privileged confidential communications between an alleged crime victim and the victim's physician, psychologist, or counselor.

Meaning of a "Blank" Vote

A "blank" vote has essentially the same effect as a "no" vote because the number of "yes" votes must exceed the sum of the "no" and "blank" votes in order for the amendment to be ratified.

Pros

State law relating to the admissibility of evidence in court currently provides that the confidential communications made by a victim to the victim's counselor for the purpose of counseling or treatment for the emotional and psychological effects of sexual assault, domestic violence, child abuse, or neglect are privileged and may not be disclosed to others without the victim's consent. Existing state laws also establish that confidential communications between patients and their physicians and psychologists are privileged communications that may not be disclosed without the patient's consent.

Many victims of crime, especially victims of sexual assault, need the help of physicians, psychologists, counselors, or other licensed mental health professionals to recover from the effects of the crime. Counseling and treatment of victims is most successful when the victims are assured that the deeply private thoughts and feelings they reveal to the professionals who treat them will remain confidential and will not be disclosed without their permission. If victims believe that their confidential communications may be disclosed and made public during their cross-examination by the defendant's attorney in a courtroom, they may be less likely to report crimes and less likely to seek and receive the medical treatment and counseling they need.

In *State v. Paseti*, 101 Hawaii 172 (2003), the Hawaii Supreme Court interpreted Hawaii's constitution to require that, in some circumstances in criminal cases, a defendant's right to confront witnesses required that the privileged confidential communications must be disclosed and could be used as evidence in court by the defendant. As a result of this decision, the confidentiality of certain privileged communications is less assured. Victims who seek counseling or treatment are now exposed to a greater chance that a court may require disclosure of certain privileged confidential information through cross-examination in a defendant's trial. The proposed amendment would permit the Legislature to provide that privileged confidential communications between a crime victim and the victim's physician, psychologist, counselor, or licensed mental health professional will not be admissible in court without the victim's consent, except when admissibility is required by the United States Constitution.

This proposed amendment balances the rights of the accused, the needs of crime victims, and the ability of physicians, psychologists, counselors, and licensed mental health professionals to provide effective treatment to victims. The accused will continue to enjoy all of the legal safeguards provided by the United States Constitution (including the right to argue to the court in a particular case that the United States Constitution gives the accused a right of access to confidential communications in that case). Furthermore, victims will be able to seek and receive help without fearing that the Hawaii Constitution will require that their confidential communications to their physician, psychologist, counselor, or licensed mental health professional be disclosed.

Cons

The proposed amendment is unnecessary as the Legislature has already acted to protect the confidential communications between crime victims and their health care professionals and counselors. Confidential communications between an alleged victim and the victim's physician, psychologist, or counselor are already inadmissible in court proceedings, except under certain limited circumstances, pursuant to Rules 504, 504.1, and 505.5 of the Hawaii Rules of Evidence, contained in chapter 626 of the Hawaii Revised Statutes.

Furthermore, to the extent that the amendment seeks to completely prevent evidence of certain statutorily privileged confidential communications from being admitted in court without consideration of a defendant's state constitutional protections, it may result in wrongful convictions and unjust incarceration of innocent persons. Many crimes, including some sexual assaults, involve no physical evidence, and the determination of the defendant's guilt or innocence rests solely on the allegation of the alleged victim. In the case of *State v. Peseti*, the alleged victim had reportedly told her counselor that the sexual abuse claims she had made against the defendant were not true. The Hawaii Supreme Court found that the trial court should not have prevented the defendant's attorney from cross-examining the alleged sex abuse victim regarding whether she had told her counselor that her sexual abuse claims were not true. The Hawaii Supreme Court held that denying such cross-examination of the victim violated the defendant's state constitutional right to confrontation by prohibiting full cross-examination of his accuser.