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March 28, 2008

MEMORANDUM

TO: Honorable Tommy Waters, Chair
House Committee on Judiciary

FROM: Lillian B. Koller, Director

SUBJECT: S.B. 3050, S.D.1, H.D.1 - RELATING TO ADULT PROTECTIVE
SERVICES

Hearing: Friday, March 28, 2008, 2:00 p.m.
Conference Room 325, State Capitol

PURPOSE: The purposes of S.B. 3050, S.D.1, H.D.1 are to add a new definition for "caregiver" to section 346-222, HRS; to require persons meeting the definition of a caregiver to promptly report to the Department of Human Services (DHS) when the caregiver knows or has reason to believe a dependent adult has been abused or is threatened with imminent abuse; and to require employees or officers of any entity or agency that provides advocacy services to persons with developmental disabilities to promptly report to DHS when those persons know of or have reason to believe a dependent adult has been abused or is threatened with imminent abuse.

DEPARTMENT'S POSITION: The Department of Human Services strongly supports this Administration bill. The provisions of

this bill will add additional mandatory reporters of adult abuse or neglect. These amendments to sections 346-222 and 346-224, Hawaii Revised Statutes (HRS), will increase DHS' opportunity to investigate and provide protective services, as deemed necessary, for vulnerable adults.

DHS would like to suggest the following friendly amendments to the mandated reporter section 346-224, HRS:

1. In subsection (a), delete the phrase "to the maximum extent permitted by federal law" and replace it with the following terminology:

"§346-224, Reports. (a) The following persons who, in the performance of their professional or official duties, know or have reason to believe that a dependent adult has been abused and is threatened with imminent abuse shall promptly report the matter orally to the department of human services which is designated as an authorized agency to receive such information, pursuant to Titles 42 and 45, Code of Federal Regulations, with or without the consent of the dependent adult or his or her guardian."

This language is necessary because federal laws pertaining to services to vulnerable adults frequently contain strict confidentiality provisions that prohibit the release of client information without client consent, unless the receiver of the information is "authorized" to receive such information. In Hawaii,

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DHS is the state agency designated by the Legislature to receive and investigate reports of abuse against vulnerable adults and is therefore authorized to receive confidential information pertaining to those vulnerable adults. The suggested language offered by DHS makes it clear that mandated reporters that have information about abuse of vulnerable adults cannot refuse to release confidential information because it is not "permitted" by federal law.

2. The new paragraph (7) adds social workers as mandated reporters for abuse against vulnerable adults. We suggest that the following language be adopted to clarify the term "social worker":

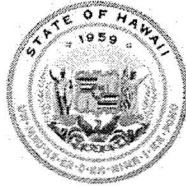
"(7) Social workers licensed pursuant to chapter 467E and non-licensed persons employed in a social worker position pursuant to chapter 467E-6(2)."

DHS also recommends that language pertaining to "dependent adult" and persons knowing or have reason to believe that a "dependent adult" has been abused and is threatened with "imminent abuse" be changed to mirror the language used in S.B. 2150, that requests amendments to the entire Chapter 346, Part X, pertaining to adult protective services (APS). The language in S.B. 2150 refers to "vulnerable adults" and changes the criteria for accepting reports for APS investigation to "vulnerable adults" who have "incurred" abuse or are "in danger of abuse if immediate action is not taken".

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Thank you for this opportunity to testify.

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STATE OF HAWAII
STATE COUNCIL
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March 28, 2008

The Honorable Tommy Waters, Chair
House Committee on Judiciary
Twenty-Fourth Legislature
State Capitol
State of Hawaii
Honolulu, Hawaii 96813

Dear Representative Waters and Members of the Committee:

SUBJECT: SB 3050 SD1 HD1 – RELATING TO ADULT PROTECTIVE SERVICES

The position and views expressed in this testimony do not represent nor reflect the position and views of the Department of Health and Department of Human Services.

The State Council on Developmental Disabilities (DD) **SUPPORTS SB 3050 SD1 HD1**. The purpose of SB 3050 SD1 HD1 is to expand the list of persons mandated to report known or suspected abuse of vulnerable adults to include caregivers, social workers, and the entity or agency designated by the Governor to provide advocacy services to persons with DD and mental illness.

We support the provision on Page 2, (6), lines 20-22, and Page 3, lines 1-3. This section is specific to the Hawaii Disability Rights Center (HDRC). HDRC is the advocacy agency designated by the Governor pursuant to Section 333F-8.5, Hawaii Revised Statutes. We defer to HDRC to ensure that this provision is in compliance with the Federal law (P.L. 106-402). Additionally, we endorse the addition of social workers to the list of persons mandated to report known or suspected abuse and the clarification of the definition of caregiver. Social workers are the front line in interacting with vulnerable adults and are integral to the service delivery system.

The Council applauds the Legislature's initiatives to protect vulnerable adults that include person with DD from abuse. Thank you for the opportunity to submit testimony supporting SB 3050 SD1 HD1.

Sincerely,

Waynette K.Y. Cabral
Executive Administrator

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TESTIMONY TO THE TWENTY-FOURTH STATE LEGISLATURE, 2008 SESSION

To: House Committee on Judiciary

From: Gary L. Smith, President
Hawaii Disability Rights Center

Re: Senate Bill 3050, SD 1, HD1
Relating to Adult Protective Services

Hearing: March 28, 2008 2:00 PM
Conference Room 325, State Capitol

Members of the Committee on Judiciary:

Thank you for the opportunity to provide testimony regarding Senate Bill 3050, SD1, HD1, Relating to Adult Protective Services.

I am Gary L. Smith, President of the Hawaii Disability Rights Center, formerly known as the Protection and Advocacy Agency of Hawaii (P&A). As you may know, we are the agency mandated by federal law and designated by Executive Order to protect and advocate for the human, civil and legal rights of Hawaii's estimated 180,000 people with disabilities.

We would like to offer the following comments on this bill. The Hawaii Disability Rights center receives numerous reports in the course of a year of possible abuse or neglect of individuals. We engage in accepted standards of best practices and conduct investigations accordingly. Many times we do not confirm the occurrence of abuse or neglect. Where we do issue a finding, our practice is to notify the appropriate regulatory or enforcement authorities.

Whether we should be included as a mandated reporter to the Department of Human Services in the event we confirm that abuse has occurred and is imminently likely to reoccur is a policy decision for the legislature as well as a matter that may be governed by federal law. Certainly, if the legislature feels that this is good public policy, we are supportive of these efforts. In prior testimony, we pointed out there are provisions in federal law which may impact our ability to release certain information which is acquired

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in the course of an investigation, without appropriate consents. This current version addresses that by providing that information would be released to the maximum extent permitted by federal law.

In some contexts, we may be not constrained by any provision in federal law. In those cases, we can simply report it. In either event, the language of this HD1 version encompasses all situations and we are in support of it. We understand that the Department of The Attorney General has additional language to suggest and we have been attempting to work with them. At the hearing before the House Committee on Human Services and Housing, they proposed amendments which may have forced our attorneys to potentially violate their ethical duty of confidentiality with their clients.

In any event, we are happy to continue to work with them as well as the Committee. The important point is that this agency is in support of attempts to protect vulnerable individuals and we want to work collaboratively with various agencies in that regard.

Thank you for the opportunity to submit testimony in support of this HD1 version of Senate Bill 3050.

House of Representatives
The Twenty-Fourth Legislature
Regular Session of 2008

Friday, March 28th, 2008, 2:00 p.m., Conference Room 325

SB3050,SD1,HD1(HSCR1149-08) -- Adult Protective Services

Honorable Tommy Waters, Chair, and the Committee on Judiciary

Testimony of Virginia Aycock
Christian Science Committee on Publication for Hawaii

Senate Bill 3050 seeks to expand the list of persons mandated to report known or suspected abuse of vulnerable adults. I respectfully request the following amendments be included in this bill, first regarding the definition of abuse and second regarding sacred communications, both of which are identical to amendments approved unanimously by the House last year with regard to SB1184.

Amendment 1: That the definition of abuse be amended as follows:

HRS[§346-222] Definitions.

"Abuse" means actual or imminent physical injury, psychological abuse or neglect, sexual abuse, financial exploitation, negligent treatment, or maltreatment as further defined in this chapter. **It shall not be considered abuse under this act for the sole reason that a vulnerable adult seeks, or his or her caregiver provides or permits to be provided with the express consent or in accordance with the practice of the vulnerable adult, treatment by spiritual means through prayer alone in accordance with a religious method of healing in lieu of medical treatment.**

Amendment 2: That SECTION 2 be amended to include a sacred communication protection in a new subsection (8) as follows:

“(8) Nothing in this section shall require a member of the clergy to report communications that are protected under rule 506 of chapter 626.”

Explanation for Amendment 1:

Many in Hawaii rely on means of health care other than conventional medical methods. Christian Science is one of the religious non-medical forms of treatment that relies on spiritual means through prayer to heal illness, injuries and other conditions. When an adult voluntarily chooses to rely on spiritual means, such as in Christian Science treatment, this choice should not be misconstrued as abuse or neglect. Christian Science care has been the health care system of choice for individuals in Hawaii for over a century. Those practicing Christian Science have found it to have both preventive and curative effects.

Explanation for Amendment 2:

The definition of clergy in HRS Rule 506 specifically acknowledges the importance of protecting sacred communications from disclosure. Without clarification, by adding our amendment #2 above, the mandated reporting requirements in SB3050 Section 346-224 create confusion and could seem to extend to sacred communications of those performing a clerical or pastoral function, as Christian Science practitioners do. These are individuals who are called upon to pray for, or treat, those who are seeking healing through Christian Science. Therefore, a practitioner's role is uniquely dual because it falls into the category of health care provider as well as minister. Indeed, these two roles are inseparable in Christian Science as health and healing come about when the spiritual needs of the individual are being addressed and met. (**Rule 506 Communications to clergy** and **506 Commentary** are printed below for your convenience.)

We appreciate the opportunity to submit this testimony and would support this bill if passed with the amendments proposed herein for the reasons stated.

Rule 506 Communications to clergy. (a) Definitions. As used in this rule:

(1) A "member of the clergy" is a minister, priest, rabbi, Christian Science practitioner, or other similar functionary of a religious organization, or an individual reasonably believed so to be by the communicant.

(2) A communication is "confidential" if made privately and not intended for further disclosure except to other persons present in furtherance of the purpose of the communication.

(b) General rule of privilege. A person has a privilege to refuse to disclose and to prevent another from disclosing a confidential

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communication by the person to a member of the clergy in the latter's professional character as spiritual advisor.

(c) Who may claim the privilege. The privilege may be claimed by the communicant or by the communicant's guardian, conservator, or personal representative. The member of the clergy may claim the privilege on behalf of the communicant. Authority so to do is presumed in the absence of evidence to the contrary. [L 1980, c 164, pt of §1; am L 1992, c 191, §2(3)]

RULE 506 COMMENTARY

This rule is identical with the U.S. Supreme Court proposal for Rule 506, see Rules of Evidence for U.S. Courts and Magistrates as promulgated by the U.S. Supreme Court, 28 App. U.S. Code Service, App. 6 (1975), except that "accredited Christian Science Practitioner" has been added to the definition of "clergyman" in subsection (a)(1), consistent with Uniform Rule of Evidence 505(a)(1). The rule supersedes a prior Hawaii statute, Hawaii Rev. Stat. §621-20 (1976) (repealed 1980) (originally enacted as L 1876, c 32, §55; am L 1933, c 45, §1; am L 1972, c 104, §1(n)):

No clergymen of any church or religious denomination shall, without the consent of the person making the confidential communication, divulge in any action or proceeding, whether civil or criminal, any confidential communication made to him in his professional character according to the uses of the church or religious denomination to which he belongs.

The present rule accords generally with the prior statute but broadens the scope of the privilege slightly in two particulars. Under the prior statute the privilege was limited to confidential communications made "according to the uses of the church or religious denomination to which [the clergyman] belongs." There seems no good reason to limit the privilege in this way so long as confidentiality was intended by the communicant. The present rule clarifies that uncertain point, granting the privilege to all confidential communications made to the clergyman in his professional capacity as a spiritual adviser. In addition, the privilege is extended to cover confidential communications to one who is not a clergyman if the person making the communication reasonably believes that he is.

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