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THE HONORABLE KARL RHOADS, CHAIR
HOUSE COMMITTEE ON JUDICIARY
Twenty-seventh State Legislature
Regular Session of 2013
State of Hawai`i

January 29, 2013

RE: H.B. 129; RELATING TO CHILD WITNESS TESTIMONY.

Chair Rhoads, Vice-Chair Har and members of the House Committee on Judiciary, the Department of the Prosecuting Attorney of the City and County of Honolulu submits the following comments regarding House Bill 129.

The Department strongly supports the intent of this bill—that is, to safeguard the mental and emotional well-being of child witnesses—and if passed, would do its utmost to utilize the new law prudently in relevant criminal cases. Consistent with existing rules, we note that the language in H.B. 129 pertaining to criminal trials does mirror Rule 616, Hawaii Rules of Evidence, by necessitating a determination of whether "requiring the child to testify in the physical presence of the accused would likely result in serious emotional distress to the child and substantial impairment of the child's ability to communicate."

In addition, H.B. 129 would require a preliminary hearing to make such determination, which is consistent with the Hawaii Supreme Court's prior comments that "any procedure adopted in furtherance of such a policy [to protect the child-witness who is a victim of an alleged sex offense] must include a specific determination of necessity in order to be constitutionally acceptable." State v. Apilando, 79 Haw 128, 135, 900 P.2d 135, 142 (1995). In Apilando, the Hawaii Supreme Court expressly agreed with statements made by U.S. Supreme Court Justice O'Connor, in her concurring opinion in Coy v. Iowa, 487 U.S. 1012, 1025, 108 S.Ct. 2798, 2805 (1988), such that:

> I would permit use of a particular trial procedure that called for something other than face-to-face confrontation if that procedure was necessary to further an important public policy. The protection of child witnesses is...just such a policy.

* * *

> [I]f a court *makes a case-specific finding of necessity*, as is required by a number of state statutes, our cases suggest that the strictures of the confrontation Clause may give way to the compelling state interest of protecting child witnesses.

Apilando, at 136, 143 (emphasis in original). Perhaps most telling is the Hawaii Supreme Court's approval of a decision by the Maryland Court of Appeals, addressing this issue, which stated that "the Confrontation Clause require[d] the trial court to make a specific finding that testimony by the child in the courtroom *in the presence of the defendant* would result in the child suffering serious emotional distress such that the child could not reasonably communicate." Apilando, at 137, 144 (emphasis in original) (citing Maryland v. Craig, 497 U.S. 836, 857-58, 110 S.Ct. 3157, 3179 (1990)). If and when such a finding is made, similar to the finding required by H.B. 129, then the Confrontational Clause would give way to the "compelling state interest of protecting child witnesses."

Thus, while the Department would urge the Committee to proceed carefully, as H.B. 129 will inherently require a delicate balance of constitutional rights and public policy, it does appear that H.B. 129 would meet constitutional requirements. Thank you for the opportunity to testify on this matter.

Testimony of the Office of the Public Defender
State of Hawaii
to the House Committee on Judiciary

January 29, 2013

H.B. No. 129: RELATING TO CHILD WITNESS TESTIMONY

Chair Rhoads and Members of the Committee:

We oppose passage of H.B. No. 129 because, in criminal cases, we believe that the measure would be unconstitutional as a violation of an accused's right to confrontation of witnesses against him or her under the Sixth Amendment of the U.S. Constitution and Article I, Section 14 of the Hawaii Constitution. Those constitutional provisions assure a criminal defendant of the right to confront every witness against him or her in a trial. The Hawaii Supreme Court, in State v. Faafiti, 54 Haw. 637 (1973) elaborated upon the importance of this fundamental right:

> **[T]he confrontation clause was incorporated into the United States Constitution as the Sixth Amendment to prevent the despised practice of having an accused tried primarily on "evidence" consisting solely of ex parte affidavits, and depositions, and to give the accused the right to demand that his accusers, *i.e.*, witnesses against him, be brought to face him.**

54 Haw. at 640

H.B. No. 129, by providing an alternative method of testifying for a child witness, would directly violate these constitutional provisions. In section 5 on page 3 of the bill, testimony by alternative method would be allowed for child witness in a criminal proceeding. Such testimony could take the form of the child testifying outside the presence of, not only the defendant, but also the fact-finder (the judge or jury).

Testimony given outside the presence of the fact-finder would result in an additional constitutional violation. A defendant in a criminal proceeding has a due process right to have the fact-finder directly observe the witness while he/she testifies. The fact-finder in a criminal proceeding is the exclusive judge of the credibility of the witnesses. To accomplish this, juries are routinely instructed that they must observe the witness's manner of testifying, the witness's intelligence, the witness's candor or frankness, or lack thereof, and the witness's temper, feeling, or bias. This duty would be severely impeded by testimony been delivered outside the presence of the fact-finder.

The definition of "alternative method," in Section 2, also implies that the testimony need not even be in the presence and full view of the fact-finder, the presiding officer and all of the parties. Such a proceeding cannot pass constitutional muster. The only determination that need be made before such testimony would be allowed is that, by clear and convincing evidence, the child witness would suffer serious emotional distress

that would substantially impair the child witness' ability to communicate. This is a very vague and amorphous standard that could be found in almost any type of case.

The Hawaii Rules of Evidence, in Rule 616, currently provides for the court to order testimony of a child witness via two-way closed circuit video equipment in an abuse offense or sexual offense prosecution. To our knowledge, this procedure has never been used in our courts primarily because of the constitutional concerns it raises. Likewise, it is very doubtful that any trial court in the state would approve alternative testimony under this measure even if it is enacted into law because any conviction where such a procedure is employed will immediately come under constitutional attack.

Thank you for the opportunity to testify in this matter.

POLICE DEPARTMENT

CITY AND COUNTY OF HONOLULU

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OUR REFERENCE LM-NTK

January 29, 2013

The Honorable Karl Rhoads, Chair
and Members
Committee on Judiciary
State House of Representatives
Hawaii State Capitol
514 South Beretania Street
Honolulu, Hawaii 96813

Dear Chair Rhoads and Members:

Subject: House Bill No. 129, Relating to Child Witness Testimony

I am Lisa Mann, Acting Captain of the Criminal Investigation Division of the Honolulu Police Department, City and County of Honolulu.

The Honolulu Police Department supports House Bill No. 129, Relating to Child Witness Testimony.

There are cases such as sex assaults involving children where a child can be reluctant to testify. The use of an alternative method of testifying would encourage witness testimony. Witness testimony is extremely important when seeking convictions in criminal prosecutions therefore the Honolulu Police Department supports this bill.

The Honolulu Police Department urges you to support House Bill No. 129, Relating to Child Witness Testimony.

Thank you for the opportunity to testify.

Sincerely,

LISA MANN, Acting Captain
Criminal Investigation Division

APPROVED:

for LOUIS M. KEALOHA
Chief of Police

TESTIMONY OF THE
COMMISSION TO PROMOTE UNIFORM LEGISLATION

ON H.B. No. 129
RELATING TO CHILD WITNESS TESTIMONY

BEFORE THE HOUSE COMMITTEE ON JUDICIARY

DATE: Tuesday, January 29, 2013, at 2:00 p.m.
LOCATION: Conference Room 325, State Capitol

PERSON(S) TESTIFYING: KEVIN P. H. SUMIDA or ELIZABETH KENT
Commission to Promote Uniform Legislation

Chair Rhoads, Vice Chair Har, and Members of the House Committee on Judiciary:

My name is Kevin Sumida and I am one of Hawaii's Uniform Law Commissioners. Hawaii's uniform law commissioners support the passage of H.B. No. 129, The ***Uniform Child Witness Testimony by Alternative Method Act***.

This Act was approved by the National Conference of Commissioners on Uniform State Laws in 2002 to address the complicated issues involved in child witness testimony.

The Act was promulgated to provide uniformity in an area of law where there was extreme diversity among state jurisdictions. Uniform laws are necessary when addressing alternative methods for taking the testimony of a child in order to protect children, guard the rights of parties, and provide predictability and clarity for attorneys and judges. The ***Uniform Child Witness Testimony by Alternative Methods Act*** is an important complement to the Uniform Rules of Evidence and our own Hawaii Rules of Evidence, and should be adopted by every state.

The Act provides a clear and effective method of protecting children from

the emotional trauma associated with giving testimony, while continuing to protect the 6th Amendment rights of defendants and respondents. Presiding officers are given clear authority to allow children to testify using alternative methods in criminal, civil, and administrative matters, without displacing the existing practices of a state.

The Act creates a framework that integrates current state practice with alternative methods of taking testimony. This allows judges, presiding officers, and attorneys to apply fair and predictable standards to the process. The Uniform Child Witness Testimony by Alternative Method Act is effective because:

- There is presently no method provided for allowing a child to testify in a proceeding other than by giving live testimony, except in criminal proceedings under Hawaii Rules of Evidence Rule 616. See below. The Act gives a presiding officer clear authority to allow children to testify using alternative methods in criminal, civil, and administrative matters.
- Hearings to determine need for an alternative method. A presiding officer may order a hearing to determine whether to allow a child to testify by an alternative method. Clear standards are established for making the determination in both criminal and non-criminal cases.
    - ✓ In a **criminal proceeding**, HRE 616 provides that a child's testimony may be taken by way of a two-way closed circuit video equipment, "if the court finds that requiring the child to testify in the physical presence of the accused would likely result in serious emotional distress to the child and substantial impairment of the child's ability to communicate." Under the Act, a similar standard will apply: a presiding officer must determine upon clear and convincing evidence that a child would suffer serious emotional trauma which would substantially impair the child's ability to communicate with the finder of fact.
    - ✓ In a **non-criminal proceeding**, the presiding officer must find

upon a preponderance of the evidence that allowing the child to testify by an alternative means is necessary to serve the best interests of the child or to enable the child to communicate with the trier of fact. The officer is directed to consider the nature of the proceeding, age and maturity of the child, relationship of the child to the parties, nature and degree of possible emotional trauma, and any other relevant factors.

- ✓ If the proper standard is met, the Act specifies additional factors to be considered by the presiding officer in deciding whether to allow presentation by an alternative method.

- Protection of the rights of defendants and respondents. The Act directs the presiding officer to employ an alternative method that is no more restrictive of the rights of the parties than is necessary under the circumstances. It requires that the chosen method must permit full and fair opportunity for cross-examination of the child witness by each party.

To date, the ***Uniform Child Witness Testimony by Alternative Method Act*** has been adopted by four states (Idaho, Nevada, New Mexico, and Oklahoma), and endorsed by the American Bar Association.

We urge your support of this bill.