



*The Judiciary, State of Hawaii*

**Testimony to the Senate Committee on Judiciary and Labor**

The Honorable Clayton Hee, Chair  
The Honorable Maile S.L. Shimabukuro, Vice Chair

Thursday, January 31, 2013  
10:00 a.m.  
State Capitol, Conference Room 016

by

Catherine H. Remigio  
District Family Judge  
Family Court of the First Circuit

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**Bill No. and Title:** Senate Bill No. 33, Relating to Child Witness Testimony

**Purpose:** Enacts the Uniform Child Witness Testimony by Alternative Methods Act.

**Judiciary's Position:**

The Judiciary takes no position on Senate Bill No. 33. However, we wish to inform the Committee that both the criminal division of the circuit court and the family court have had, for many years, effective procedures to protect the child witness. We would also add that some of these procedures have been successfully tested by or crafted as a result of appellate cases. This bill is, therefore, not necessary.

Our experience shows that trying to use one template (one "cookie cutter") for matters dealing with child victims is not appropriate and not good for the children. Under our current practices, we are able to craft the safest procedure that will also honor the defendant's due process rights as well as pass appellate muster. Applying a new and, on the face of it, more constricted procedure may cause problems on all three fronts (harm to the child, abrogation of the defendant's rights, and not passing appellate muster).

Thank you for the opportunity to testify on this bill.

**Testimony of the Office of the Public Defender  
State of Hawaii  
to the Senate Committee on Judiciary and Labor**

January 31, 2013

S.B. No. 33: RELATING TO CHILD WITNESS TESTIMONY

Chair Hee and Members of the Committee:

We oppose passage of S.B. No. 33 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

S.B. No. 33, 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.

TESTIMONY OF THE  
COMMISSION TO PROMOTE UNIFORM LEGISLATION

**ON S.B. No. 33**  
RELATING TO CHILD WITNESS TESTIMONY

BEFORE THE SENATE COMMITTEE ON JUDICIARY AND LABOR

DATE: Thursday, January 31, 2013, at 10:00 a.m.

LOCATION: Conference Room 016, State Capitol

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

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Chair Hee, Vice Chair Shimabukuro, and Members of the Senate Committee on  
Judiciary and Labor:

My name is Kevin Sumida and I am one of Hawaii's Uniform Law  
Commissioners. Hawaii's uniform law commissioners support the passage of  
S.B. No. 33, 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.

POLICE DEPARTMENT  
CITY AND COUNTY OF HONOLULU

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DEPUTY CHIEFS

OUR REFERENCE RC-NTK

January 31, 2013

The Honorable Clayton Hee, Chair  
and Members  
Committee on Judiciary and Labor  
State Senate  
Hawaii State Capitol  
415 South Beretania Street  
Honolulu, Hawaii 96813

Dear Chair Hee and Members:

Subject: Senate Bill No. 33, 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 Senate Bill No. 33, 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 Senate Bill No. 33, Relating to Child Witness Testimony.

Thank you for the opportunity to testify.

Sincerely,

A handwritten signature in cursive script, appearing to read "Lisa Mann".

LISA MANN, Acting Captain  
Criminal Investigation Division

APPROVED:

A handwritten signature in cursive script, appearing to read "Louis M. Kealoha".

LOUIS M. KEALOHA  
Chief of Police