TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
TWENTY-SEVENTH LEGISLATURE, 2014

ON THE FOLLOWING MEASURE:
S.B. NO. 2687, S.D. 1, H.D. 1, RELATING TO LIMITATIONS OF ACTIONS.

BEFORE THE:
HOUSE COMMITTEE ON JUDICIARY

DATE: Tuesday, March 25, 2014 **TIME:** 4:00 p.m.

LOCATION: State Capitol, Room 325

TESTIFIER(S): David M. Louie, Attorney General, or
Caron Inagaki, Deputy Attorney General

Chair Rhoads and Members of the Committee:

The Department of the Attorney General opposes this measure.

The purpose of this bill is to amend section 657-1.8, subsection (b), Hawaii Revised Statutes (HRS), to eliminate the two-year window that allowed civil claims to be brought by victims of childhood sexual assault who had been barred from filing a claim due to the expiration of the applicable statute of limitations to allow all previously barred claims to be brought at any time. This bill also lowers the standard of proof required to allow damages against a legal entity from a finding of gross negligence to simple negligence. In addition, this bill adds a provision that "[t]he court, plaintiff, or any person enumerated under paragraphs (1) to (4) [in subsection (d) of section 657-1.8, HRS] shall not be required to disclose the contents of the sealed certificate of merit to fulfill the requirements under this section."

When section 657-1.8(b) was first enacted, the bill was highly publicized and the public was made aware that any victims of childhood sexual assault whose claims may have been untimely due to the applicable statute of limitations at that time, could have two years in which to now bring a civil lawsuit. Indeed, many civil lawsuits alleging acts of sexual assault that occurred many years, sometimes decades, earlier, were filed as a result of the passage of this law. These lawsuits were also highly publicized. We believe that the two-year window was a reasonable period of time and allowed victims a fair opportunity to have a second chance to file a claim.

We oppose having no limitation on civil actions that may be brought no matter how long ago the incident occurred. Having no time limitation raises grave due process concerns because

the bill could severely prejudice defendants from defending themselves in a lawsuit, and it may detrimentally affect not only the accused perpetrator but also any entity that may be subject to the law.

With no time limit, a victim could theoretically bring a lawsuit many decades after the sexual assault. Over the passage of time, memories fade, witnesses move or pass away, and documents are lost or destroyed. Most entities have records retention policies that call for the destruction of documents after a certain period of time. A claimant could conceivably wait to file a lawsuit until the most strategically opportune time to prevent a defendant from defending against the lawsuit. A lawsuit could even be brought against an innocent individual after his or her death and there would be no opportunity for the accused to establish his or her innocence.

Just one example where this bill could be misapplied is in the instance of a minor who is a victim of sexual abuse of one of the identified crimes and is taken to a hospital to be treated. A medical care provider who examines the minor is mandated to report the suspected abuse. If no medical care provider reports the suspected abuse and the child is abused again, there may be grounds to file an action against the medical care provider and the hospital. However, because a lawsuit may not be filed until decades after the alleged assault, there may no longer be any witnesses or documentation that would allow the medical care provider or hospital to defend itself in the lawsuit.

Also, any claim against a medical care provider under this bill would be in direct conflict with section 657-7.3, HRS, which sets forth a specific limitation period for actions for medical torts.

With respect to the proposed amendment in subsection (d) (page 3, lines 10-13), the wording is unclear as to its meaning, purpose, or necessity. The amendment provides that "[t]he court, plaintiff, or any person enumerated under paragraphs (1) to (4) shall not be required to disclose the contents of the sealed certificate of merit to fulfill the requirements under this section." However, the statute already provides that the certificate of merit "shall be sealed and remain confidential." Thus, the privacy of the plaintiff in a civil action is already protected. Moreover, under basic litigation principles, litigants in a civil action cannot be prevented from having access to information that is relevant and may be critical to that litigant's defense. There are other ways that this information could be protected, for example, by a court protective order.

The court would be in the best position to know and decide whether the information should be made available to the requestor within the context of the litigation before it.

Another bill that deals with a similar subject matter, H.B. No. 2034, House Draft 2, is currently before the Senate Judiciary and Labor Committee. The Committee has not made a decision on this bill because the interested parties have been attempting to reach an agreement on amendments to the bill.

We ask that this bill be held and the interested parties be allowed to similarly reach an agreement on H.B. No. 2034.

HAWAII CATHOLIC CONFERENCE
6301 Pali Highway
Kaneohe, HI 96744-5224

ONLINE SUBMISSION
Hearing on: Tuesday, March 25, 2014 @ 4:00 p.m.
Conference Room 325

DATE: **March 24, 2014**

TO: **House Committee on Judiciary**
Representative Karl Rhoads, Chair
Representative Sharon E. Har, Vice Chair

FROM: Walter Yoshimitsu

RE: **OPPOSITION TO SB 2687, SD 1, HD1, RELATING TO LIMITATION OF ACTIONS**

Honorable Members of the House Committee on Judiciary, I am Walter Yoshimitsu, representing the **Hawaii Catholic Conference**. The Hawaii Catholic Conference is the public policy voice for the Roman Catholic Church in the State of Hawaii, which under the leadership of Bishop Larry Silva, represents the Catholic Church in Hawaii. **We oppose this bill for the following reasons**:

This bill in its present amended form seeks to completely abolish the statute of limitations for child sexual abuse that would constitute offenses under Part V (Sexual Offenses) and Part VI (Child Abuse) of Chapter 707, for claims that were once barred. If it becomes law, it could cause substantial problems for all types of programs and nonprofits, including schools, churches, camps, and youth programs.

Many such institutions, including private elementary and secondary schools, Boy Scouts, Girl Scouts, YMCA, YWCA, Boys' and Girls' Clubs, childcare programs, preschools, after school programs, camps, churches, and youth-at-risk programs, will be substantially affected by the revival of claims already barred by the statute of limitations. **Because of the lapse of time, many institutions potentially subject to suit under this bill no longer have the ability to meaningfully defend themselves from such claims.**

The reason for statutes of limitation is to reflect the fact that, over time, individual memories fade, witnesses who may prove or disprove a claim have died or are no longer available, and written records may no longer be available that would have relevance to the case. Especially in the case of nonprofits, record-keeping over a prolonged period may be far from ideal. Boards and staff change, and institutional memories are lost.

This bill, however, would now allow the assertion of claims for an indefinite period. This means that claims could be asserted that date back 60, 70 or more years, depending only on whether the claimant is still alive. Many institutions may be put in the situation of defending themselves in situations where not only is there a lack of evidence, but the abuser and anyone who may have been at fault for negligently overseeing or supervising the abuser are long gone. All that remains as a target

for litigation may be the institution, which is now without any practical way to defend itself from the allegations.

After the passage of so many years, it is unlikely that the institution will be able to find persons with knowledge as to what actually occurred. Even if there were such persons still alive, it is unlikely they will still have an accurate memory of what occurred that long ago. So the institution is left with the claims of abuse, and absolutely no way to defend itself from such claims. It is fundamentally unfair to put an institution in such a position.

This bill would have substantial negative impacts on the ability of nonprofits to remain open and provide services. Many nonprofits that provide services for children and families do so on very thin budgets, especially in these economically challenging times. The cost of defending against a single claim brought under this bill could have a devastating impact. Further, to the extent that such claims can be insured against, it would seem that premiums for such insurance could increase substantially if this bill became law. Again, many nonprofit organizations may not be able to pay for such insurance, and it is quite possible that such organizations would simply cease to provide services rather than the organization, as well as its directors and officers, being exposed to suit.

Certain testimony submitted to the legislature on this bill--which we assume will again be submitted to this committee--gives a misleading impression that similar legislation has been passed or is pending in numerous other states. This is not correct. Most such legislation is very different from SB 2687. It is prospective only (for incidents of abuse that occur after the effective date), or applies to extend the limitations period for claims that are not already barred.

Thus, for example, of all the states listed by Professor Marci Hamilton as having passed or considered legislation that would eliminate or expand the statute of limitations (either criminal or civil), nineteen have judicial decisions that in fact prohibit application of such legislation to reopen barred claims: Alabama, Arkansas, Colorado, Florida, Illinois, Indiana, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Nebraska, New Jersey, North Carolina, Pennsylvania, Rhode Island, South Dakota, Utah, Virginia and Wisconsin. A summary of the judicial decisions of the states that in fact prohibit legislation such as SB 2687 is attached hereto.

This bill also perpetuates the basic unfairness of allowing resuscitated abuse claims against private institutions while immunizing the State and its political subdivisions from the exact same culpable conduct. While people often single out the Catholic Church for past instances of abuse, the problem is by no means unique to the Church. There is always the potential for abuse in any institution that deals with, supervises or cares for children.

Studies indicate that the institutions most likely to foster an atmosphere of abuse are not private institutions, but public ones. As indicated by a study prepared for the federal Department of Education, 6.7% of students in public schools nationwide have reported being sexually abused by an educator, a much higher percentage than the reported incidence of clergy abuse of children. (U.S. Department of Education, "Educator Sexual Misconduct: A Synthesis of Existing Literature" (2004).) Government reports also indicate that, across the country, there has been a high incidence of sexual

abuse in juvenile detention facilities, with 10.3% of incarcerated youth reporting they had been sexually abused by a facility staff member during the prior year. (U.S. Department Justice, Bureau of Justice Statistics, "Sexual Victimization in Juvenile Facilities Reported by Youth 2008-09" (2010).)

These rates of abuse in public institutions are much higher than those reported in the private sector, including incidents of abuse involving clergy of the Catholic Church. Yet this bill only allows assertions of claims against private institutions and immunizes the State and its political subdivisions from any responsibility for the exact same abuses. Where is the fairness here, either for victims of abuse, or for private institutions that are faced with having to defend themselves while knowing the State and its political subdivisions are absolved from any accountability for the exact same types of claims?

We submit that allowing victims to sue private institutions, while completely immunizing public institutions against identical claims, is discriminatory, fundamentally unfair, and violates equal protection and due process. It becomes increasingly clear that the legislature is targeting certain types of institutions while protecting others.

In October 2013, Governor Brown of California vetoed similar legislation, Senate Bill 131 (2013), on the grounds that it was too unfair to become law. There, prior legislation had opened a one-year window for abuse claims against private but not public institutions, and then, in SB 131, the California legislature again proposed to open the window as to private institutions while providing no cause of action against public ones.

Governor Brown's veto message regarding SB 131 is just as applicable to this bill:

> . . . I can't believe the legislature decided that victims of abuse by a public entity are somehow less deserving than those who suffered abuse by a private entity. The children assaulted by Jerry Sandusky at Penn State or the teachers at Miramonte Elementary School in Los Angeles are no less worthy because of the nature of the institution they attended . . . .
>
> This brings us to the bill now before me, SB 131. This bill does not change a victim's ability to sue a perpetrator. The bill also does not change the significant inequity that exists between private and public entities. What this bill does do is go back to the only group, i.e. private institutions, that have already been subjected to the unusual "one year revival period" and makes them, and them alone, subject to suit indefinitely. <u>This extraordinary extension of the statute of limitations, which legislators chose not to apply to public institutions, is simply too open-ended and unfair</u>.

(Emphasis added.)

The present amended bill also removes the ability of defendants in abuse cases to gain discovery regarding the certificate of merit, in order to investigate whether the certificate is well-founded or is the basis of a spurious accusation. The restriction makes illusory another protection mechanism of the original legislation, which is the ability of someone falsely accused to recover attorneys' fees. Section 657-1.8(c) provides that a wrongly accused defendant may recover attorney's fees if the court

determines a false accusation has been made with no basis in fact and with malicious intent. However, If a defendant is prohibited from examining the documentation that formed the basis of the claim, the defendant is denied the practical ability to make a claim for fees and again denied a fair judicial process that comports with due process.

Finally, this bill will not provide any additional protection for children**.** While not belittling in any way the suffering that those already abused have suffered, as we have previously testified we believe that the focus of efforts at preventing sexual abuse should be on prevention. Over the past few years, as this problem has come to light, churches, schools and other nonprofits have taken substantial steps to reduce the possibility for abuse to occur, including substantially increased screening and background checks on potential teachers and employees, accountability and reporting procedures, and supervisory procedures to ensure that children are not put in situations and environments where they could be abused. This bill, however, which resuscitates claims that are 50, 60 or 70 years old, will not do anything to make children safer today.

For these reasons, we believe this bill should be held in committee.

Thank you for the opportunity to testify.

Summary of States Whose Statute of Limitation Laws
Are Cited as Supporting SB 2687 Which In Fact Would Not Permit Such a Law

Alabama. *Johnson v. Garlock*, 682 So.2d 25, 26-28 (Ala. 1996) (once a claim is barred by the statute of limitations, the defendant has a vested right which cannot be taken away by legislation without violating section 95 of the state constitution, which forbids the legislature to revive any time-barred right or remedy or to eliminate any existing defense to a cause of action); *Bajalia v. Jim Magill Chevrolet, Inc.*, 497 So.2d 489, 491 (Ala. 1986) (the legislature has no power to revive a cause of action already barred), *Tyson v. Johns-Manville Sales Corp.*, 399 So.2d 263, 268 (Ala. 1981) (the legislature's power to amend the statute of limitations "can only be exercised so as to apply … where the bar was not complete before the enactment of the statute, for, if the action was … barred (before enactment), its effect would be to revive a cause of action already barred and would violate § 95") (ellipsis in the original), quoting *Floyd v. Wilson*, 54 So. 528, 528-29 (Ala. 1911).

Arkansas. *Hall v. Summit Contractors*, 356 Ark. 609, 614, 158 S.W.3d 185, 188 (Ark. 2004) ("[W]e have long taken the view, along with a majority of the other states, that *the legislature cannot expand a statute of limitation so as to revive a cause of action already barred*…. [¶] In most jurisdictions it is held that, *after a cause of action has become barred by the statute of limitations, the defendant has a vested right to rely on that statute as a defense, and neither a constitutional convention nor the Legislature has power to divest that right and revive the cause of action.*") (original emphasis), quoting *Johnson v. Lilly*, 308 Ark. 201, 203-04, 823 S.W.2d 883, 885 (Ark. 1992).

Colorado. *Jefferson County Dep't of Social Services v. D.A.G.*, 199 Colo. 315, 317-18, 607 P.2d 1004, 1006 (Colo. 1980) (right to plead statute of limitations is a vested right which, by virtue of a state constitutional provision forbidding retroactive legislation, cannot be taken away by subsequent legislation), and cases cited therein; *D.Z.M. v. D.A.G.*, 41 Colo.App. 377, 379, 592 P.2d 1, 2 (Colo. App. 1978) (subsequent statutory modification of a statute of limitation cannot revive or reinstate a right to litigate a cause of action previously barred; to hold otherwise would be to give retrospective effect to the statute in violation of state constitutional provision forbidding retroactive legislation), and cases cited therein.

Florida. *Wood v. Eli Lilly & Co.*, 701 So.2d 344, 346 (Fl. 1997) ("this Court has held that once a claim is extinguished by the statute of limitations, it cannot be revived as a result of a subsequent court decision … or as a result of legislative action" because "after an action has been time barred, the defendant possesses a constitutionally protected property interest to be free from that claim"), citing, among other authorities, *Wiley v. Roof*, 641 So.2d 66, 68-69 (Fl. 1994) (holding, in a case involving the sexual abuse of a minor, that statutory revival of a previously time-barred claim would deprive the defendant of a property interest protected under the due process guarantee of the state constitution); *see also Williams v. Southeast Florida Cable*, 782 So.2d 988, 991 (Fl. Dt. Ct. App. 2001) (once a claim is extinguished by the statute of limitations, it cannot be revived by the legislature because the defendant possesses a constitutionally protected property interest to be free from such claims).

Illinois. *Doe A. v. Diocese of Dallas*, 234 Ill.2d 393, 407-12, 917 N.E.2d 475, 483-86 (Ill. 2009) (statutory amendment increasing limitation period in childhood sexual abuse cases could not be applied retroactively to claims that were time-barred when the amendment became effective without violating due process protections of state constitution), citing *M.E.H. v. L.H.*, 177 Ill.2d 207, 214-15, 218, 685 N.E.2d 335, 339-41 (Ill. 1997) (once the statute of limitations or repose has expired, the defendant has a vested right to invoke the limitations period, a right that "cannot be taken away by the legislature without offending the due process protections" of the state constitution), citing *Sepmeyer v. Holman*, 162 Ill.2d 249, 642 N.E.2d 1242 (Ill. 1994); *see also Sundance Homes v. County of DuPage*, 195 Ill.2d 257, 267-68, 746 N.E.2d 254, 261 (Ill. 2001) (subsequent legislative action cannot revive an action barred by a statute of limitation), citing *Clay v. Kuhl*, 189 Ill.2d 603, 609, 727 N.E.2d 217 (Ill. 2000).

Indiana. *Right v. Martin*, 11 Ind. 123, 1858 WL 4103, *1 (Ind. 1858) (legislative repeal of statute of limitations "could not renew a liability that had already been extinguished"); *Stipp v. Brown*, 2 Ind. 647, 1851 WL 2995, *1 (Ind. 1851) (action was "barred while the statute of limitations … was in force, and no subsequent statute could renew the defendant's liability"); *McKinney v. Springer*, 8 Blackf. 506, 1847 WL 2471, *1 (Ind. 1847) ("we are clearly of [the] opinion, that no statute [of limitation] subsequently passed could renew the defendant's liability" for a claim barred at the time the new statute was enacted); *In re Paternity of S.J.J.*, 877 N.E.2d 826, 829 (Ind. App. 2007) ("a new statute of limitations cannot revive a claim which was foregone under the prior statute of limitations before passage of the new one"), quoting *Connell v. Welty*, 725 N.E.2d 502, 506 (Ind. App. 2000) (same); *Dore v. Dore*, 782 N.E.2d 1015, 1021 (Ind. App. 2003) (same); *Thurman v. Thurman*, 777 N.E.2d 41, 44-45 (Ind. App. 2002) (same); *Indiana Department of State Revenue v. Puett's Estate*, 435 N.E.2d 298, 301 (Ind. App. 1982) ("if, while the old statute [of limitations] was in force and before the plaintiff's suit was commenced, the plaintiff's right of action was barred by that statute, no statute subsequently passed can renew the defendant's liability"); *Green v. Karol*, 344 N.E.2d 106, 112 (Ind. App. 1976) ("it is well established that if, while the old statute [of limitations] was in force and before plaintiff's suit was commenced, plaintiff's right of action was barred by that statute, no statute subsequently passed can renew defendant's liability"), citing *Right*, *Stipp*, and *McKinney*, *supra*.

Kentucky. *Johnson v. Gans Furniture Industries*, 114 S.W.3d 850, 854-55 (Ky. 2003) ("Although an amendment that extends the period of limitation may be applied to a claim in which the period has not already run, it may not be applied to revive a claim that has expired without impairing vested rights"); *Kiser v. Bartley Mining Co.*, 397 S.W.2d 56, 57-58 (Ky. 1965) (adopting "the majority view" that an amendment to a statute of limitations "properly may be considered applicable to claims that arose before the amendment, *where the previously existing limitation had not run* on those claims at the time the amendment became effective") (emphasis added); *Stone v. Thompson*, 460 S.W.2d 809, 810 (Ky. App. 1970) ("There is no vested right in the running of the statute of limitations *unless it has completely run and barred the action*, so that as to existing causes of action which are not barred, the statute may be amended, suspended or repealed") (emphasis added); *Jackson v. Evans*, 284 Ky. 748, 145 S.W.2d 1061, 1062 (Ky. App. 1940) ("the legislature cannot remove a bar of limitation which has become complete"); *Heath v. Hazelip*, 159 Ky. 555, 167 S.W. 905, 907 (Ky. App. 1914) ("the Legislature cannot remove a bar of limitation which has already become complete"); *Lawrence v. City of Louisville*, 96 Ky. 595, 29 S.W. 450, 451 (Ky. App. 1895) ("The lawmaking branch of the government has no more power to destroy a defense that has accrued than it has to take the citizen's property 'without due process of

law… The defense is in the nature of a vested right… When one is guilty of a tort, and immunity from suit has arisen by operation of the statute of limitation, the legislature cannot deprive him of it…. [T]he old statute of limitation is … a complete bar before the repeal, and the repeal of a statute [of limitation] does not affect the rights acquired under the repealed statute.").

Louisiana. *Hall v. Hall*, 516 So.2d 119, 120 (La. 1987) (a new statute could not revive a cause of action, including this action for childhood sexual abuse, that was already time-barred under the previous statute); *Murray v. Town of Mansura*, 940 So.2d 832, 838 (La. App. 2006) (once barred, a claim "cannot be revived"); *Johnson v. Roman Catholic Church for the Archdiocese of New Orleans*, 844 So.2d 65, 69 n.2 (La. App. 2003) (the legislature "is without authority" to revive a cause of action, including this one for childhood sexual abuse, that was previously time-barred); *G.B.F. v. Keys*, 687 So.2d 632, 635 (La. App. 1997) (retroactive application of new statute of limitation to revive previously time-barred cause of action for childhood sexual abuse would "infring[e] upon constitutionally vested rights"); *Orleans Parish School Board v. United States Gypsum Co.*, 892 F.Supp. 794, 806-07 (E.D. La. 1995) ("The due process clause of the Louisiana constitution prohibits the revival of a prescribed cause of action").

Maryland. *Smith v. Westinghouse Electric Corp*., 266 Md. 52, 57, 291 A.2d 452, 455 (Md. 1972) (legislation purporting to revive previously time-barred claims violated Article 23 [now Article 24] of the Declaration of Rights of the Maryland Constitution, a provision that guarantees that no person be "deprived of his … property, but by … the Law of the land"); *Dua v. Comcast Cable of Maryland, Inc.*, 370 Md. 604, 627-30, 635-36, 805 A.2d 1061, 1075-76, 1079-80 (Md. 2002) (citing *Smith v. Westinghouse Electric*, with approval, for the proposition that a "statute … resulting in reviving a cause of action that was otherwise barred … deprive[d] the defendant of property rights in violation of Article 24 of the Declaration of Rights", and citing the Maryland "takings" clause as an additional basis for rejecting retroactive laws abrogating vested rights).

Mississippi. *University of Miss. Med. Ctr. v. Robinson*, 876 So.2d 337, 339-41 (Miss. 2004) (by virtue of a state constitutional provision that expressly deprives the legislature of the power to revive "any remedy which may have become barred by lapse of time, or by any statute of limitations of this state," a previously barred claim cannot be revived), and cases cited therein.

Missouri. *Doe v. Roman Catholic Diocese of Jefferson City*, 862 S.W.2d 338, 341-42 (Mo. 1993) (holding, in this suit for damages based on childhood sexual abuse, that once the original statute of limitation expires, the defendant has acquired a vested right to be free from suit, a right that cannot be revived by the legislature because of a state constitutional provision that prohibits any law that is "retrospective in its operation"); *W.B. v. M.G.R.*, 955 S.W.2d 935, 937 (Mo. banc 1997) (holding, based on *Doe*, that legislation purportedly reviving time-barred suit challenging father's paternity violated state constitutional provision forbidding retrospective laws).

Nebraska. *Givens v. Anchor Packing, Inc.*, 237 Neb. 565, 568-72, 466 N.W.2d 771, 773-75 (Neb. 1991) (revival of an expired cause of action by the legislature is barred under the due process guarantee of the state constitution), and cases cited therein; *see also Kratochvil v. Motor Club Ins. Ass'n*, 255 Neb. 977, 987, 588 N.W.2d 565, 573 (Neb. 1999) ("The Legislature's power to change limitation periods is subject

to two restrictions," the first of which is that "the Legislature may not deprive a defendant of a bar which has already become complete.").

New Jersey.[1] The New Jersey courts do not permit revival of common law or contract claim, though they do allow revival of a cause of action created by statute (*e.g.*, workers compensation or wrongful death). *Panzino v. Continental Can Co.*, 364 A.2d 1043 (N.J. 1976) (upholding retroactive application of the statute of limitations to revive a workers compensation claim, based in part on features unique to workers compensation, but recognizing that contract claims cannot be revived); *Id.* (Schreiber, J., dissenting) (describing the majority opinion as also implicitly recognizing, for purposes of retroactivity, a distinction between causes of action arising from statute and common law, and permitting revival of the former but not the latter), citing *Burns v. Bethlehem Steel Co.*, 118 A.2d 544 (N.J. 1955) (holding that cause of action for personal injury could not be revived); *State v. Standard Oil Co.*, 74 A.2d 565 (N.J. 1950) (holding that cause of action based on contract cannot be revived), *aff'd*, 341 U.S. 428 (1951); *Sarasota-Coolidge Equities II v. S. Rotondi & Sons, Inc.*, 770 A.2d 1264 (N.J. App. Div. 2001) (same); *see also Short v. Short*, 858 A.2d 571 (N.J. App. Div. 2004) (upholding retroactive application of the statute of limitations to revive a wrongful death action).

North Carolina. *Trustees of Rowan Technical College v. J. Hyatt Hammond*, 313 N.C. 230, 233-34, 328 S.E.2d 274, 276 (N.C. 1985) (legislature cannot revive claim that is already time barred); *Jewell v. Price*, 264 N.C. 459, 461, 142 S.E.2d 1, 3 (N.C. 1965) (action that is time barred "may not be revived by an act of the legislature"); *McCrater v. Stone & Webster Engineering*, 248 N.C. 707, 710, 104 S.E.2d 858, 861 (N.C. 1958) (the legislature has the power to enlarge the statute of limitations provided the amendment is made before the cause of action is barred under the pre-existing statute of limitations); *Waldrop v. Hodges*, 230 N.C. 370, 373, 53 S.E.2d 263, 265 (N.C. 1949) ("a right or remedy, once barred by a statute of limitations, may not be revived by an Act of the General Assembly"), and cases cited therein; *Colony Hill Condominium v. Colony Co.*, 70 N.C.App. 390, 394, 320 S.E.2d 273, 276 (N.C. App. 1984) (a subsequent statute cannot revive a claim barred under the statute of repose without offending due process); *see also Whitt v. Roxboro Dyeing Co.*, 91 N.C.App. 636, 638, 372 S.E.2d 731 (N.C. App. 1988) ("The legislature may extend at will the time within which a right may be asserted or a remedy invoked so long as it is not already barred by an existing statute"); *Gillespie v. American Motors Corp.*, 51 N.C.App. 535, 538, 277 S.E.2d 100, 101 (N.C. App. 1981) ("We agree that once a claim is barred by the running of the applicable statute of limitations, it cannot be revived by a subsequent action of the legislature"); *Troy's Stereo Center v. Hodson*, 39 N.C.App. 591, 595, 251 S.E.2d 673, 675 (N.C. App. 1979) ("an action already barred by a statute of limitations may not be revived by an act of the legislature").

Pennsylvania. *Clark v. Jeter*, 358 Pa.Super. 550, 555, 518 A.2d 276, 278 (Pa. Super. Ct. 1986) ("once the right to sue has expired, no subsequent legislation can revive it"), citing *Overmiller v. D.E. Horn & Co.*, 191 Pa.Super. 562, 568-73, 159 A.2d 245, 248-50 (Pa. Super. Ct. 1960) ("after an action has become barred by an existing statute of limitations, no subsequent legislation will remove the bar or revive the action," and noting that "had the legislature made any such attempt there is authority to indicate that it

[1] We include New Jersey in the list of states that bar revival of time-barred claimed because the SB 2687 involves tort liability specifically, revival of which is forbidden in New Jersey.

would be unconstitutional" and "that the legislature could not have breathed life into these barred claims even if it intended to do so"); *Urland v. Merrell-Dow Pharmaceuticals, Inc.*, 822 F.2d 1268, 1276 (3rd Cir. 1987) ("Under Pennsylvania law, 'after an action has become barred by an existing statute of limitations, no subsequent legislation will remove the bar or revive the action'"), citing *Overmiller* and *Clark*, *supra*; *Simon Wrecking Co. v. AIU Ins. Co.*, 350 F.Supp.2d 624, 634 (E.D. Pa. 2004) ("In Pennsylvania, intervening changes in law do not revive actions that have already been barred by the running of the statute of limitations"), citing *Urland*, *supra*.

Rhode Island. *Kelly v. Marcantonio*, 678 A.2d 873, 883 (R.I. 1996) (holding, in this suit seeking damages based on childhood sexual abuse, that legislation permitting revival of an already time-barred action "would impinge upon a defendant's vested and substantive rights" in violation of the due process guarantee of the state constitution).

South Dakota. *Koenig v. Lambert*, 527 N.W.2d 903, 904-05 (S.D. 1995) (holding, in this suit for damages based on childhood sexual abuse, that "a cause of action barred by the applicable statute of limitations cannot be revived by a subsequent change in the law which extends the time for bringing that particular cause of action"; in so ruling, the court "has aligned itself with the great majority of the courts which have considered this question"), overruled on other grounds, *Stratmeyer v. Stratmeyer*, 567 N.W.2d 220 (S.D. 1997); *Barrow v. Bladow*, 521 N.W.2d 141, 142 (S.D. 1994) ("[l]egislation attempting to revive previously time-barred claims impermissibly interferes with a defendant's vested rights and violates due process"), quoting *Dotson v. Serr*, 506 N.W.2d 421, 423 (S.D. 1993); *State of Minnesota v. Doese*, 501 N.W.2d 366, 368-71 (S.D. 1993) (canvassing the authorities and agreeing with the majority of states that the legislature has no power to revive a time-barred claim); *Gross v. Weber*, 112 F.Supp.2d 923, 926 (D. S.D. 2000) (citing *Dotson*, *Doese*, *Barrow*, and *Koenig*, distinguishing *Stratmeyer*, and noting that "the South Dakota Supreme Court has made it clear, that notwithstanding the legislature's intent, 'legislation attempting to revive previously time-barred claims impermissibly interferes with a defendant's vested rights and violates due process'"), quoting *Dotson*, supra at 423.

Utah. *State v. Lusk*, 37 P.3d 1103, 1110 & n.7 (Utah 2001) ("We have consistently held that once the statute of limitations has run in a particular case, a defendant has a vested right to rely on the limitations defense, which right cannot be rescinded by subsequent legislation extending a limitations period," and this rule, which originates in civil cases, is applicable as well to criminal cases); *Roark v. Crabtree*, 893 P.2d 1058, 1062-63 (Utah 1995) (holding, in a case seeking damages for childhood rape and sexual abuse, that the legislature cannot revive an expired claim, a rule that Utah courts have "consistently maintained" since 1900 and that is followed by a majority of states), and cases cited therein.

Virginia. *Starnes v. Cayouette*, 244 Va. 202, 207-12, 419 S.E.2d 669, 671-75 (Va. 1992) (holding, in this suit for damages based on alleged childhood sexual abuse, that revival of a time-barred claim by the legislature is barred by the due process guarantee of the state constitution); *see also Kopalchick v. Catholic Diocese of Richmond*, 274 Va. 332, 338-40, 645 S.E.2d 439, 441-43 (Va. 2007) (claims against Catholic diocese arising out of alleged childhood sexual abuse were barred under *Starnes*; state constitutional amendment that was approved after *Starnes* and that permits retroactive changes in

accrual dates for intentional torts committed by "natural persons" against minors, did not authorize revival of claims against diocese because the diocese is not a "natural person").

Wisconsin. *Haase v. Sawicki*, 20 Wis.2d 308, 311-17, 121 N.W.2d 876, 878-81 (Wis. 1963) (retroactive extension of the limitation period after its expiration amounts to a taking of property without due process of law), and cases cited therein; *Lundquist v. Coddington Bros.*, 202 F.Supp. 19, 20-21 (W.D. Wis. 1962) ("The Supreme Court of Wisconsin has consistently adhered to the Wisconsin doctrine that the running of the [s]tatute of [l]imitations absolutely extinguishes the cause of action…. The limitation of actions is a right …, extinguishing the right on one side and creating a right on the other, and it is a right which enjoys constitutional protection"), applying Wisconsin law and citing Wisconsin cases.

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March 22, 2014

To: Chair Hee, Vice Chair Shimabukuro and Committee Members

From: Mark Gallagher

Re: Testimony in support of S.B. No. 2687, S.D. 1, H.D. 1

Relating To Limitation of Actions

Thank you for the opportunity to provide additional testimony in support of S.B. No. 2687. S.D. 1, Relating to Limitation of Actions.

As a practicing Hawaii attorney, I have had the opportunity to represent numerous survivors of childhood sex abuse in pursuing justice under Hawaii's current window statute. Many of these claims were brought under Hawaii's "window statute", H.R.S. 657-1.8, which represented a significant step forward in providing long delayed justice to survivors of childhood sex abuse. The proposed bill would further amend this section, and it represents another step forward in protecting children by holding accountable abusers and those responsible for them.

In allowing survivors of childhood sex abuse to bring civil claims against perpetrators who abused them and the institutions which employed or were responsible for the perpetrators after April 24, 2014, SB 2687, S.D. 1, H.D. 1 will protect the rights of victims who have not yet felt strong enough to face what happened to them. Currently, the window for bringing such claims closes on April 24, 2014. Children who are abused often feel that they have no one to turn to. The abuse is held as a terrible secret between the victim and the abuser, and too often another responsible party who does nothing. The child, feeling powerless, tells no one and keeps the secret and the damage cascades through the years. As a result, even when an option to pursue justice as an adult is presented, it takes a survivor a significant amount of courage and time to seize the opportunity. The expiration of the window in effect will reward perpetrators who terrified

their victims so much that the secrets remain buried even many years later. It is fundamentally unfair to rush these survivors merely to protect the repose of perpetrators in our midst.

SB 2687, S.D. 1, H.D. 1 also proposes to change the standard of proof for claims by survivors of childhood sex abuse against entities who employed or were responsible for perpetrators to "negligence", rather than "gross negligence." The general standard of proof in civil claims is negligence, however the existing law provides the special protection of the higher standard of proof of gross negligence. This change would level the playing field to put these entities in the same position as other civil defendants.

Gross negligence is a very high standard, just below intentional misconduct. This standard could keep the courthouse doors closed for many victims. Outside of child sex abuse Hawai'i Courts have defined it as:

- "a step below willful misconduct"[1]
- "conduct that is more extreme than ordinary negligence but less than willful or wanton conduct" [2]
- "It is an aggravated or magnified failure to use that care which a reasonable person would use."[3]

There is no good reason why a negligent employer of a child molester should have the protection of such a heightened burden of proof compared to a negligent employer of a bad driver. HRS 657-1.8 already provides the defendants with extra protections such as the need to file a certificate of merit to weed out unreasonable claims and sanctions for groundless actions.

Another important change proposed by SB 2687, S.D. 1, H.D. 1 is that it stops defendants from employing a litigation strategy of seeking to force the disclosure of certificates of merit, which are confidential certifications by psychological professionals submitted to the court to assure only claims with a reasonable basis in fact are even filed. This change clarifies the original intent that these certificates provide the court a confidential mechanism to weed out frivolous

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[1] Pancakes of Hawaii, Inc. v. Pomare Properties Corp., 944 P.2d 83 (Hi. Ct. App. 1997)

[2] HI R CIV JURY Instr. §8.17: Punitive Damages (Definition of "Gross Negligence")

[3] Id.

claims. The defense bar has been seeking production of these confidential certificates of merit in an obvious attempt to create a technical defense to claims. If successful, defense lawyers likely will launch a campaign of deposing the professionals who prepared the certificates of merit and challenging the court's determination that the certificates were valid through motions to dismiss or introducing evidence at trial. This would drive up litigation expense and delay for all involved. The judge's review of the certificate of merit already provides the defense with a protection not afforded other defendants and they should not be permitted to expand this extra protection even further by litigating the content of the certificate of merit. Precluding disclosure would do so.

Thank you for the opportunity to address this most important matter.

Very truly yours,
Mark F. Gallagher

JAMES, VERNON & WEEKS, P.A.

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March 25, 2014

VIA DROPBOX/EMAIL SUBMISSION
Rep. Karl Rhoads, Chair
Rep. Sharon E. Har, Vice Chair
House Committee on Judiciary
State Capitol Conference Room 325
Honolulu, HI
Hearing: March 25, 2014 4:00 PM

RE: Hawaii S.B. 2687 Allows a victim of child sexual abuse to bring a civil action against the victim's abuser or an entity with a duty of care, with the exception of the State or its political subdivisions, if the statute of limitations for filing a civil claim has lapsed. Prohibits the court, plaintiff, or author of a notarized statement of facts from being required to disclose the contents of a sealed certificate of merit. Effective July 1, 2080. (SB2687 HD1)

Dear Representative Rhoads, Representative Har and Members of the Committee:

Thank you for continuing to advance this important legislation for the protection of children from sexual harm. In my personal experience (please see my prior testimony), laws like S.B. 2687, with a **negligence** standard, help to accomplish societal goals of 1) protecting children, 2) holding child sexual predators accountable and 3) encouraging institutional change for the protection of children. Please consider this submission in support of S.B. 2687 with a negligence standard *and in opposition to those promoting changes in the bill that would protect people and institutions who negligently expose children to sexual molestation*.

I. The legislation should contain a "negligence" standard.

I understand the Attorney General (AG) and others are promoting a position that denies justice to children who are negligently exposed to sexual harm and protects those who negligently harm them. They call for a "gross negligence" standard. I am aware of no other state that has updated its laws to protect children from sexual harm (such as Washington, Idaho, Montana, California and Minnesota) that applies a "gross negligence" burden of proof to the

victim. Yet, the AG and others want to change the statute to a "gross negligence" standard. By doing so, the AG is advocating for the protection of those who negligently cause sexual harm to children. What possible good can come from this?

The "gross negligence" standard the AG advocates by definition provides immunity to those who "negligently" cause child sexual molestation. "Gross negligence" is a heightened standard protecting child molesters and those who harbor them. Without diminishing the need to pass S.B. 2687 in any form, we must recognize that there is no logic why we would apply a legal standard that protects those who negligently cause sexual abuse of children. It is not logical, for example, that we apply a "negligence" standard to those who cause physical harm (such as in motor vehicle collision), but would provide a more protective "gross negligence" standard to those who negligently cause child sexual abuse.

II. Remove the "window"; make the law permanent.

I understand the AG and others are advocating complete immunity for child molesters and those who negligently expose children to sexual harm by arguing for a second "window" period that would immunize these wrongdoers after the window closes. What possible good can come from protecting those who cause sexual harm to children by shutting the window of justice on the victims?

The phenomenon of delayed ability to confront child sexual abuse is the reason why statutes are being passed across the United States giving adult survivors access to justice. In recognition of this phenomenon, informed legislators have passed laws largely removing the statutes of limitations that historically prevented victims from seeking justice when they were psychologically able. States like Washington, Idaho and Montana have essentially eliminated the statute of limitations by allowing a victim to bring their claim within a certain period after they make the causal connection between the child sexual abuse and harm.

The unfortunate reality of window statutes is that the window arbitrarily "shuts" out survivors who, even a day later, are ready to seek justice by confronting their molester or the institution who harbored their molester. A window statute would further discriminate against victims who, for cultural or other reasons, are slow to come forward. For example, the "shut out" phenomenon is worse, in my personal experience, for victims of indigenous peoples and in Asian cultures. In many of these and other cultures there is an added layer of shame, guilt and social stigma associated with identifying oneself as a child sexual abuse victim. Consequently, these children often take longer to "come forward" to seek justice and healing. Therefore, a "window" statute results in discriminating against these peoples as well as victims from other cultures who attach added social stigma to child sexual abuse. The only way to remedy this is to provide ongoing access to justice for all victims by keeping the window permanently open, as S.B. 2687 does.

Children are our greatest asset and our future. They deserve the greatest protection the law can afford. Please pass S.B. 2687 with a "negligence" standard and without a window.

Very Respectfully Submitted,

Leander L. James

THE SEX ABUSE TREATMENT CENTER

A Program of Kapi'olani Medical Center for Women & Children

DATE: March 25, 2014

TO: The Honorable Karl Rhoads, Chair
The Honorable Sharon E. Har, Vice Chair
House Committee on Judiciary

FROM: Alana Peacott-Ricardos, Policy Research Associate
The Sex Abuse Treatment Center

RE: S.B. 2687, S.D. 1, H.D. 1
Relating to Limitation of Actions

Good afternoon Chair Rhoads, Vice Chair Har and members of the House Committee on Judiciary. My name is Alana Peacott-Ricardos and I am the Policy Research Associate for the Sex Abuse Treatment Center (SATC), a program of the Kapi'olani Medical Center for Women & Children (KMCWC), an affiliate of Hawai'i Pacific Health.

SATC strongly supports S.B. 2687, S.D.1, H.D. 1, which allows a survivor of child sexual abuse to bring a civil action against the abuser or an entity with a duty of care, if the statute of limitations for filing a civil claim has lapsed. Eliminating the statute of limitations on sexual assault sends a strong message that sexual violence will not be tolerated in our community at any time.

It is common for survivors of sexual assault to wait some time before telling anyone about the assault. Some survivors may never tell. A sexual assault is an unexpected intrusion and can create upheaval at home, work, or in social settings. There are many ways that survivors respond to sexual violence: fear, guilt, shock, disbelief, anger, confusion, helplessness, anxiety. Reporting an assault takes tremendous courage and it may not take first priority following an assault. A survivor may need time to work through the many emotions and experiences before they are ready to engage with the legal system.

This is especially true for survivors of child sexual abuse. Many children do not disclose sexual abuse right away. Some studies have estimated that between 60–80% of child survivors withhold disclosure.[i] Studies examining latency to disclosure have reported a mean delay from 3–18 years.[ii] There may be many reasons for this, from the child's stage of cognitive development and their ability to express what happened, to the fact that a majority of survivors know the perpetrator[iii] and may fear the impact on their family or the perpetrator's family.

Eliminating the statute of limitations can encourage more survivors to come forward and hold more perpetrators accountable. Statutes of limitation assure both the perpetrator and survivor that the perpetrator will not be liable for any harm after a certain point. No matter what the perpetrator has done or how deep of an impact the perpetrator has had on the survivor, the perpetrator can be guaranteed to walk away

without consequence. Thus, there is much less incentive to come forward and reveal such a personal experience. By knowing that there is a possibility that the perpetrator may be held responsible for their actions, more survivors may be motivated to share their story when they are ready. Additionally, this enhances public safety. Studies have found that a number of undetected sex offenders are serial offenders.[iv] These offenders pose a continuing threat to the community. When more survivors are able to come forward, more perpetrators are identified.

In 2012, Hawai‘i amended its statute of limitations for civil actions involving child sexual abuse and provided a two-year window allowing survivors who had been previously barred by the statute of limitations to bring a civil action against the perpetrator or against the entity that employed the person accused of committing the abuse. This window will close this April. To date, a number of survivors have come forward with suits directly attributable to the law.

S.B. 2687, S.D.1, H.D. 1 would keep that window open indefinitely and allow a civil suit against not only the perpetrator but also a legal entity owing a duty of care to the survivor. Allowing civil suits against these entities is vitally important because it exposes and holds accountable the institutions who failed to protect children from abuse. However, we do not believe that claims against the State and its political subdivisions should be exempt. All survivors should be given the opportunity for justice regardless of the status of the entity where the perpetrator worked.

We urge you to pass S.B. 2687, S.D.1, H.D. 1. Eliminating the statute of limitations does not change the burden of proof or difficulty that both sides face in terms of evidence where there has been a passage of time. It merely improves survivors' access to justice by allowing them the opportunity to move forward in the legal system when they are ready.

Thank you for this opportunity to testify.

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[i] Ramona Alagia, *An Ecological Analysis of Child Sexual Abuse Disclosure: Considerations for Child and Adolescent Mental Health*, 19(1) J. CAN. ACAD. CHILD ADOLESC. PSYCHIATRY 32 (Feb. 2010).
[ii] *Id.*
[iii] *See, e.g.,* THE SEX ABUSE TREATMENT CENTER, SEXUAL ASSAULT VICTIMS IN THE CITY AND COUNTY OF HONOLULU: 2001-2010 STATISTICAL PROFILE 1 (2013), *available at* http://satchawaii.org/pdf/sexual-assault-victims-2001-2010-statistical-report.pdf. According to the report, 92.5% of child victims and 80% of adult victims receiving services from SATC knew the perpetrator.
[iv] *See, e.g.*, David Lisak & Paul M. Miller, *Repeat Rape and Multiple Offending Among Undetected Rapists*, 17 Violence & Victims 73 (2002).

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Randall L.K.M. Rosenberg
Charles E. McKay
Moana A. Yost

March 24, 2014

VIA DROPBOX/EMAIL SUBMISSION
Senator Clayton Hee, Chair
Senator Maile Shimabukuro, Vice Chair
Senate Committee on Judiciary and Labor
State Capitol, Conference Room 016
415 South Beretania Street
Honolulu, HI
Hearing: March 19, 2014 10AM

RE: SB2687 SD1 HD1 Allows a victim of child sexual abuse to bring a civil action against the victim's abuser or an entity with a duty of care, with the exception of the State or its political subdivisions, if the statute of limitations for filing a civil claim has lapsed. Prohibits the court, plaintiff, or author of a notarized statement of facts from being required to disclose the contents of a sealed certificate of merit. Effective July 1, 2080.

Aloha Senator Hee, Senator Shimabukuro and Members of the Committee:

I am grateful for the committee's efforts, thus far, towards the passage of S.B. 2687 and this opportunity to testify again on its behalf. I believe that the current version of this bill is best for Hawaii's children and encourage the Committee to review the previous testimony submitted in overwhelming support for this measure.

It is my understanding that the Attorney General's office objects to an open extension of the civil statute of limitations and would prefer another limit of two years. I am puzzled by the AG's interest in this matter. As you know, the State is exempt from the effect of the current window statute as the result of a last minute insertion into the bill back in 2012 before its passage as HRS §657-1.8. That exemption remains in the current version of S.B. 2687. Additionally, there is no "enforcement" obligation on the part of the AG's office, so there seems to be no direct impact upon the A.G. at all from anything related to this bill.

I am similarly at a loss to understand why the AG agrees that an open-ended criminal statute of limitations is acceptable where the same policy applied to the civil statute of limitations is not. The oft-repeated (and easily rebutted) concern of "stale claims imposing an unfair burden upon

defendants to prove their innocence" presumably would be the same regardless of whether the claim at issue is in the context of a criminal complaint or a civil complaint. In fact, the only logical reason for this illogical position is gleaned from the awareness that civil claims brought under the window statute may also include as a party, along with the perpetrator, other institutional defendants that either harbored or protected the pedophile or had a duty of care to the child-victim of abuse and failed to meet its responsibilities. The AG appears to have proffered arguments that, if accepted, would confer a direct benefit upon certain private entities, like the Roman Catholic Church, other religious churches and groups, and private schools and daycare centers. These are organizations which have significant daily contact with our children and yet historically have served as safe havens for pedophiles. Viewed in concert with the AG's inexplicable interest in restoring the "gross negligence" standard for proving liability against these private entities, a standard which is unprecedented in Hawaii law and unprecedented in the law of any other state we are aware of, the AG's true motivation in this matter is confirmed.

I believe that eliminating the civil and criminal statutes of limitations for all child victims of sexual abuse and retaining S.B. 2687's negligence standard is best for Hawaii and best for the protection of Hawaii's most precious resource, its children.

Again, I appreciate your consideration of these matters.

Mahalo Nui Loa,

Randall Louis Ka'imina'auou Meyer Rosenberg

Joelle Casteix, Survivor Advocate
Volunteer Western Regional Director, SNAP
The Survivors Network of those Abused by Priests
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Testimony in support of SB 2687 — Statute of Limitations; Civil Actions; Sexual Abuse of a Minor.

Aloha. My name is Joelle Casteix and I am a 43-year-old wife and mother and the volunteer Western Regional Director of SNAP, the Survivors Network of those Abused by Priests, the nation's largest support group for men and women who have been sexually abused as children in institutional settings. As a victim of child sexual abuse and have devoted my career to preventing abuse and helping other victims find hope, healing and accountability.

Why is a bill like SB 2687 is essential to the safety of Hawai'i's children?

- It gives the opportunity for victims of child sex abuse to heal and come forward *on their own terms*
- It puts predators on notice that they can be prosecuted for their crimes
- It exposes predators who may be hurting Hawaii's children RIGHT NOW
- It holds institutions accountable for covering up abuse
- It allows victims the opportunity to use the tried-and-true civil justice system
- It is a fair bill, putting the burden of evidence and proof on the victim, and
- It puts the burden of caring for victims on wrong-doers, not state social services

For the past ten years, I have worked with more than 1000 victims of child sexual abuse across the United States. Since the civil window here opened in 2012, I have been working closely with victims all over the state of Hawaii, helping them come forward, learn about their rights, and get the help they need.

I got into this work because I, too, am a victim. Like many victims, by the time I came forward, it was too late. I could do nothing in the courts to stop my predator, even though he went on to molest other children.

It took me more than 15 years to heal enough from the injuries to even understand that what happened to me was not my fault. For most victims, it takes far longer.

But a 2003 law changed everything for me. California's civil window for victims of child sexual abuse allowed me to use the tried-and-true civil court system to expose the man who abused me and the men and women who covered up for him. Fortunately, I was healed enough at the time to come forward. I was healed enough to bear the burden of proof that that victims must bear in the courts. I was healed enough to overcome the shame and embarrassment that victims abuse carry with them.

When my case settled, the public got access to more than 200 pages of previously secret documents. They included my perpetrator's signed confession, in which he admitted abusing me and at least two other girls. There were also documents that showed how school administrators and diocese officials knew about the abuse, covered it up, and then lied to me and the media afterward, letting a child rapist go free to hurt other kids. In writing, they blamed the abuse on my "emotional problems."

Across California, brave victims exposed more than 250 predators. Some were still working with kids, some were in other schools, working in school districts, volunteering, and holding positions of power.

We are seeing the same kind of success for victims in Hawaii that we saw in California. Brave victims from Honolulu to Hilo have exposed more than two-dozen predators in Hawaii's schools, churches and foster homes. We have learned how people in power covered up for abusers and allowed children to be abused. But the word is really only beginning to spread, and victims are only just starting to talk about abuse. We have only scratched the surface.

But after April 24, many victims will never get the chance for justice.

My biggest fear is for the victims who are not healed enough or able to come forward before April 24. These victims will not be able to do anything to expose their abuser or get justice, even if a credibly accused abuser is still working with children. Without legal rights and the ability to prove their cases in a court of law, victims have no recourse to ensure that no other children are hurt. Without a law like SD1, no one will be held accountable for what happened to hundreds of children all over the state and no one can warn the thousands of children still in harm's way.

SB 2687 gives these victims a window of hope. It puts predators on notice that they will be exposed. It helps law enforcement by unearthing evidence that has been hidden. It gives victims rights and dignity. It helps survivors like me finally protect and embrace the child within us who was so terribly savaged. It allows victims to come forward on their own terms, when they are ready and healed enough to stand up and demand justice.

If we cannot help the most vulnerable among us to become empowered, prove their stories, get justice, keep children safe right now, and punish wrong-doers, then we have failed.

I ask you to support SB 2687. Thank you.

SB2687
Submitted on: 3/24/2014
Testimony for JUD on Mar 25, 2014 16:00PM in Conference Room 325

Submitted By	Organization	Testifier Position	Present at Hearing
Dara Carlin, M.A.	Individual	Support	No

Comments: PLEASE SUPPORT & PASS INTO LAW!

Please note that testimony submitted less than 24 hours prior to the hearing, improperly identified, or directed to the incorrect office, may not be posted online or distributed to the committee prior to the convening of the public hearing.

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Randall L.K.M. Rosenberg
Charles E. McKay
Moana A. Yost

March 24, 2014

VIA DROPBOX/EMAIL SUBMISSION
Representative Karl Rhoads, Chair
Representative Sharon E. Har, Vice Chair
House Committee on Judiciary
State Capitol, House Conference Room 325
415 South Beretania Street
Honolulu, HI

Hearing: March 25, 2014 4:00 p.m.

RE: Hawaii S.D.1, H.D.1, SB 2687 (Amends Haw. Rev. Stat. §657-1.8, and extends the time for a victim of child sexual abuse to bring a civil action against victim's abuser or an entity, except for the State or counties, when the entity was negligent, if the statute of limitations for filing a civil claim has lapsed) [Effective 4/23/2014].

Representative Rhoads, Representative Har and Members of the Committee:

I am an attorney in Honolulu, Hawaii. My office represents more than twenty survivors of childhood sexual abuse who brought claims under the current version of HRS 657-1.8.

HRS 657-1.8 created a two-year "window," running from April, 2012 through April, 2014, within which otherwise-expired civil claims might be brought against predators and the institutions which employed and harbored the abusers.

I previously submitted testimony in connection with the House Committee on Human Services hearing held on February 7, 2014. I offer this testimony, also in strong support of H.D.1.

I respectfully offer the following comments:

1. Victims of childhood abuse very frequently take decades to summon the courage to overcome their shame and embarrassment in order to come forward. The window in the statute of limitations created by HRS 657-1.8 allowed a number of such victims to assert their claims. However, notwithstanding the publicity about the window statute, information about HRS 657-1.8 is not ubiquitous or widely known, and word has not reached many victims. I recently learned of another survivor two weeks ago. That individual just discovered that his claims were not time-barred. This occurred twenty

three months after the legislation was first passed. Unfortunately, many of the pedophiles responsible for the abuse were serial abusers. Thus, there are likely many, many victims who are not yet aware of their rights and who have not yet come forward.

2. Some opponents of the statute argue that the passage of time is detrimental to the defense because "records are lost" or "memories fade." I respectfully point out that the plaintiff/survivors bear the burden of proof, not the defendants. If an employer's or supervisor's personnel files on a predator are "lost" or "destroyed" (i.e., files showing there were complaints against the pedophile or that he was relocated to another geographic area), the absence of that evidence works to the detriment of the survivor's claim. It does not prejudice the defendant.

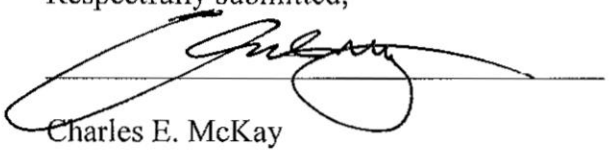
3. Some opponents of the statute assert that survivors might bring false claims regarding events which are remote in time. From our experience, no one has come forward seeking to reveal humiliating abuse in exchange for the prospect of some undefined possible monetary award at some point in the future. Survivors come forward because they were abused. Additionally, the proposed legislation, like the current Section 657-1.8, HRS, contains safeguards against fictitious claims. A survivor must be interviewed in depth by a Hawaii-licensed mental health professional. That health care professional must, as prerequisite for the filing of any claim, confirm that there is a reasonable basis to believe the plaintiff was indeed subjected to sex abuse as a child.

4. An example raised in opposition to the proposed statute is that a sexually-abused child might be brought to a hospital and if the hospital failed to report the assault, the hospital could be vulnerable under the window statute. Under this theory, other statutes on medical torts might be bypassed and physician malpractice insurance costs could rise. These arguments are misplaced. H.D. 1 creates a limited window in the statute of limitations. Claims are available under limited circumstances (a) against an entity which employed the person who committed the sexual abuse; or (b) against an entity which had a degree of responsibility or control over the person who committed the sexual abuse. In the example above, the hospital (and the ER doctor) did not "employ" the predator and the hospital and ER doctor were not "responsible for" and did not "control" the perpetrator. Thus, H.D. 1 would not result in any greater liability exposure for those persons or entities. H.D. 1 only exposes the perpetrator and the institution that employed or harbored the predator.

For the foregoing reasons and those submitted in prior testimony, I respectfully support H.D. 1.

Thank you for your consideration of the above.

Respectfully submitted,



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LATE

March 24, 2014

Chairman Representative Karl Rhoades and House Judiciary Committee Members
State Capitol
Honolulu, HI 96813

Re: Senate Bill 2687

Dear Chairman Rhoades and Committee Members:

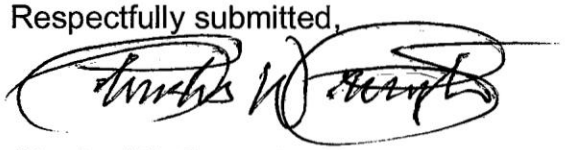
As a 1978 graduate of the William S. Richardson School of Law, an attorney practicing civil litigation here since then, a mediator and arbitrator of civil cases since 1985, and a teacher and trainer of collaborative leadership, conflict resolution, mediation and arbitration since 1995, I am honored to have the opportunity to support in part and recommend amendment in part (to eliminate exception from the bill for the State and its political subdivisions) of Senate Bill 2687 as a necessary and appropriate protection of fairness and humanity to both minor victims of sexual abuse and the people and organizations involved in such conduct.

My partner and our firm have tried and have settled a number of cases against the State of Hawai'i and State employees, acting and using their authority and powers as State employees, to engage in sexual abuse and assault of minor girls in their custody and control and helpless to protect or defend themselves. It has been shown in those cases that the sexual abuse and assault of minor girls in the State's custody at the female Youth Correctional Facility in Waimanalo by guards was so systemic that it involved a room without any video camera in which they had newspapered over the windows, and sometimes removed the furniture and put in mattresses, and used to carry out sexual abuse and assault of minor girls in their custody, and then threaten harsher conditions and treatment if they dared to disclose or report it. It has been shown in those cases that this conduct was pervasive and known to and neglected by supervisors acting in their employment roles. It has been shown in those cases by expert psychological testimony and evidence that the minor victims of the sexual abuse were so mentally and emotionally harmed by that sexual abuse that the memory of those instances was repressed until some later event or communication triggered that memory, and therefore that extension or elimination of any statute of limitations for such claims is necessary and appropriate for fairness and humanity to the minor victims of such sexual abuse and their families and supporters.

There is no factual or legal justification for exempting the State and its subdivisions from responsibility for this systemic, known sexual abuse of minors, and that exception should be removed from SB 2687. The State's claim, through its Attorney General's office, that extension or elimination of the statute of limitations for minor victims of such sexual abuse could unfairly deprive the State of witnesses and evidence lost through time is contradicted by the established law that the burden of proof, through witnesses and evidence, is on the plaintiff, not the defendant, and the loss of witnesses and evidence through time most adversely impacts the victims of such conduct. The protection of confidentiality and against disclosure of the contents of affidavits of merit in such cases of sexual abuse of minors is necessary and appropriate to minimize risks and harm of abuse and retaliation against victims of such sexual abuse and those who represent and support them.

I will be glad to provide any additional information and support for this testimony that may be desired.

Respectfully submitted,



Charles W. Crumpton

CWC:lah

cc: Leslie Kop, Esq. via fax 527-7102
Attorney for Defendant

LATE

Dear Chair Rhoads, Vice Chair Har, and committee members:

I am a survivor of childhood sex abuse and I support SB 2687.

Extending the statute of limitations is very important due to the nature of childhood sex abuse. Childhood sex abuse is confusing, creates feelings of shame, guilt and anger, and destroys your ability to trust. Your ability to connect with other people is crippled since you feel alone and that the abuse was your fault. Many people's lives have been ruined by sex abuse, with the life-long destructive effects on children, the most damning.

As a survivor, talking about the abuse is hard…as a male survivor, near impossible. Our culture and gender norms make it difficult for men to seek help. It can take many years after the abuse to even admit what happened, let alone seek the medical attention needed to accept and move on. My abuse was from 4th to 6th grade, yet the first time I told someone was when I was 27. I didn't take my recovery seriously until age 33, when I sought help from the Sex Abuse Treatment Center. Today, at 38, I am grateful that I am full of compassion and love for my 3 month old daughter, rather than the anger and shame that consumed me for so many years.

The current statute of limitations doesn't take into account the severity of the crime and the effects on its victims. I ask the respected committee members today to please consider SB 2687, and to think about the other survivors out there suffering in silence. Their pain is real and debilitating. These survivors are your auntys, uncles, brothers, sisters, sons and daughters. Please show that you acknowledge their suffering and support their recovery by giving them the chance to speak out against their perpetrators and feel whole again. Thank you.

Andre Bisquera