



*The Judiciary, State of Hawai'i*

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

Senator Gilbert S. C. Keith-Agaran, Chair

Senator Maile Shimabukuro, Vice Chair

Friday, January 30, 2015

State Capitol, Conference Room 016

**WRITTEN TESTIMONY ONLY**

by

Judge Glenn J. Kim, Chair

Hawai'i Supreme Court Standing Committee on the Rules of Evidence

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**Bill No. and Title:** Senate Bill No. 136, Relating to Child Witness Testimony

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

**Judiciary's Position:**

The Hawaii Supreme Court's Standing Committee on Rules of Evidence opposes Senate Bill 136, which would adopt the so-called "Uniform child witness testimony by alternative method act" in Hawaii. This measure should not be adopted as it is totally unnecessary, poorly drafted, and probably offensive to the constitutional right of confrontation in at least some of its predictable applications.

Hawaii Rule of Evidence 616, entitled "Televised testimony of child," and adopted in 1993 in response to *Maryland v. Craig*, 497 U.S. 836 (1990) (approving a Maryland statute allowing televised broadcast into a courtroom of testimony of a child crime victim taken at a remote location under carefully specified conditions), adequately protects a child victim-witness who would suffer "serious emotional distress" if required to give testimony in an accused's presence. And HRE 611, enabling trial courts to "exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence" so as to ascertain the truth and protect witnesses "from harassment or undue embarrassment," vests in the trial judge the power to adopt any procedure that the HB 129 measure would countenance in a civil case. This committee is an arm of the Judiciary, and we are aware of no instance in which HRE 611 and 616 were



inadequate to protect a child witness from the stresses of the courtroom. Had there been such a development, it would certainly have been brought to our attention. To the contrary, judges report that their courtrooms, equipped as they are to implement the remote TV procedure of HRE 616, are more than adequate to protect child witnesses in criminal cases, and that their inherent power, restated in HRE 611, to adapt courtroom procedures to comport with the needs of litigants and witnesses, includes the necessary leeway to fashion appropriate modes of eliciting child testimony in civil and family court cases.

The vice of this measure lies in its utterly permissive approach to methodology. Rather than carefully specify the conditions and procedures for taking testimony from children, this bill defines an alternative method as follows:

“ ‘Alternative method’ means a method by which a child witness testifies that does not include all of the following:  
(1) Having the child witness present in person in an open forum;  
(2) Having the child witness testify in the presence and full view of the finder of fact and presiding officer; and  
(3) Allowing all of the parties to be present, to participate, and to view and be viewed by the child.”

To begin with, it seems clear that a “method” that does not include any of the specified criteria will nonetheless qualify as a method that does not include all of them. The person who drafted this measure may, to the contrary, have entertained an expectation that the language *implies* that at least two of the criteria should be present, but relying on implication on a matter that directly challenges the “facing” prerequisite of the Sixth Amendment right to confrontation reveals the kind of shoddy draftsmanship, vagueness, and overbreadth that countenances procedures that will violate the Constitution. See *Maryland v. Craig*, *supra*, and *Coy v. Iowa*, 487 U.S. 1012 (1988)(striking down a procedure allowing placement of a screen between an accused and two complaining witnesses in such a way that it blocked him from their view as they gave their testimony). Would the *Coy* procedure be a permitted “alternative method” in the HB 129 scheme of things? Of course the trial judge would know about *Coy* and would presumably follow the U.S. Supreme Court law and disallow the screen. But the vice of overbreadth is that it will permit an entire range of process that will also offend the law, and statutes implementing criminal procedures should not be written in this way. Compare the Hawaii scheme, which employs a tightly circumscribed criminal rule -- HRE 616 -- and a broadly fashioned HRE 611 to allow maximum discretion in civil and family cases.

Section -3 of this measure makes it applicable “in a criminal or noncriminal proceeding,” and the commentary makes clear that maximum discretionary leeway in interpreting the open ended term, “alternative method,” is intended:



Senate Bill No. 136 Relating to the Child Witness Testimony by Alternative  
Methods Act  
Senate Committee on Judiciary and Labor  
Friday, January 30, 2015  
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Finally, as to the taking of the testimony of a child by an alternative method, the term is defined broadly in Section 2(1) to mean not only alternative methods currently recognized among the several states for taking the testimony of a child, such as audio visual recordings to be later presented in the courtroom, closed-circuit television which is transmitted directly to the courtroom, and room arrangements that avoid direct confrontation between a witness and a particular party or the finder of fact, but also other similar methods either currently employed or through technology yet to be developed or recognized in the future.

Such breadth is desirable in family court, where the best interests of children are the governing criterion. But HRE 611 is equally flexible, and family court judges can be counted on, with or without this “uniform” measure that its proponents boast has been adopted in four states, to continue to administer justice with ample regard to the psychological well being of the child witnesses who appear before them.

Thank you for the opportunity to testify on Senate Bill 136.



*The Judiciary, State of Hawaii*

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

The Honorable Gilbert S.C. Keith- Agaran, Chair

The Honorable Maile S.L. Shimabukuro, Vice Chair

Friday, January 30, 2015

8:30 a.m.

State Capitol, Conference Room 016

**WRITTEN TESTIMONY ONLY**

by

R. Mark Browning

Deputy Chief Judge, Senior Judge

Family Court of the First Circuit

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**Bill No. and Title:** Senate Bill No. 136, 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. 136. 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 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.



STATE OF HAWAII  
**DEPARTMENT OF HUMAN SERVICES**  
P. O. Box 339  
Honolulu, Hawaii 96809-0339

January 28, 2015

**TO:** The Honorable Gilbert S.C. Keith-Agaran, Chair  
Senate Committee on Judiciary and Labor

**FROM:** Rachael Wong, Director

**SUBJECT: S.B. 136 Relating to Child Witness Testimony**

Hearing: Friday, January 30, 2015, 8:30 a.m.  
Conference Room 016, State Capitol  
415 South Beretania Street, Honolulu

**PURPOSE:** The purpose of this bill is to enact the Uniform Child Witness Testimony by Alternative Methods Act which authorizes courts to allow children to testify in a place other than an open forum or away from the finder of fact, court, or parties.

**DEPARTMENT'S POSITION:** The Department of Human Services (DHS) supports the proposed bill, as it takes important steps to protect the emotional safety and wellbeing of child witnesses, while at the same time ensuring the full and fair opportunity for examination and cross-examination by each party.

A serious problem confronting the courts is how to protect children from experiencing the psychological trauma resulting from a face-to-face confrontation with a defendant who may have physically harmed the child. Another concern is that this trauma may impair children's performance and their willingness to disclose the truth. There is ample social science data which documents the psychological trauma of child

abuse victims who are forced to testify in court in the traditional manner. There is also substantial data which demonstrates the very real effects of confrontational stress on children. The overwhelmed child is often unable to provide meaningful testimony, thereby undermining the truth-seeking function of the court process. (Louise Dezwirek-Sas's 1992 *Empowering Child Witnesses for Sexual Abuse Prosecution*; Rhona H. Flin's 1993 *Hearing and Testing Children's Evidence*; Gail S. Goodman et al.'s 1992 *Testifying in Criminal Court: Emotional Effects on Child Sexual Assault Victims*.)

Researchers interviewed children in both the presence and absence of their perpetrator. Young children (aged 3-5) were less willing to provide complete and accurate information when perpetrators were present, and all children experienced significantly higher levels of trauma when testifying in front of the defendants than in their absence. (Gail S. Goodman & Bette L. Bottoms eds., 1993 *Child Victims, Child Witnesses*)

This bill provides an opportunity for the Court to take an important step in further protecting children from harm, while simultaneously maintaining the integrity of the judicial process.

Thank you for the opportunity to testify.

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

January 30, 2015

S.B. No. 136: RELATING TO CHILD WITNESS TESTIMONY

Chair Keith-Agaran and Members of the Committee:

We oppose passage of S.B. No. 136 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. 136, 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 the defendant. A defendant would be denied his or her constitutional right to confront his or her accuser.

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.

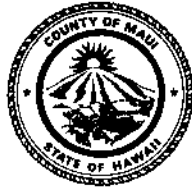
The Hawaii Rules of Evidence, in Rule 616, currently provides for the court to order testimony of a child witness via two-way closed circuit video equipment in an abuse offense or sexual offense prosecution. To our knowledge, this procedure has never been used in our courts primarily because of the constitutional 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 would be vulnerable to constitutional attack.

Thank you for the opportunity to testify in this matter.



ALAN M. ARAKAWA  
Mayor



JOHN D. KIM  
Acting Prosecuting Attorney  
ROBERT D. RIVERA  
Acting First Deputy Prosecuting Attorney

DEPARTMENT OF THE PROSECUTING ATTORNEY  
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150 S. HIGH STREET  
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CONTACT: RICHARD K. MINATOYA  
Deputy Prosecuting Attorney  
Supervisor, Appellate, Asset Forfeiture and Administrative Services Division

TESTIMONY  
ON  
SB 136 - RELATING TO CHILD WITNESS TESTIMONY

January 30, 2015

The Honorable Gilbert S. C. Keith-Agaran  
Chair  
The Honorable Maile S. L. Shimabukuro  
Vice Chair  
and Members  
Senate Committee on Judiciary and Labor

Chair Keith-Agaran, Vice Chair Shimabukuro and Members of the Committee:

The Department of the Prosecuting Attorney, County of Maui, submits these comments setting forth our CONCERNS about SB 136 - Relating to Child Witness Testimony. The bill would enact the Uniform Child Witness Testimony by Alternative Methods Act.

While we are always concerned for child witnesses, we are concerned about the impact of the bill, which would allow non-parties to intervene in criminal proceedings. We believe that this may lead to a disruption of court proceedings, and may have an adverse impact on the rights of defendants. Further, Rule 616 of the Hawaii Rules of Evidence already allows for abuse and sexual assault victims under the age of 18 to testify by two-way closed circuit video. We request that § -4 of the proposed Uniform Child Witness Testimony by Alternative Methods Act be deleted.

Thank you very much for the opportunity to provide comments on this bill.

**Justin F. Kollar**  
Prosecuting Attorney

**Kevin K. Takata**  
First Deputy



**Rebecca A. Vogt**  
Second Deputy

**Diana Gausepohl-White**  
Victim/Witness Program Director

**OFFICE OF THE PROSECUTING ATTORNEY**

**County of Kaua'i, State of Hawai'i**

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Victim/Witness Program 808-241-1898 or 800-668-5734

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**COMMENTS REGARDING  
SB 136 – RELATING TO CHILD WITNESS TESTIMONY**

Justin F. Kollar, Prosecuting Attorney  
County of Kaua'i

Senate Committee on Judiciary & Labor  
January 30, 2015, 8:30 a.m., Conference Room 016

Chair Keith-Agaran, Vice Chair Shimabukuro, and Members of the Committee:

The County of Kaua'i, Office of the Prosecuting Attorney, submits these COMMENTS expressing CONCERNS pertaining to SB 136 – Relating to Child Witness Testimony.

Section 4 of the Bill provides that a proceeding's "presiding officer, for good cause shown, shall order the hearing upon motion of a party, a child witness, or an individual determined by the presiding officer to have sufficient standing to act on behalf of the child witness." We are concerned that this provision, while well-intentioned, allows individuals other than the prosecutor and defense attorney to intervene in a criminal proceeding. This could have the effect of interfering with the orderly and effective proceeding of a case and also interfere with a defendant's rights. Moreover, there is already a little-used provision of the Hawai'i Rules of Evidence allowing for the televised testimony of children.

We ask your Committee to consider removing this provision.

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Thank you very much for the opportunity to provide our COMMENTS expressing CONCERNS regarding this bill.

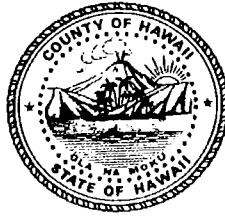
Respectfully,

A handwritten signature in black ink, appearing to read "Justin F. Kollar", with a decorative flourish extending to the right.

Justin F. Kollar  
Prosecuting Attorney

MITCHELL D. ROTH  
PROSECUTING ATTORNEY

DALE A. ROSS  
FIRST DEPUTY  
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**OFFICE OF THE PROSECUTING ATTORNEY**

TESTIMONY IN SUPPORT OF SENATE BILL 136 WITH  
ADDITIONAL LANGUAGE TO BE INCLUDED

A BILL FOR AN ACT RELATING TO CHILD WITNESS  
TESTIMONY

COMMITTEE ON JUDICIARY AND LABOR

Sen. Gilbert S.C. Keith-Agaran, Chair

Sen. Maile S.L. Shimabukuro, Vice Chair

Friday, January 30, 2015, 8:30 AM  
State Capitol, Conference Room 016

Honorable Chair Keith-Agaran, Vice-Chair Shimabukuro, and Members of the Committee on Judiciary and Labor, the Office of the Prosecuting Attorney, County of Hawai'i submits the following testimony in support of Senate Bill No. 136 with additional language to be included.

This measure enacts the Uniform Child Witness Testimony by Alternative Methods Act, which authorizes courts to allow for children to testify in a place other than an open forum or away from the finder of fact, court, or parties.

We request the following additional language be included in this bill:

**§ -11 When the court orders the testimony of a minor to be taken in another place outside of the courtroom, the court shall do the following:**

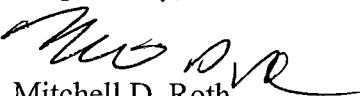
- (a) Order that a complete record of the examination of the minor, including the images and voices of all persons who in any way participate in the examination, be made and preserved on videotape in addition to being stenographically recorded. The videotape shall be transmitted to the clerk of the court in which the action is pending and shall be made available for viewing to the prosecuting attorney, the defendant or defendants, and

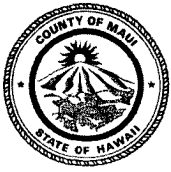
his or her attorney during ordinary business hours. The videotape shall be destroyed after five years have elapsed from the date of entry of judgment. If an appeal is filed, the tape shall not be destroyed until a final judgment on appeal has been ordered. Any videotape that is taken pursuant to this section is subject to a protective order of the court for the purpose of protecting the privacy of the witness.

- (b) When the court orders the testimony of a minor to be taken in another place outside the courtroom, only the minor, a support person, a non-uniformed bailiff, any technicians necessary to operate the closed-circuit equipment, and, after consultation with the prosecution and the defense, a representative appointed by the court, shall be physically present for the testimony. A videotape shall record the image of the minor and his or her testimony, and a separate videotape shall record the image of the support person.
- (c) When the court orders the testimony of a minor to be taken in another place outside of the courtroom, the minor shall be brought into the judge's chambers prior to the taking of his or her testimony to meet for a reasonable period of time with the judge, the prosecutor, and the defense counsel. A support person for the minor shall also be present. This meeting shall be for the purpose of explaining the court process to the child and to allow the attorneys an opportunity to establish rapport with the child to facilitate later questioning by closed-circuit television. No participant shall discuss the defendant or defendants or any of the facts of the case with the minor during this meeting.

The Office of the Prosecuting Attorney, County of Hawai'i supports the passage of Senate Bill No. 136 with the above additional language included. Thank you for the opportunity to testify on this matter.

Respectfully,

  
Mitchell D. Roth  
Prosecuting Attorney  
County of Hawai'i



**ALAN M. ARAKAWA**  
MAYOR

OUR REFERENCE  
YOUR REFERENCE

# **POLICE DEPARTMENT**

## **COUNTY OF MAUI**

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**TIVOLI S. FAAUMU**  
CHIEF OF POLICE

**DEAN M. RICKARD**  
DEPUTY CHIEF OF POLICE

January 29, 2015

The Honorable Gilbert S.C. Keith-Agaran, Chair  
and Members of the Committee on Judiciary and Labor  
The Senate  
State Capitol  
Honolulu, Hawaii 96813

RE: Senate Bill No. 136 RELATING TO CHILD WITNESS TESTIMONY

Dear Chair Keith-Agaran and Members of the Judiciary and Labor Committee:

The Maui Police Department SUPPORTS the passing of SB No. 136.

This bill enacts the Uniform Child Witness Testimony by Alternative Methods Act, which authorizes courts to allow for children to testify in a place other than an open forum or away from the finder of fact, court, or parties.

The Maui Police Department supports this measure as it will help to protect the child witnesses from the related issues of emotional distress while testifying in stressful court proceedings.

The Maui Police Department again asks for your SUPPORT to S.B. No. 136.

Thank you for the opportunity to testify.

Sincerely,

  
TIVOLI S. FAAUMU  
Chief of Police