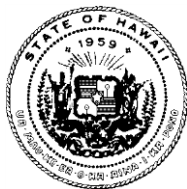


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STATE OF HAWAII  
DEPARTMENT OF HUMAN SERVICES  
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January 27, 2017

TO: The Honorable Senator Josh Green, Chair  
Senate Committee on Human Services

FROM: Pankaj Bhanot, Director

SUBJECT: **SB 747 – RELATING TO ORDERS FOR IMMEDIATE PROTECTION**

Hearing: Friday, January 27, 2017, 2:45 p.m.  
Conference Room 016, State Capitol

**DEPARTMENT'S POSITION:** Department of Human Services (DHS) appreciates the intent of this bill, but feels the proposed statutory amendments to Section 346-231, Hawaii Revised Statutes (HRS), are unnecessary. DHS offers these comments and defers to the Department of the Attorney General regarding the standard of proof.

**PURPOSE:** The purpose of the bill is to require a finding of substantial evidence that a vulnerable adult has incurred abuse or is in danger of abuse prior to the issuance of an order for immediate protection when the vulnerable adult is living at home with a prognosis of six months or less to live.

The current language of Section 346-231, HRS, allows DHS to seek an order for immediate protection (OIP) from the Family Court when DHS believes it is probable that the vulnerable adult has incurred abuse or is in danger of abuse if immediate action is not taken. The vulnerable adult's immediate safety and welfare are the primary concerns of DHS and the Adult Protective Services (APS) Program, whether or not the adult is living in one's own home, in the home of a relative, or in a residential care facility.

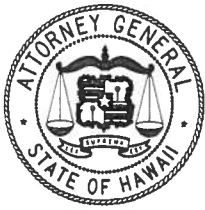
DHS recognizes the vulnerable adult's right to self-determination, and will abide by the wishes of a vulnerable adult to refuse APS intervention when the adult has the capacity to

understand the consequences of one's decisions and is able to communicate those decisions. If DHS finds that the vulnerable adult does not have the capacity to understand the nature of one's situation, an OIP may be pursued to ensure the well-being of the adult when: 1) APS has confirmed via an investigation that the vulnerable adult has incurred abuse, neglect, and/or exploitation; 2) safety concerns presently exist; and/or 3) a decision-maker must be appointed to ensure that the vulnerable adult's daily living, medical, and/or financial obligations are met. APS confirmation of abuse, neglect, and/or exploitation at minimum meets the definition of "appears probable that the adult has been abused and is threatened with imminent abuse unless immediate action is taken", according to HRS 346-231. Often times APS investigation findings are more than "probable" that a vulnerable adult was abused.

In calendar years 2015 and 2016, the Court granted 79 OIPs statewide (Oahu: 61, East Hawaii: 0, West Hawaii: 3, Kauai: 3, Maui: 12.) Of these 79 OIPs awarded, caregiver neglect was alleged in approximately 23 or 29% of the cases (Oahu: 15, East Hawaii: 0, West Hawaii: 1, Kauai: 2, Maui: 5.) In order to file for an OIP, APS must have confirmed, via an investigation, that the vulnerable adult at minimum, probably incurred abuse, neglect, and/or exploitation, and APS either obtained consent of the vulnerable adult to proceed, or obtained a physician's evaluation that the vulnerable adult does not have the capacity to consent to intervention by APS.

Petitions for an OIP must be approved by Family Court before action can be taken to ensure the safety of the vulnerable adult. Requiring APS to apply a higher standard of "substantial evidence", rather than probable cause, for only those vulnerable adults living in their own residence and who have a prognosis of six months or less to live, would place those vulnerable adults at risk for re-abuse and prevent APS' ability to provide immediate and appropriate protective services.

Thank you for the opportunity to testify on this bill.



**TESTIMONY OF  
THE DEPARTMENT OF THE ATTORNEY GENERAL  
TWENTY-NINTH LEGISLATURE, 2017**

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**ON THE FOLLOWING MEASURE:**

S.B. NO. 747, RELATING TO ORDERS FOR IMMEDIATE PROTECTION.

**BEFORE THE:**

SENATE COMMITTEE ON HUMAN SERVICES

**DATE:** Friday, January 27, 2017

**TIME:** 2:45 p.m.

**LOCATION:** State Capitol, Room 016

**TESTIFIER(S):** Douglas S. Chin, Attorney General, or  
Erin L.S. Yamashiro, Deputy Attorney General

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Chair Green and Members of the Committee:

The Department of the Attorney General opposes this bill due to concerns about the application of the new standard of proof proposed by this bill.

The purpose of this bill is to change the burden of proof from probable cause to "substantial evidence" for the Department of Human Services (DHS) to seek, and for the family court to grant, an ex parte order for immediate protection under chapter 346, Hawaii Revised Statutes (HRS), and to continue the ex parte order at the show cause hearing when the vulnerable adult is living in their own residence and has a prognosis of six months or less to live.

"Substantial evidence" is not a common term used to define the standard of proof for judicial determinations in family court. If this measure passes, there will be confusion as to the meaning of "substantial evidence," as there is no workable definition provided. "Probable cause," however, is a recognizable legal standard.

Currently, chapter 346, HRS, provides safeguards to ensure that the DHS is not infringing upon a person's right to self-determination by requiring judicial oversight. Section 346-231(a), HRS, allows the DHS to petition the court for an ex parte order for protection when there is probable cause that a vulnerable adult lacks capacity, or consents, and has incurred abuse or is in danger of abuse if immediate action is not taken. The court may issue the ex parte order for immediate protection upon finding the same based on probable cause. Section 346-232(a), HRS, then requires a show cause

hearing within seventy-two hours after the ex parte order is issued by the court. Under section 346-232(b), HRS, at the show cause hearing, the court may only continue the orders if it continues to find that there is probable cause to believe the allegations contained in the ex parte application are true, after allowing the alleged perpetrator an opportunity to respond. Section 346-231(f), HRS, requires the DHS to also file a petition for protection within twenty-four hours of the issuance of the ex parte orders. Pursuant to section 346-240, HRS, a return hearing must be held within thirty days of filing the petition. At this time, per section 346-240, HRS, the court may hold an evidentiary hearing or schedule a trial. Section 346-240, HRS, requires the court to dismiss the petition for protection and to revoke the ex parte order for immediate protection if the allegations are not shown to be true by a preponderance of the evidence. Preponderance of the evidence is a higher legal standard of proof than probable cause, which means the evidence proves that it is more likely than not that the facts presented are true. See Masaki v. General Motors Corp., 71 Haw. 1 (1989). Probable cause requires something more than mere suspicion. See State v. Maganis, 109 Haw. 84 (2005).

This process as set forth under chapter 346, HRS, allows the DHS to respond quickly to protect a vulnerable adult, and ensures that the DHS is not acting beyond its authority by requiring judicial oversight. Therefore, it is unnecessary to raise the standard of proof for the DHS to help a vulnerable adult who has six months or less to live and is living at the vulnerable adult's residence. In addition, this measure would make it more difficult for the DHS to protect this population from abuse, which is contrary to the purpose of chapter 346, HRS.

We respectfully ask this committee to defer this measure.



*The Judiciary, State of Hawai‘i*

**Testimony to the Senate Committee on Human Services**

Senator Josh Green, Chair  
Senator Stanley Chang, Vice Chair

Friday, January 27, 2017, 2:45 p.m.  
State Capitol, Conference Room 016

By

R. Mark Browning  
Senior Judge, Deputy Chief Judge  
Family Court of the First Circuit

**WRITTEN TESTIMONY ONLY**

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**Bill No. and Title:** **Senate Bill No. 747**, Relating to Orders for Immediate Protection

**Purpose:** Requires findings prior to issuance of an order for immediate protection in certain cases.

**Judiciary's Position:**

The Judiciary takes no position on this bill but respectfully offers these comments.

Requiring the Department of Human Services (DHS) to provide “substantial evidence” as opposed to “probable cause to believe” allegations in cases where the vulnerable adult living in his/her own residence and “has a prognosis of six months or less to live” appears to put a particularly vulnerable section of an already vulnerable population at increased risk. We are also concerned about the required prognosis. In many of the current cases, the vulnerable adult is often unable to give accurate medical information and history. Without the ability of the DHS to file a petition based on probable cause, there would not be a mechanism that would allow the DHS to investigate “substantial evidence” or to establish the required prognosis.

Thank you for the opportunity to provide testimony on this measure.