



March 17, 2021

Re: Senate Bills 176 and 177

Dear Chair Prozanski, Vice Chair Thatcher, and members of the Senate Committee on Judiciary and Ballot Measure 110 Implementation:

The Office of Public Defense Services (OPDS) is neutral on Senate Bills (SB) 176 and 177, two bills from the Oregon Department of Justice (DOJ), responding to Oregon appellate court cases. We submit this testimony as technical feedback on the underlying issues prompting these bills.

SB 176

Background:

SB 176 is a response to [State v. Judd, 301 Or App 549 \(2019\)](#), an Oregon Court of Appeals case in which the state prosecuted the defendant for murder after the defendant's mental health counselor/social worker made a mandatory report of elder abuse under an existing statute, ORS 124.060 (duty of officials to report elder abuse). The mandatory report that prompted the investigation was not challenged. Rather, the state sought to call the defendant's counselor as a witness to testify against her, repeat privileged communications made during counseling sessions, and testify as to her belief that the defendant killed her grandmother. The court held that, although the counselor properly reported the defendant's confession to police, the legislature had previously considered and decided against abrogating the privilege to the extent that a counselor would be required to testify as to those privileged communications.

Issues to consider:

- An exception to privileged communications already exists to allow for persons to report elder abuse to law enforcement under ORS 124.065; this bill would greatly expand admissible statements, potentially at the cost of eroding trust persons seeking mental health treatment may have in their providers.
- What should be the outcome for a person seeking treatment when his/her/their provider files a report about them, abrogating privilege? Should that provider be permitted to continue to aid that person to, in

effect, gather state's evidence during treatment sessions for the prosecution to use at trial? What effect will this have on small communities in which provider resources are scarce?

Suggestions:

- If pursued, SB 176 should clarify that any waiver of privilege for use in a prosecution extends *only* as far as the required contents of the report in ORS 124.065, which establishes methods of reporting elder abuse.

SB 177

Background:

SB 177 is a response to [State v. Iseli](#), 366 Or 151 (2020), a case in which the Oregon Supreme Court held that the state had not shown that a witness was unavailable under the Oregon Evidence Code.

The Oregon Evidence Code (OEC) permits the admission of otherwise inadmissible hearsay statements if the person who made the statement (the “declarant”) is unavailable as a witness against a person against whom admission of the statement is sought engaged in conduct that caused the witness to not appear. OEC 804(3)(g). For a court to admit this otherwise prohibited hearsay evidence, the state must show that it could not achieve the declarant’s attendance in court to describe the statement by “process or other reasonable means.” OEC 804(1).

In addition to the state’s needing to show that a declarant is unavailable despite its attempts to get the declarant to court by process or other reasonable means, an additional constitutional analysis of this situation must be performed, known as the “forfeiture by wrongdoing” test under Article I, section 11, of the Oregon Constitution, and under the Sixth Amendment of the federal Constitution. A defendant may, in certain circumstances, perform conduct so egregious that it forfeits their right to confront witnesses or accusers in court.

Issues:

- SB 177, as written, would remove the requirement that the state show that a witness is “unavailable” and would expand hearsay exceptions.



Under some circumstances, this change could run afoul of the aforementioned constitutional confrontation requirements.

Suggestions:

- OPDS understands that DOJ's intent behind SB 177 is to ensure that victims of crime are not being arrested to avoid their being otherwise "unavailable" and that an amendment has been requested to maintain ORS 40.465(3)(f) and (g) (unavailability hearsay exceptions). This amendment would also add a provision to ORS 40.465 that a declarant's attendance by "process or other reasonable means" under ORS 40.465(1)(e) would expressly not require the issuance of a material witness warrant (a warrant in which a crime victim may be arrested) in order to prove unavailability in the context of ORS 40.465(3)(f) and (g). An amendment of this nature would alleviate the primary technical concerns that OPDS initially had with SB 177.

The OPDS appreciates the opportunity to submit this testimony. Please reach out with any questions.

Thank you,

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