OCDLA
OREGON CRIMINAL DEFENSE LAWYERS ASSOCIATION

TO: **Senate Committee On Judiciary and Ballot Measure 110 Implementation**
FROM: **Mae Lee Browning, Oregon Criminal Defense Lawyers Association**
DATE: **March 26, 2021**
RE: **Opposition to SB 474**

Chair Prozanski, Vice Chair Thatcher, and Members of the Committee:

My name is Mae Lee Browning and on behalf of OCDLA, I write to express opposition to SB 474.

The Oregon Criminal Defense Lawyers Association is a nonprofit professional association for experts, private investigators, and attorneys who represent Oregon's children and parents in juvenile dependency proceedings, youth in juvenile delinquency proceedings, adults in criminal proceedings at the trial and appellate level, as well as civil commitment proceedings throughout the state of Oregon.

Our criminal legal system can be painful and traumatic for many. OCDLA supports exploring ways for the system to be less so. There are rights for victims in our criminal legal system and constitutional protections for those accused of crime, such as the right of confrontation. Cross examination and the rules around hearsay are essential to maintain our system. Creating a carveout to hearsay is highly problematic and can be a slippery slope. Alleged victims who may be scared or traumatized still have to appear in court and testify in cases other than sex trafficking, purchasing sex with a minor, and promoting and compelling prostitution.

OCDLA raised issues when this bill was introduced in 2015 as HB 3040. Those concerns from 2015, which we still have today with SB 474, are as follows:

1) Article I, section 11: "In all criminal prosecutions, the accused shall have the right * * * to meet the witnesses face to face."

This has two requirements: Unavailability *and* "adequate indicia of reliability." *State v. Cook*, 340 Or 530, 540, 135 P3d 260 (2006) (explaining that Oregon adheres to the pre-*Crawford* federal confrontation analysis of *Ohio v. Roberts*, 448 US 56, 65–66, 100 S Ct 2531, 65 L Ed 2d 597 (1980).

Unavailability is where the witness (*i.e.*, the declarant of the hearsay statement) must be unavailable to testify at trial. To show unavailability, the state must show that it "made a good-faith effort to obtain [the witness's] testimony but was unable to do so." *State v. Nielsen*, 316 Or 611, 623, 853 P.2d 256 (1993).

"Adequate indicia of reliability" – Hearsay is reliable when it meets a "firmly-rooted hearsay exception" or the state shows that it has "particularized guarantees of trustworthiness." *State v. Stevens*, 311 Or 119, 140–41, 806 P2d 92 (1991). Firmly-rooted hearsay exceptions include excited

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utterances, *State v. Moen*, 309 Or 45, 65, 786 P2d 111, 124 (1990), statements for purposes of a medical diagnosis, *id*. at 62-63, complaints of sexual misconduct, *State v. Campbell*, 299 Or 633, 650, 705 P2d 694, 704 (1985), and coconspirator statements, *State v. Cornell*, 314 Or 673, 685, 842 P2d 394, 401 (1992).

If a firmly-rooted exception does not apply, the state must show that the evidence has particularized guarantees of trustworthiness. That is multi-factor totality test that includes the circumstances and character of the statement, the timing of the statement, and the declarant's competence and motive to fabricate. *Nielson*, 316 at 623-24.

2) Sixth Amendment: "In all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him * * *."

This applies to testimonial evidence. *Crawford* described it in terms of how closely the evidence resembled the harm that the Framers sought to prevent, which were out –of –court accusations made to magistrates. *Crawford v. Washington*, 541 US 36, 50, 124 S Ct 1354, 158 L Ed 2d 177 (2004). It includes statements made in response to police interrogations, affidavits, prior testimony, and other situations in which the defendant has no opportunity to cross-examine the witness. More recently, the Court has explained that the test is to examine "the primary purpose that a reasonable person would have ascribed to the statement, taking into account all of the surrounding circumstances" and determine whether the declarant intended to accuse a targeted individual. *Williams v. Illinois* (2012). Statements made to a 9-1-1 responder, for example, not testimonial because the witness made them with the purpose of getting emergency assistance, as opposed to making an accusation. *State v. Camarena*, 344 Or 28, 41, 176 P3d 380, 387 (2008). If out-of-court statements are testimonial, they are only admissible if the witness is unavailable and the defendant had a prior opportunity for cross-examination. *Crawford*, 541 US at 59.

The DV Exception, OEC 803(26), is broader than what the constitution allows.

- **Does not require unavailability:** Despite the fact that OEC 803 states that its exceptions apply regardless of the availability of the declarant, the state must show unavailability to admit a statement under Article I, section 11. *Wilcox*, 180 Or App at 564.
- **Uses corroboration as a factor for reliability under Article I, section 11:** OEC 803(26) is not a firmly-rooted hearsay exception. *Id.* at 564-65. Although its reliability analysis is similar to the constitutional test, it relies on corroboration, whereas the constitution does not. The constitution evaluates the reliability of a statements independently of the other evidence at trial. Thus, the constitutional test is more "narrow in focus." *Id*.
- **Allows testimonial evidence:** Because OEC 803(26) is not limited with regards to testimonial evidence, it is broader than what the constitution allows. For example, in *State v. Haggblom*, 228 Or App 541, 544, 208 P3d 1033, 1035 (2009), the trial court admitted an audio recording of a victim's description to police of her domestic abuse under OEC 803(26). *See also State v. Mendoza-Lazaro*, 225 Or App 57, 62, 200 P3d 167, 170 (2008) (correcting as plain error trial court's admission of victim's statements under OEC 803(26)

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because that inadmissible evidence "was the result of the very type of inquiry of which *Crawford* disapproved").

HB 3040 (now SB 474) not only repeats the mistakes of OEC 803(26), it makes new ones.

OEC 803(26) was enacted *before Crawford*. The legislature did not know they were creating an unconstitutionally-broad rule of admission. Knowing what we do now, we should have our evidence code meet constitutional limitations. HB 3040 (2015) as presently constituted, it just invites trial-court error and costly appeals. For example, it expressly allows hearsay reports and narrations of crimes to a police officer. *Crawford* explains that that type of evidence is exactly what the Framers intended the Sixth Amendment to prohibit.

HB 3040 removes 24-hour limitation. As *Nielson* explains, how close in time a statement is to the event it describes is a key factor in establishing reliability under Article I, section 11. 316 Or at 623-24.

This bill creates a class of super evidence. It is not limited to sex-trafficking cases, or even criminal cases. HB 3040/SB 474 places no restrictions on the use of evidence admitted under its proposed exception. HB 3040/SB 474 does not require that the evidence be used for any specific purpose. HB 3040 does not even require that the hearsay evidence be in any form. It can be in writing, or an email, a text message, or a social media posting. It does not have to be under oath. So long as the evidence purports to relate to a sex trafficking crime, it does not have to meet the safeguards of the hearsay rule in *any* context, even civil trials. That invites self-serving, false statements.

HB 3040/SB 474 is unnecessary. When this evidence is <u>not</u> unconstitutional (because the witness testifies), it is probably already admissible as impeachment evidence of a prior inconsistent statement. And, if the purpose of the statements is something other than proving their truth, they are not hearsay and do not need an exception

After the 2015 session, this issue was sent to the Oregon Law Commission to study. Tthe Legislature recognized in its debate on 2015 HB 3040 that the bill embraced an issue that was beyond mere policy, but underscored an important constitutional right. The delicate interface between the hearsay rule and the Confrontation Rights of the accused is not well known, understood or appreciated by most non-lawyers. Hence, it is important that a body of attorneys with legal training debate these issues if they are to get it right. The Oregon Law Commission is the best and only body of that nature capable of doing that work.

OCDLA asks this Committee to reconsider SB 474, not pass the measure this session, and convene a body of all stakeholders to address this carveout to the hearsay rule and send this to the Oregon Law Commission. Thank you for the opportunity to provide this testimony.

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