Legislative Testimony

Oregon Criminal Defense Lawyers Association

March 12, 2013

The Honorable Jeff Barker, Co-Chair
The Honorable Chris Garrett, Vice-Chair
The Honorable Wayne Krieger, Vice-Chair
House Judiciary Committee, Members

RE: House Bill 2779

Dear Chair Barker, Vice-Chairs and Members,

The Oregon Criminal Defense Lawyers Association (OCDLA) is an organization of attorneys who represent juveniles and adults in delinquency, dependency, and criminal prosecutions and appeals throughout the state of Oregon. Thank you for the opportunity to submit the following comments regarding House Bill HB 2779.

1. I would personally like to thank Representative Gelser, her staff, and advocates working on this bill for their consistent thoughtful and respectful engagement. It is much appreciated.

2. OCDLA agrees that persons who experience an unwanted sexual assault and who are in jeopardy of future harm ought to be able to secure a protective order such as is contemplated in HB 2779. It should not be necessary to pursue a criminal prosecution if what an individual truly seeks is the security and assurance that an offender will leave them alone.

3. Were HB 2779 constructed to accomplish that objective, we would have no concern with the bill. As written, however, HB 2779 is much broader is sweep and scope that it's related cousins, the Family Abuse Prevention Act (FAPA) or Elderly Persons and Persons with Disabilities Abuse Prevention Act. We believe that HB 2779 over-steps the mark in two respects:

- We are concerned that the predicate act that would support the order – "sexual contact" – must, at a minimum, rise to the level of a Sexual Abuse in the First Degree; and

- The standard for determining future harm should require a showing of imminency and be based on an objective reasonable standard, not a subjective standard.

4. Predicate act in support of the order: As written, HB 2779 would allow a protective order upon commission of unwanted "sexual contact" which is any touching of a sexual or intimate body part for the purpose of arousing or gratifying the sexual desire of either party. [ORS 163.305] The case law is clear that contact of one's neck, cheek or lips can constitute an "intimate body part." *See, e.g., State v. Meyrovich*, 204 Or App 385 (2006). In truth, an unwanted kiss can constitute "sexual contact" within the meaning of ORS 163.305.

5. OCDLA submits that the predicate act that supports the protective order should minimally rise to the level of a Sexual Abuse in the First Degree under ORS 163.427 which would be "sexual contact" of a victim less than 14 years of age, or contact that is accompanied by force or threat of force. In this instance, a *forcible* unwanted kiss, or a kiss accompanied by *intimidating* language, or a kiss of a person less than 14 would support the order.

6. Elevating the nature of the underlying predicate event would place this proceeding on par with related FAPA proceedings. A FAPA protective order must be based upon the causation of "bodily injury," or the fear of "imminent bodily injury" or "involuntary sexual relations by force or threat of force." [ORS 107.705 (1)]

7. An Elderly Persons and Persons with Disabilities protective order can be predicated on unconsensual "sexual contact," [ORS 124.005 (1) (h)] but in those instances, persons of advanced age or disability are less able to defend their boundaries than are those of younger and more able stature.

8. Unless amended as suggested, OCDLA is concerned that the restrictive and potentially criminal aspect of the protective order is out-of-balance and excessive in relation to the underlying event.

7. Standard for showing of future harm: The standard for future harm in HB 2779 is different and much lower than the standard required for a FAPA or Elder Abuse protective orders. The standard in HB 2779 requires no showing of imminency, and embraces a standard of *subjective* reasonableness: i.e., that "a person in the petitioner's situation would reasonably fear for the person's physical safety if an order granting relief .. .is not entered." [Section 3 (1); Section 7 (1)]

8. In contrast, the standard in FAPA and Elder Abuse protective orders require a showing of imminency and that future harm is *objectively* likely:

- FAPA requires a showing that the person "is in imminent danger of further abuse from the abuser." [ORS 107.710 (1)]

- Elder Abuse requires a showing that the person "is in immediate and present danger of further abuse from the abuser." [ORS 124.010]

9. The *subjective* standard in HB 2779 with no showing of imminency presents difficulties in adjudication. How is a court to determine whether there is sufficient evidence that the petitioner "reasonably fears for the petitioner's physical safety"? Suppose the court determines that there is no basis for alarm in the *objective* world, but the petitioner nonetheless *subjectively* experiences apprehension? How is an appellate court to review the record for sufficiency of evidence?

10. Case law is clear under FAPA that a subjective apprehension of fear is insufficient to support an order:

> "'Even if a petitioner makes subjective assertions of fear, a FAPA restraining order will not be upheld when there is insufficient evidence that the alleged conduct creates an imminent danger of further abuse and a credible threat to the physical safety of the petitioner.' *Hubbell v. Sanders,* 245 Or App 321, 326, 263 P3d 1096 (2011). Objectively, there is no evidence that respondent posed an imminent danger of further abuse to the petitioner and represents a credible threat to her physical safety." *C.U.P. v. Lempea,* 251 Or App 656 (2012).

11. OCDLA is concerned that embracing a *subjective* reasonable standard without a showing of imminency will make adjudications difficult, if not impossible for the trial court, and will render the appellate review process virtually meaningless.

12. OCDLA submits that if HB 2779 is amended to require a predicate act that rises to the level of a Sex Abuse I and employs the standards of future harm as in the FAPA and Elder Abuse proceedings, that it would be a good addition to the arsenal of protective orders in Oregon law.

Thank you for your consideration of these comments. Please do not hesitate to contact me if you have any questions.

Respectfully submitted,

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