



Legislative Testimony

Oregon Criminal Defense Lawyers Association

February 8 2016

The Honorable Floyd Prozanski, Chair
Senate Judiciary Committee, Members

RE: Senate Bill 1553 (Section 1: statute of limitations)

Chair Prozanski and Members,

The Oregon Criminal Defense Lawyers Association 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 in opposition to Senate Bill 1553.

This written testimony addresses Section 1 of SB 1553.

The time-honored importance of a statute of limitations

1. It is believed that the need for a limitation period on criminal prosecutions was first recognized by classical Athens, which established a five-year limitation on all crimes except murder. The foundational principles behind a statute of limitations for crimes are many. Foremost among them is the desirability of requiring that prosecutions be based upon reasonably fresh evidence so as to lessen the possibility of an erroneous conviction. The prosecution should be commenced with “sufficient promptness to allow [the accused] to prepare his defense before evidence of his innocence becomes weakened with age.” ALI Model Penal Code.

2. As noted by the United States Supreme Court in *Toussie v. United States*, 397 US 112 (1970):

The purpose of a statute of limitations is to limit exposure to criminal prosecution to a certain fixed period of time following the occurrence of those acts the legislature had decided to punish by criminal sanctions. Such a limitation is designed to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of

official punishment because of acts in the far-distant past. Such a time limit may also have the salutary effect of encouraging law enforcement officials promptly to investigate suspected criminal activity.”

Oregon is different: fewer due process guarantees

3. Oregon’s current twelve-year statute of limitations is right within the national norm. It is by no means a short limitation period when compared to other states. But if comparison to other states were to be had, Oregon would be unique not due to the length of the limitation period but due to the lack of procedural due process guarantees for the accused. Oregon has some of the weakest safety nets to prevent wrongful conviction of any state in the union.

(a) Oregon tolerates a non-unanimous jury verdict

“Proof beyond a reasonable doubt” means something different in Oregon than it does in the rest of the nation. Oregon allows a felony conviction on a 10 – 2 jury verdict; all other states except Louisiana and the federal system require unanimity. The difference is critical. Studies show that non-unanimous jury dynamics serve to marginalize the minority voice, whether it be race, social status, sexual preference or political ideology.

(b) Oregon affords the accused few rights of pretrial discovery

The criminally accused in Oregon has fewer rights of pretrial discovery than almost any other state in the nation. The defense has no opportunity to compel the complaining witness to grant an interview prior to trial; doing so is barred by Article I Section 42 (1)(c). In fact, in many counties, the defense attorney is ordered to not even attempt contact with the complainant to request a cooperative interview. Sworn testimony given before the grand jury is not recorded; the defense has no ability to learn what the complainant has said under oath. The defense is frequently left with the statements contained in police reports, and nothing more.

In contrast, Oregon’s neighboring states afford the defense much greater discovery opportunities to prepare and investigate their case:

Washington: Under Wash CrR 4.6(a), either party may petition the court for a motion to depose a witness, including the complainant, if they otherwise are uncooperative in giving an interview to opposing counsel prior to trial.

Idaho: Under I.C.R. 6.3(a) and (c), grand jury proceedings are recorded verbatim and the defense is entitled to a copy after arraignment.

Nevada: Under N.R.S. 172.215 and 172.225, grand jury proceedings are recorded verbatim and the defense is entitled to a copy after arraignment.

4. Evidence inevitably disappears or degrades with the passage of time. SB 1553 is only concerned with the complainant's ability to corroborate her allegation, but it worries not at all whether the accused has lost evidence which establishes his innocence. With the passage of time, and with no prior forewarning that an allegation will be lodged at some indefinite moment in the future, the accused is at a marked disadvantage. Witnesses to events inevitably die, move away, or lose memory of key events. Documents that can refute or support a chronology of events - such as cell phone records, credit card receipts, e-mail messages, log notes, journal entries - are discarded, lost or destroyed. Perceptions and memories are influenced by subsequent occurring events, hostility, favoritism, suggestion or life experience.

5. Existing law already extends the statute of limitations for sex crimes against minors until age 30, or within 12 years after the crime if first reported (not necessarily when it occurs).

6. By eliminating the statute of limitations for sex crimes altogether (albeit with one-sided evidence), Senate Bill 1553 would expose a defendant to greater liability under criminal law than under civil law. Oregon law limits a civil claim for "child abuse" to when the child reaches the age of 40, or 5 years from the date the plaintiff discovers the causal relationship between the child abuse and the plaintiff's injuries. Normally, the reverse is true: in recognizing the difference between the loss of personal money versus the loss of personal liberty, the law usually subjects a person to greater civil liability than criminal liability.

7. If Oregon defendants are forced to defend themselves on allegations that are 15, 35, or 50 years old, then they must have the rights of discovery commensurate with the risk. Only civil discovery rights such as the right to take sworn depositions and issue subpoenas for the production of records are suitable to redress the risk of an erroneous and unjust conviction.

Sex Abuse 1 is different: consists of "contact" (touching) rather than penetration

8. SB 1553 goes further than eliminate the limitation period for sex crimes involving penetration, but also eliminates the limitation period for Sexual Abuse 1. This crime is completed upon "sexual contact" which consists of touching an "intimate part" of a person's body for the purpose of sexual gratification or arousal. [ORS 163.305(6)] What constitutes an "intimate part" is based on the subjective assessment of the complainant. Convictions have been upheld for nibbling of an ear-lobe and stroking the cheek and neck area. It need not involve contact with genitalia or a portion of the female breast.

9. OCDLA submits that whatever merit may exist to extend a limitation period for a sex crime involving penetration is not present when the crime consists of "contact."

The best public policy: promoting prompt reporting

10. OCDLA submits that the best public policy is one which encourages and supports the prompt reporting of sexual abuse allegations, whether crimes against minors or against adults. Policies that support prompt reporting serve the interests of all: the complainant, the police, prosecutors, the accused, courts, juries, and the greater public. Countenance of delaying for years, after evidence has inevitably eroded and disappeared, prevents society from having confidence in a just outcome in a court of 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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