



May 13, 2021

Re: Senate Bills 176 and 177

Dear Chair Bynum, Vice Chairs Power and Noble, and members of the House Committee on Judiciary:

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), that respond to Oregon appellate court cases. We submit this testimony as technical feedback.

### **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 and Suggestions:**

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 expand admissible statements, potentially at the cost of eroding trust persons seeking mental health treatment may have in their providers. To guard against this potential issue, OPDS suggests clarifying that any waiver of this 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 A**

### **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 the right to confront witnesses or accusers in court.

### **Adopted -1 Amendment to SB 177:**

SB 177, as initially drafted, would have removed the requirement that the state show that a witness is “unavailable” and would expand hearsay exceptions. Under some circumstances, this may have run afoul of constitutional confrontation requirements. The -1 amendment adopted in the Senate has alleviated OPDS’s concerns with SB 177. As amended, SB 177 aims to avoid circumstances in which victims may be arrested to avoid their being otherwise unavailable for trial.

We appreciate the opportunity to submit this testimony. Please feel free to reach out with any questions.

Thank you,

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