MEMORANDUM

TO: The Pennsylvania House Judiciary Committee

FROM: Elizabeth Randol, Legislative Director, ACLU of Pennsylvania

DATE: January 22, 2021

RE: OPPOSITION TO HB 156 P.N. 121 (OWLETT)

Pennsylvania's Tender Years Hearsay Act[1] is a hearsay exception that allows out-of-court statements made by individuals 12 years of age or younger to be entered into evidence under specific conditions. For these statements to be admitted into evidence for certain offenses[2] in lieu of live testimony, the trial court must find that a) the statements are relevant and reliable, and b) that the child is "unavailable" as a witness. If such determinations are made, the out-of-court statements are admitted into evidence and the defendant would go to trial *without the opportunity to have his or her lawyer cross-examine the witness*.

HB 156 (PN 121) would uniformly expand the Tender Years Hearsay Act to allow the introduction of hearsay statements made by people 16 years of age or younger, instead of 12 years or younger.

On behalf of over 100,000 members and supporters of the ACLU of Pennsylvania, I respectfully urge you to oppose House Bill 156 for the following reasons:

HB 156 would further erode due process protections, joining two bills enacted just last session

- SB 469 created a new hearsay exception to allow out-of-court statements from victims or witnesses — of any age — diagnosed with an intellectual disability or autism to be admissible as evidence in criminal or civil trials. Removing the age restrictions to this exception is a striking and sweeping extension of this exception that we opposed last session.[3] To be clear, children twelve years and younger with an intellectual disability or autism ***were already covered*** under the existing Tender Years exception. SB 469 did not offer those children any new protections. Instead, by expanding this exception to everyone who meets the criteria regardless of age, Act 30 of 2019 rendered the term “tender years” all but meaningless and undermined the fundamental rationale for providing such exceptions to hearsay testimony in the first place.
- SB 479, enacted as Act 31 of 2019, significantly expanded the list of offenses for which hearsay statements may be admitted. We also opposed this bill last session.[4] Special hearsay exceptions run afoul of the constitutional protections guaranteed under the Sixth Amendment and any expansion of these exceptions only increases the likelihood that a defendant’s rights are violated.

Special hearsay exceptions deny defendants the constitutional protection guaranteed under the Confrontation Clause of the Sixth Amendment

One of the foundations of the American legal system is that the accused has the right to challenge a witness’ testimony. The Confrontation Clause of the Sixth Amendment to the U.S. Constitution guarantees this by providing that “[i]n all criminal prosecutions, the accused shall enjoy the right…to be confronted with the witness against him.”[5]

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[1] 42 Pa.C.S. § 5985.1

[2] An out-of-court statement made by a child victim or witness, who at the time the statement was made was 12 years of age or younger, describing any of the offenses enumerated in 18 Pa.C.S. Chs. 25 (criminal homicide), 27 (assault), 29 (kidnapping), 31 (sexual offenses), 35 (burglary and other criminal intrusion) and 37 (robbery).

[3] ACLU-PA Opposition to SB 469, https://www.aclupa.org/en/legislation/sb-469-expansion-tender-years-hearsay-exception.

[4] ACLU-PA Opposition to SB 479, https://www.aclupa.org/en/legislation/sb-479-expansion-tender-years-hearsay-exception.

[5] U.S. CONST. amend. VI.

The right of confrontation has two parts: the right to cross-examine and the right to face-to-face confrontation of witnesses. The right to confront witnesses is the right to cross-examine them – a fundamental principle, vital to discerning the truth at trial.[6] Face-to-face confrontation in particular is considered essential for a fair trial. These rights should not be subject to exceptions based upon the category of victims involved. When a clash between the defendant's right to confront a child face-to-face and the witness's psychological interest cannot be avoided, the defendant's constitutional right must prevail.

Hearsay is generally inadmissible and regarded as unreliable

The Hearsay Rule prevents the use of out-of-court statements as evidence in court.[7] Hearsay is considered unreliable for numerous reasons including, but not limited to, the fact that it is not stated under oath and may be of questionable accuracy and reliability.[8] Hearsay testimony is typically not admissible in court unless it falls under one of the exceptions to the hearsay rule.[9]

Expanding the hearsay exception will grant prosecutors dangerous power

Increasing the age of those permitted to admit hearsay statements into evidence enables prosecutors to more easily bypass a defendant's Sixth Amendment rights, making it possible to secure convictions based on non-testimonial, out-of-court statements.[10] HB 156 would contribute to this enhanced prosecutorial power by permitting more hearsay statements to suffice as evidence with no opportunity for the defense to cross-examine witnesses.

The ACLU of Pennsylvania believes that all appropriate efforts should be made to spare children or vulnerable adults as much distress as possible. Judges may exercise their discretion to protect witnesses from abusive cross-examination, prosecutors may question children sensitively and in the presence of an appropriate adult, and extra efforts may be made to have the victim or witness observe another trial or to receive counseling.

Cases involving children frequently involve a conflict between the constitutional rights of the defendant and the interests of the witness who is subject to the criminal process. But the Constitution offers protections to the accused in criminal proceedings precisely because the state is attempting to deprive ***the accused*** — not the victim — of life, liberty, and property. And while mitigating the stress and potential trauma of testifying is certainly prudent, these efforts may not go so far as to compromise a person's right of confrontation to defend themselves when faced with the risk of conviction and the consequences that follow.

For these reasons, we ask you to oppose House Bill 156.

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[6] *See* Perry v. Leeke, 488 U.S. 272, 283 (1989).

[7] "Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." FED. R. EVID. 801(c).

[8] *See* generally Edmund Morgan, Hearsay Dangers and the Application of the Hearsay Concept, 62 HARV. L. REV. 177 (1948).

[9] *See* FED. R. EVID. 803. Commonly used hearsay exceptions are statements made for purposes of medical diagnosis, present sense impressions, and excited utterances. Id. 803(1), (2), & (4).

[10] The legal context here can get complicated. In 2004, the U.S. Supreme Court decided *Crawford v. Washington*, 541 U.S. 36 (2004), which overruled *Ohio v. Roberts*, 448 U.S. 56 (1980). *Roberts* held that if a child's statements were reliable, a defendant could be convicted without ever having the opportunity to cross-examine him or her. But in *Crawford*, the court ruled that any out-of-court statement that is testimonial in nature is not admissible unless the defendant has had a full and fair opportunity to cross-examine the declarant AND the declarant is unavailable as a witness. Unfortunately, *Crawford* offered little guidance to determine whether a statement is testimonial or non-testimonial. As a result, prosecutors attempt to persuade the court that a statement is non-testimonial in nature (when, in fact, it may be testimonial), in order to admit out-of-court-statements as evidence in lieu of live testimony.