

ELDER ABUSE AND LAWS TO PROTECT OLDER PERSONS IN HAWAII

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Victims of elder abuse are parents and grandparents, neighbors and friends. Elder abuse cuts across race, gender, culture, and circumstance, and whether physical, emotional, or financial, it takes an unacceptable toll on individuals and families across our Nation. Seniors who experience abuse or neglect face a heightened risk of health complications and premature death, while financial exploitation can rob men and women of the security they have built over a lifetime. Tragically, many older Americans suffer in silence, burdened by fear, shame, or impairments that prevent them from speaking out about abuse.

Presidential Proclamation -- World Elder Abuse Awareness Day, June 14, 2012,
President Barack Obama²

Introduction

Elder abuse continues to plague Hawaii as it does across the nation.³ Protecting older persons through adult protective laws is primarily the responsibility of the states, although the federal government is attempting to play a greater role in supporting “elder justice” initiatives. According to the American Bar Association (“ABA”) Commission on Law and Aging⁴ there is no overall federal law on elder abuse. However, all fifty states, the District of Columbia, Guam, Puerto Rico, and the Virgin Islands have enacted some form of legislation for adult protective services. In most states, these laws apply to abused adults who have a disability, vulnerability, or physical or mental

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² See <http://www.whitehouse.gov/the-press-office/2012/06/14/presidential-proclamation-world-elder-abuse-awareness-day-2012>, last visited December 3, 2012.

³ See, e.g., Matthew Coke, “A Survey of Adult Protective Services and Elder Abuse in Hawaii and Nationwide, Honolulu Hawaii, Legislative Reference Bureau Report No. 4, 2007 (December 2007); see also Rob Shikina, “Surge in elder abuse prompts more investigation, awareness,” (February 21, 2011), available at http://www.staradvertiser.com/news/20110221_Surge_in_elder_abuse_prompts_more_investigation_awareness.html id=116585873 (last visited December 3, 2012); see also Jason Kotowski, “Family feud breaks out over \$51 million jackpot” (May 4, 2012), available at <http://www.bakersfieldcalifornian.com/local/x213982075/Familys-lottery-win-leads-to-lawsuit> (last visited December 3, 2012). In fiscal year 2011, adult protective service reports were received and investigated on 1160 vulnerable adults: 79% of the reports involved individuals age 60 and older; 8.5% of the reports investigated were confirmed for abuse, neglect, or financial exploitation. Subsequent re-abuse within a 12-month period occurred for 6% of the confirmed reports. See, State of Hawaii Department of Human Services Fiscal Year 2011 Report, Adult Protective Services at page 49.

⁴ See American Bar Association Commission on Law and Aging, <http://www.abanet.org/aging> (last visited December 3, 2012).

impairment. Some states have specific elder protective services laws or programs, but Hawaii does not.⁵ While there is no specific overall “elder abuse” law in Hawaii, there are a variety of laws and interventions that protect older adults. After addressing federal and other national initiatives, this article will highlight some of the most commonly used laws and interventions in Hawaii to combat elder abuse.

Federal Initiatives

One major federal initiative to bring federal leadership to the issue of elder abuse is the Elder Justice Act (“EJA”) legislation.⁶ However, the promise of the EJA has yet to be met according to both the ABA Commission on Law and Aging⁷ and the National Committee on Elder

⁵ See Lori Stiegel & Ellen Klem, Information About Laws Related to Elder Abuse, available at http://www.abanet.org/aging/about/pdfs/explanation_for_APS-IA-LTCOP_citations_chart.pdf (last visited December 3, 2012). Each of the fifty states, the District of Columbia, Guam, Puerto Rico, and the Virgin Islands have authorized adult protective services statutes. These statutes vary widely based on who may be eligible for services and the types of abuse that may be actionable. At the same time, federal laws such as the Older Americans Act (42 U.S.C. § 3002, *et seq.*) do little more than authorize funds for local awareness and coordination endeavors. Unlike federal laws on child abuse and domestic violence which fund services and shelters for victims, there is no comparable federal law on elder abuse.

⁶ See Pub. L. No. 111-148 (“The Elder Justice Act”). The Elder Justice Act was passed by both the Senate and the House in the Health Care Reform Act of 2009 H.R. 3590 and signed into law by President Barack Obama. In Section 3 of the bill, the purposes of this Act are listed as follows:

(1) To enhance the social security of the Nation by ensuring adequate public-private infrastructure and resolving to prevent, detect, treat, understand, and intervene in, and where appropriate, aid in the prosecution of, elder abuse, neglect, and exploitation.

(2) To bring a comprehensive approach to preventing and combating elder abuse, neglect, and exploitation, a long invisible problem that afflicts the most vulnerable among the aging population of the United States.

(3) To raise the issue of elder abuse, neglect, and exploitation to national attention, and to create the infrastructure at the Federal, State, and local levels, to ensure that individuals and organizations on the front lines, who are fighting elder abuse, neglect, and exploitation with scarce resources and fragmented systems, have the resources and information needed to carry out their fight.

(4) To bring a comprehensive multidisciplinary approach to elder justice.

(5) To set in motion research and data collection to fill gaps in knowledge about elder abuse, neglect, and exploitation.

(6) To supplement the activities of service providers and programs, to enhance training, and to leverage scarce resources efficiently, in order to ensure that elder justice receives the attention it deserves as the Nation's population ages.

(7) To recognize and address the role of mental health, disability, dementia, substance abuse, medication mismanagement, and family dysfunction problems in increasing and exacerbating elder abuse, neglect, and exploitation.

(8) To create short- and long-term strategic plans for the development and coordination of elder justice research, programs, studies, training, and other efforts nationwide.

(9) To promote collaborative efforts and diminish overlap and gaps in efforts in developing the important field of elder justice.

(10) To honor and respect the right of all individuals with diminished capacity to decisionmaking autonomy, self-determination, and dignity of choice.

(11) To respect the wishes of individuals with diminished capacity and their family members in providing supportive services and care plans intended to protect elders from abuse, neglect (including self-neglect), and exploitation.

⁷ See Lori Stiegel, Elder Justice Act Becomes Law, But Victory Is Only Partial, 31 BIFOCAL 4, (March-April 2010).

Abuse (“NCEA”).⁸ The NCEA has defined the major types of elder abuse as physical abuse, sexual abuse, emotional or psychological abuse, neglect, abandonment, financial or material exploitation, and self-neglect.⁹

The NCEA was one of the major organizations in the Elder Justice Coalition¹⁰ that partnered to help pass the Elder Justice Act. While acknowledging that “[d]ifferences in State laws

⁸ See National Center on Elder Abuse Administration on Aging, <http://www.ncea.aoa.gov> (last visited December 3, 2012). According to its website, “[t]he NCEA, directed by the U.S. Administration on Aging, is committed to helping national, state, and local partners in the field be fully prepared to ensure that older Americans will live with dignity, integrity, independence, and without abuse, neglect, and exploitation.”

⁹ See National Center on Elder Abuse, Major Types of Abuse, http://www.ncea.aoa.gov/NCEARoot/Main_Site/FAQ/Basics/Types_Of_Abuse.aspx (last visited December 3, 2012). The NCEA defines these major types of abuse as follows:

Physical abuse is defined as the use of physical force that may result in bodily injury, physical pain, or impairment. Physical abuse may include but is not limited to such acts of violence as striking (with or without an object), hitting, beating, pushing, shoving, shaking, slapping, kicking, pinching, and burning. In addition, inappropriate use of drugs and physical restraints, force-feeding, and physical punishment of any kind also are examples of physical abuse.

Sexual abuse is defined as non-consensual sexual contact of any kind with an elderly person. Sexual contact with any person incapable of giving consent is also considered sexual abuse. It includes, but is not limited to, unwanted touching, all types of sexual assault or battery, such as rape, sodomy, coerced nudity, and sexually explicit photographing.

Emotional or psychological abuse is defined as the infliction of anguish, pain, or distress through verbal or nonverbal acts. Emotional/psychological abuse includes but is not limited to verbal assaults, insults, threats, intimidation, humiliation, and harassment. In addition, treating an older person like an infant; isolating an elderly person from his/her family, friends, or regular activities; giving an older person the “silent treatment;” and enforced social isolation are examples of emotional/psychological abuse.

Neglect is defined as the refusal or failure to fulfill any part of a person's obligations or duties to an elder. Neglect may also include failure of a person who has fiduciary responsibilities to provide care for an elder (e.g., pay for necessary home care services) or the failure on the part of an in-home service provider to provide necessary care. Neglect typically means the refusal or failure to provide an elderly person with such life necessities as food, water, clothing, shelter, personal hygiene, medicine, comfort, personal safety, and other essentials included in an implied or agreed-upon responsibility to an elder.

Abandonment is defined as the desertion of an elderly person by an individual who has assumed responsibility for providing care for an elder, or by a person with physical custody of an elder.

Financial or material exploitation is defined as the illegal or improper use of an elder's funds, property, or assets. Examples include, but are not limited to, cashing an elderly person's checks without authorization or permission; forging an older person's signature; misusing or stealing an older person's money or possessions; coercing or deceiving an older person into signing any document (e.g., contracts or will); and the improper use of conservatorship, guardianship, or power of attorney.

Self-neglect is characterized as the behavior of an elderly person that threatens his/her own health or safety. Self-neglect generally manifests itself in an older person as a refusal or failure to provide himself/herself with adequate food, water, clothing, shelter, personal hygiene, medication (when indicated), and safety precautions.

The definition of self-neglect excludes a situation in which a mentally competent older person, who understands the consequences of his/her decisions, makes a conscious and voluntary decision to engage in acts that threaten his/her health or safety as a matter of personal choice.

¹⁰ See Elder Justice Coalition, <http://www.elderjusticecoalition.com> (last visited December 3, 2012). According to its website, the Elder Justice Coalition was formally launched on February 10, 2003, to coincide

and practices in the areas of elder abuse, neglect, and exploitation lead to significant disparities in prevention, protective and social services, treatment systems, and law enforcement, and lead to other inequities,” nowhere in the EJA is there a provision for a federal elder abuse law, nor is there any requirement or real encouragement for the states to specifically include old age¹¹ as a basis for inclusion in any state adult protective service law.

As evidenced by the substantial number of articles listed by the Clearinghouse on Abuse and Neglect of the Elderly (“CANE”),¹² legal and ethical dilemmas, including issues of ageism, abound in addressing elder abuse issues.¹³ Using age classifications to protect individuals from harm has been considered Constitutional under a rational basis test.¹⁴ Although definitions vary from the use of specific ages, e.g. 60 or 65, or through such terms as “advanced age” or “the

with the introduction of the Elder Justice Act (S. 333), which was introduced by Senators John Breaux and Orrin Hatch. The Coalition has five founding organizational members: the National Committee for the Prevention of Elder Abuse (NCPEA), the National Academy of Elder Law Attorneys (NAELA), the National Association of State Units on Aging (“NASUA”), the National Association of Adult Protective Service Administrators (“NAAPSA”), and the National Association of State Long-Term Care Ombudsman Programs (“NASOP”). NCPEA has assumed the additional role of providing the physical and administrative home for the Coalition.

¹¹ See Age Discrimination in Employment Act of 1967 (Pub. L. No. 90-202 as amended). Labor, Age Limitation, 29 U.S.C. § 631; Programs for Older Americans, The Public Health and Welfare, 42 U.S.C. § 3002 (35); The Social Security Act, Federal Old-Age, Survivors, and Disability Insurance Benefits, 42 U.S.C. §§ 401-433. What constitutes “old age” is a foundational issue to ask but is very difficult to answer. Is it chronological, biological, psychological, functional or social age? The federal government and the states have used different ages for different purposes. For example: Age 40 is the threshold age under the federal Age Discrimination in Employment Act. See 29 U.S.C. § 631. Age 60 is the age of eligibility for most services and programs under the Older Americans Act. (“The term ‘older individual’ means an individual who is 60 years of age or older”). See 42 U.S.C. § 3002 (35). Age 62 is the age a worker is eligible for Social Security early retirement benefits. See Title III of the Social Security Act, 42 U.S.C. §§401-433. Age 65 was the standard age for full Social Security retirement benefits, but this is increasing for people born after 1938 and will go from 65 to 67 depending upon the year of birth, *Id.* State “Elder Abuse” statutes vary on age criteria for protective services. See, e.g., Center for Elders and Courts, “Elder Abuse Laws,” <http://www.eldersandcourts.org/Elder-Abuse/Elder-Abuse-Basics/Elder-Abuse-Laws.aspx>, last visited December 3, 2012.

¹² The Clearinghouse on Abuse and Neglect of the Elderly, <http://www.cane.udel.edu/> (last visited December 3, 2012). Located at the University of Delaware, CANE is the nation's largest archive of published research, training resources, government documents, and other sources on elder abuse.

¹³ See, e.g., National Center on Elder Abuse, Ethical Concerns in Addressing Elder Abuse - Respecting Autonomy and Self-Determination while Providing Protection, available at http://www.ncea.aoa.gov/NCEAroot/Main_Site/Library/CANE/CANE_Series/CANE_ethicalconcerns.aspx (last visited December 3, 2012). See also National Center on Elder Abuse, Ageism, available at http://www.ncea.aoa.gov/NCEAroot/Main_Site/Library/CANE/CANE_Series/CANE_ageism.aspx (last visited December 3, 2012).

¹⁴ See, e.g., *Essling v. Markman*, 335 N.W. 2d. 237 (Minn. 1983) (Involving the State of Minnesota’s attempt to curb abuses by the insurance industry in selling policies to persons over 65). The Minnesota Supreme Court addressed, along with a right to contract claim, a claim that the State had wrongfully interfered with their right to privacy because of their age. They claim this deprivation occurred without due process of law. Citing *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976), the court found that, absent a fundamental right or suspect class, minimal judicial scrutiny is appropriate, that age has never been considered a suspect classification, and, accordingly, minimal judicial scrutiny is appropriate. The court went on to find that the law should be upheld because the classification is rationally related to achievement of a legitimate governmental purpose.

infirmities of old age,” at least fifteen states use age as a criterion for providing protective services to seniors who are victims of abuse.¹⁵

Elder Abuse in Hawaii and Laws to Protect Abused Elderly

Combating elder abuse in Hawaii involves both federal and state laws and relies on federal and state agencies as well as non-governmental organizations, legal and health care professionals, family members and volunteers. Like many other states, Hawaii has addressed the issue of elder abuse through the legislative process. The Hawaii State Legislature has not been consistent in its philosophy relating to whether or not specific protection should be extended to older persons. This inconsistency can be seen through the evolution of the laws Hawaii has adopted relating to elder abuse.

The Law of the Splintered Paddle

Nearly two centuries ago, King Kamehameha the Great¹⁶ gave Hawaii its first law. Known as the Law of the Splintered Paddle, or Mamala-hoe Kanawai,¹⁷ Hawaii’s first law establishes a history and tradition of protecting older persons. The initial edict of the King required that the elderly together with women and children should be protected from harm while they slept by the roadside, under the most severe of penalties.¹⁸ The Law of the Splintered Paddle continues to be a part of the

¹⁵ Conn. Gen. Stat. §17b.450; Ga. Code Ann. § 30-5-31; Ill. Comp. Stat. ch. 320, §20/2(e); La. Rev. Stat. Ann. §93.3(C); Mo. Ann. Stat. § 660.350 ; N.D. Cent. Code §12.1-31-07 (c.); N.C. Gen. Stat. §108A-101(d); Ohio Rev. Code Ann. §5101.60(B); Or. Rev. Stat. §124.005(2); S.C. Code Ann. §43-35-10(11); S.D. Codified Laws §22-46-1(2); Tenn. Code Ann. §71-6-102(2); Tex. Hum. Res. Code Ann. §48.002(1); Wis. Stat. Ann. §940.285 (b), (e); Wyo. Stat. Ann. §35-20-102(a)(vi).

¹⁶ King Kamehameha I united all of the islands except Kauai during his reign.

¹⁷ The first edict declared by Kamehameha was the Law of the Splintered Paddle, based on his own experience on a fateful day which taught him that human life was precious and deserved respect:

O my people,
Honor thy god;
Respect alike (the rights of) men great and humble;
See to it that our aged, our women, and our children
Lie down to sleep by the roadside
Without fear of harm.
Disobey and die.

The Law of The Splintered Paddle.

¹⁸ *Id.* Traditionally, older persons in Hawaii have been shown respect and deference and were valued for the lessons they imparted to following generations. Some lament the changes in modern society. *See, e.g.,* Claire Ku’uleilani Hughes, “Traditional behaviors and Kupuna,” *KA WAI OLA, THE LIVING WATER OF OHA* (Office of Hawaiian Affairs), page 9 (August 2008).

Early Hawaiians were often characterized as gentle, gracious, generous and polite. And that is because chiefs and commoners alike were taught the traditional values of humility, kindness and generosity. Kupuna taught children of all social strata the courtesies and behaviors required with their elders, particularly, with their chiefs. Good breeding was demonstrated by acting and speaking with courtesy and walking and sitting with dignity.

By the mid-1800s, Hawaiian historian Kepelino lamented, “But, today these good teachings are being lost and the arrogant ways of the Americans are common here.” . . . Interestingly, Kepelino saw the traditionally taught courtesies and behaviors were being lost and replaced, 150 years ago. Admittedly, today courtesy is no longer a demonstrated norm. And sadly, speaking with respect for elders has also waned.

. . . Traditionally, Kupuna held an enviable position in the Hawaiian family. *Kūpuna* were considered wise and accomplished. Kupuna were the constant, steady and positive influence for both makua (ancestors) and mo’opuna (grandchildren). Kūpuna observed and continued to gently guide their own children as they settled into the role of family providers. Kupuna also focused on teaching mo’opuna the family history, values,

current State Constitution,¹⁹ but now only serves as a “symbol of the State’s concern for public safety.”²⁰

The cultural conditions that existed in the times of King Kamehameha I have changed and elder abuse in Hawaii takes the same form as in other states.²¹ In order to address these many forms of abuse, Hawaii has adopted a number of laws.

The Old Dependent Adult Protective Services Act

In 1989, the Hawaii State Legislature enacted the Dependent Adult Protective Services Act (“DAPSA”).²² Early proposed legislation included specific reference to older persons²³ but that provision was deleted by the legislature in the final version that ultimately became law.²⁴ Despite the protests of those who questioned the constitutionality of laws intended to afford greater protections to older persons, the DAPSA did recognize the State’s interest in protecting elders.²⁵ The stated purpose of DAPSA was to protect adults at a high risk of abuse, neglect, and financial exploitation due to their dependency on others.²⁶ To be entitled to protection under the previous law, individuals must have been “dependent adults,” defined as persons at least 18 years old, having a mental or physical impairment, being “dependent upon another person, a care organization, or a care facility for personal health, safety, or welfare,” due to the impairment.²⁷

The New Adult Protective Services Law

The DAPSA statute was amended by the legislature in 2008, but failed to specifically address “elder abuse.”²⁸ The new Adult Protective Services statute (“APS”) made significant changes to the law but under the new APS law, like DAPSA, vestiges of the original draft Dependent and Elder Abuse bill remain and elders continue to be mentioned as an important segment of the population deserving protection.²⁹

behaviors and courtesies taught to them by their Kupuna. The 21st century has brought more challenges and changes to the Hawaiian family system and many are not desirable.

Id.

¹⁹ HAW. CONST. Art. IX, §10 (1978).

²⁰ *Id.* (“The law of the splintered paddle, *mamala-hoe kanawai*, decreed by Kamehameha I – Let every elderly person, woman and child lie by the roadside in safety—shall be a unique and living symbol of the State’s concern for public safety.”)

²¹ See note 10 *supra*.

²² See 1989 Haw. Sess. Laws 189, codified at HAW. REV. STAT. Part X, Chapter 346 (1989).

²³ 346 HAW.REV.STAT. §221 (1989) (Dependent Adult Protective Services). The original proposal was entitled, Elder and Dependent Adult Protective Services Act, which would have included under its scope both older persons (60 years of age or above—original draft 1988 draft proposal on file with author) and “dependent adults” between the ages of 18 and 59. Although the statute provides protections to all persons who are 18 years of age or over, HAW. REV. STAT. § 346-221 emphasizes “[t]he legislature recognizes that citizens of the State who are elders and mentally or physically impaired constitute a significant and identifiable segment of the population and are particularly subject to risks of abuse, neglect and exploitation.”

²⁴ HAW. REV. STAT. § 346-224 provides that “[a]n individual shall not be involuntarily subjected to the provisions of this part solely based on advanced age.”

²⁵ See HAW. REV. STAT. § 346-221 (1993).

²⁶ HAW. REV. STAT. § 346-221 (1993).

²⁷ HAW. REV. STAT. § 346-222 (1993).

²⁸ See Act 154, S.B. No. 2150, S.D. 2, H.D. 2, C.D. 1 Hawaii State Legislature (2008).

²⁹ *Id.* Section I, modifying HAW. REV. STAT. § 346-221:

While advanced age alone is not sufficient reason to intervene in a person’s life, the legislature finds that many elders have become subjects of abuse, neglect, and exploitation. Substantial public interest exists to ensure that this segment of the population receives protection.

The new law removed “dependent” from its title and is now called “Adult Protective Services.”³⁰ As an overview, changes include deleting the term “dependent,” adding a more inclusive term, “vulnerable,” and giving the Department of Human Services the jurisdiction to investigate cases of abuse of a vulnerable adult who has incurred abuse or is in danger of abuse if immediate action is not taken.

Under the new law, mandated reporters are required to report cases of abuse of a vulnerable adult who has incurred abuse or is in danger of abuse if immediate action is not taken and the department is required to investigate.

Under the new law, a “vulnerable adult” means a person eighteen years of age or older who, because of mental, developmental, or physical impairment, is unable to:

- Communicate or make responsible decisions to manage the person’s own care or resources;
- Carry out or arrange for essential activities of daily living; or
- Protect oneself from abuse.³¹

Under the new law, “abuse” means any of the following, separately or in combination:

- Physical abuse,
- Psychological abuse,
- Sexual abuse,
- Financial exploitation,
- Caregiver neglect, or
- Self-neglect.³²

“Caregiver neglect” means the failure of a caregiver to exercise that degree of care for a vulnerable adult that a reasonable person with the responsibility of a caregiver would exercise within the scope of the caregiver’s assumed, legal, or contractual duties, including but not limited to the failure to:

- Assist with personal hygiene,
- Protect the vulnerable adult from abandonment,
- Provide, in a timely manner, necessary food, shelter, or clothing,
- Provide, in a timely manner, necessary health care, access to health care, prescribed medication, psychological care, physical care, or supervision;
- Protect the vulnerable adult from dangerous, harmful, or detrimental drugs,
- Protect the vulnerable adult from health and safety hazards, or
- Protect the vulnerable adult from abuse by third parties.³³

“Self-neglect” means: A vulnerable adult’s inability or failure, due to physical or mental impairment, or both, to perform tasks essential to caring for oneself, including but not limited to:

- Obtaining essential food, clothing, shelter, and medical care,
- Obtaining goods and services reasonably necessary to maintain minimum standards of physical health, mental health, emotional well-being, and general safety,
- Management of one’s financial assets, and
- The vulnerable adult appears to lack sufficient understanding or capacity to make

³⁰ HAW. REV. STAT. Chap. 346-221, et seq.(2009).

³¹ HAW. REV. STAT. § 346-224 (2009).

³² HAW. REV. STAT. § 346-222 (2009) (Definitions).

³³ *Id.*

or communicate responsible decisions and appears to be exposed to a situation or condition that poses an immediate risk of death or serious physical harm.³⁴

Intervention is initiated by a report to the Department of Human Services' ("DHS") Adult Intake.³⁵ The report may be made by a mandated reporter³⁶ or any other person who has reason to believe that a vulnerable adult has incurred abuse or is in danger of abuse if immediate action is not taken.³⁷ If the abuse criteria are met, the report is sent to the Adult Protective Services Unit of DHS for investigation.³⁸ However, DHS must have the consent of the victim before an investigation or protective action can commence.³⁹ A person required under the law to file a report who knowingly fails to do so, or willfully prevents another from reporting the abuse, may be subject to prosecution and may be guilty of a petty misdemeanor.⁴⁰ Further, immunity is granted to anyone making a report in good faith who might otherwise have incurred liability.⁴¹

The goal of protective services offered by DHS is to remedy abuse, neglect, or exploitation of vulnerable adults.⁴² The Hawaii Administrative Rules details how adult protective services are provided throughout the state upon receiving a report.⁴³

The DHS screens each report of vulnerable adult abuse received to determine whether the subject of the report is a vulnerable adult who has incurred abuse or is in danger of abuse if immediate action is not taken.⁴⁴ If these conditions are met, the vulnerable adult abuse report is accepted for investigation by the DHS but when those provisions are not met, the DHS provides information, referral, or consultation services as appropriate.⁴⁵

The DHS is required to take every good faith effort to maintain the confidentiality of the reporter's identity pursuant to section 346-225 of Hawaii Revised Statutes⁴⁶ but instances of vulnerable adult abuse that may involve a crime are reported to the police or appropriate law enforcement agency with or without the adult's consent.⁴⁷

Investigations include but are not limited to:

1. Reasonable efforts to have face to face contact with the vulnerable adult and alleged perpetrators of abuse using police assistance as necessary in accordance with section 346-229, of the statute;
2. Collateral contacts as needed with others such as family members, friends of the vulnerable adult, and professionals who may have information about the vulnerable adult relevant to the investigation; and

³⁴ *Id.*

³⁵ HAW. REV. STAT. § 346-224 (2009).

³⁶ See HAW. REV. STAT. § 346-224 (2009). Mandated reporters include licensed or registered professionals of healing arts, physicians, nurses, pharmacists, employees or officers of any public or private agency or institution providing medical services, law enforcement, and employees or officers of any adult residential care home or similar institution.

³⁷ HAW. REV. STAT. § 346-224 (2009).

³⁸ HAW. REV. STAT. § 346-227 (2009).

³⁹ HAW. REV. STAT. § 346-230 (2009).

⁴⁰ HAW. REV. STAT. § 346-224(e) (2009).

⁴¹ HAW. REV. STAT. § 346-250 (2009).

⁴² Haw. Admin R. § 17-1421-1.

⁴³ Haw. Admin. R. § 17-1421-4 Geographic areas of service, provides that protective services for vulnerable adults shall be available throughout the State subject to the availability of resources.

⁴⁴ Haw. Admin. R. § 17-1421-6.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ Haw. Admin. R. § 17-1421-8.

3. An assessment of the need for protective services and referrals to appropriate resources.⁴⁸

In the process, the DHS is authorized to arrange for appropriate evaluations to be conducted as necessary to complete the assessment, including but not limited to psychological, medical, or other evaluations in accordance with departmental procedures.⁴⁹

For those reports accepted for investigation, a disposition must be made in accordance with departmental procedures and documented in the department's information system within sixty calendar days of the date of the report as to whether the vulnerable adult has been abused.⁵⁰

Protective services for vulnerable adults include the development of a protective services plan. Services are provided as determined necessary by the DHS to prevent further abuse. Such services may include: (1) Providing counseling to the vulnerable adult alone, and where appropriate, to family members and other collaterals to assist the individuals in recognizing the problems resulting in abuse and in developing alternative means of handling the situation; (2) Assisting the vulnerable adult, the vulnerable adult's family or friends, or legal guardian in locating and arranging for needed services in the vulnerable adult's home or in an alternative living arrangement; and (3) Assisting the vulnerable adult in the initial adjustment to services provided.

The DHS may initiate court action by petitioning for an order for immediate protection when, in accordance with Haw. Rev. Stat. §§ 346-231 and 346-232, the DHS determines that there is reason to believe the vulnerable adult has incurred abuse or is in danger of abuse if immediate action is not taken.⁵¹ The department may also initiate court action for the appointment of a legal guardian or conservator under Haw. Rev. Stat., Chapter 560, Article V of chapter 560 and may consolidate this action with the proceedings for an order for immediate protection.⁵²

If the DHS believes that a person is a vulnerable adult and it appears probable that the vulnerable adult has incurred abuse or is in danger of abuse if immediate action is not taken and the vulnerable adult consents, or if the vulnerable adult does not consent and there is probable cause to believe that the vulnerable adult lacks the capacity to make decisions concerning the vulnerable adult's person, the DHS may seek an order for immediate protection.⁵³ Under the law, an individual is presumed to be capable of making decisions concerning the individual's person.⁵⁴

Orders for immediate protection may include:

- (1) An authorization for the department to transport the person to an appropriate medical or care facility;
- (2) An authorization for medical examinations;

⁴⁸ Haw. Admin. R. § 17-1421-9.

⁴⁹ *Id.*

⁵⁰ Haw. Admin. R. § 17-1421-9.1. The disposition is shared with and explained to the vulnerable adult or the vulnerable adult's legal guardian and the identified perpetrators either in writing or orally. In addition, the department provides a written notice on a prescribed department form to the identified perpetrators of the disposition of the investigation. The written notice includes:

1. The department's decision to confirm or not confirm the allegations of vulnerable adult abuse;
2. The specific rules supporting the action; and
3. The identified perpetrator's right to appeal the department's disposition through established hearing procedures.

⁵¹ Haw. Admin. R. § 17-1421-11.

⁵² *Id.*

⁵³ HAW. REV. STAT. § 346-231(a) (2009). Section (b) provides that a finding of probable cause may be based in whole or in part upon hearsay evidence when direct testimony is unavailable or when it is demonstrated that it is demonstrably inconvenient to summon witnesses who will be able to testify to facts from personal knowledge.

⁵⁴ HAW. REV. STAT. § 346-251 (2009).

- (3) An authorization for emergency medical treatment; and
- (4) Any other matters as may prevent immediate abuse, pending a hearing under [Haw. Rev. Stat.] Section 346-232.⁵⁵

The court may also make orders as may be appropriate to third persons, including temporary restraining orders, enjoining them from:

- (1) Removing the vulnerable adult from the care or custody of another;
- (2) Actions that would result in abuse of the vulnerable adult;
- (3) Living at the vulnerable adult's residence;
- (4) Contacting the vulnerable adult in person or by telephone;
- (5) Selling, removing, or otherwise disposing of the vulnerable adult's personal property;
- (6) Withdrawing funds from any bank, savings and loan association, credit union, or other financial institution, or from a stock account in which the vulnerable adult has an interest;
- (7) Negotiating any instruments payable to the vulnerable adult;
- (8) Selling, mortgaging, or otherwise encumbering any interest that the vulnerable adult has in real property;
- (9) Exercising any powers on behalf of the vulnerable adult by representatives of the department, any court-appointed guardian or guardian ad litem, or any official acting on the vulnerable adult's behalf; and
- (10) Engaging in any other specified act that, based upon the facts alleged, would constitute harm or present a danger of immediate harm to the vulnerable adult or would cause the loss of the vulnerable adult's property.⁵⁶

When a written order for immediate protection is issued, the court must hold a hearing on the application for immediate protection, no later than seventy-two hours after issuance of the written order, excluding any Saturday or Sunday, requiring cause to be shown why the order or orders should not continue. The DHS must make arrangements to have the vulnerable adult attend the hearing or show cause why the vulnerable adult cannot attend.⁵⁷

When the court finds there is probable cause to believe a vulnerable adult has incurred abuse or is in danger of abuse if immediate action is not taken, and the vulnerable adult consents, or if the vulnerable adult does not consent and the court finds there is probable cause to believe the vulnerable adult lacks the capacity to make decisions concerning the vulnerable adult's person, the court may continue or modify any order pending an adjudicatory hearing on the petition. These orders may include orders for the vulnerable adult's temporary placement and ordinary medical care.⁵⁸

A petition invoking the jurisdiction of the court is entitled "In the matter of the protection of (Name of Vulnerable Adult)," and must be verified.⁵⁹ The petition must specifically state: (1) the reasons the person is considered to be a vulnerable adult; (2) the facts that bring the vulnerable adult within the statutory authority; (3) the name, birthdate, sex, and residence address of the vulnerable adult; (4) the names and addresses of any living persons or entities required to be

⁵⁵ HAW. REV. STAT. § 346-231(c) (2009).

⁵⁶ HAW. REV. STAT. § 346-231(d) (2009).

⁵⁷ HAW. REV. STAT. § 346-232(a) (2009).

⁵⁸ HAW. REV. STAT. § 346-232(b) (2009).

⁵⁹ HAW. REV. STAT. § 346-233 (2009).

notified under Haw. Rev. Stat. § 346-237; and (5) if appropriate, allegations describing any lack of capacity of the vulnerable adult. In any case, where the court has reason to believe a vulnerable adult or any other party lacks the capacity to effectively make decisions concerning the party's person, it may appoint a guardian ad litem to represent the interests of that party throughout the pendency of proceedings under this part. The court shall appoint counsel for the vulnerable adult at any time where it finds the vulnerable adult requires a separate legal advocate and is unable to afford private counsel.⁶⁰

Permanent changes in the living situation of a vulnerable adult who has incurred abuse shall not ordinarily be made under authority of Chapter 346. If permanent changes in the living situation or nonemergency medical treatment are necessary, the appropriate guardianship, or civil commitment action shall be initiated pursuant to applicable state law.⁶¹

When a petition has been filed, the court sets a return hearing date to be held within thirty days of the filing of the petition. On the return date, the parties personally, or through counsel, may stipulate to the entry or continuance of the orders as the court deems to be in the best interests of the vulnerable adult, and the court sets the case for an adjudicatory hearing as soon as is practical.⁶²

In an adjudicatory hearing, the court determines whether the person is a vulnerable adult, and whether the vulnerable adult has incurred abuse or is in danger of abuse if immediate action is not taken, based upon a preponderance of the evidence.⁶³ If facts sufficient to sustain the petition are established in court, or are stipulated to by all parties, the court shall enter an order finding the vulnerable adult has incurred abuse or is in danger of abuse if immediate action is not taken and shall state the grounds for the finding. The court must also make a finding concerning the capacity of the vulnerable adult to effectively make decisions concerning personal needs or property.⁶⁴

Upon the completion of the adjudicatory hearing, the disposition hearing may commence immediately after the required findings are made or the court may set the disposition hearing for such time as it deems appropriate.⁶⁵ If facts sufficient to sustain the petition under this part are not established, the court must dismiss the petition and must state the grounds for dismissal.⁶⁶

If the court sustains the petition and does not commence immediately to the disposition hearing, it will determine, based upon the facts adduced during the adjudicatory hearing and any additional facts presented to it, whether any temporary orders should be issued pending final disposition.⁶⁷ The DHS will prepare the proposed protective order and a written protective plan.⁶⁸ In

⁶⁰ HAW. REV. STAT. § 346-234 (2009).

⁶¹ HAW. REV. STAT. § 346-236 (2009).

⁶² HAW. REV. STAT. § 346-240(a) (2009).

⁶³ HAW. REV. STAT. § 346-240(b) (2009).

⁶⁴ HAW. REV. STAT. § 346-240(c) (2009). If the capacity of the vulnerable adult is at issue, the court will require that the vulnerable adult be examined by a psychiatrist or other physician who is skilled in evaluating the particular area in which the vulnerable adult is alleged to lack capacity before making any finding that the vulnerable adult lacks capacity. If there is no finding that the vulnerable adult lacks capacity to make decisions regarding personal needs or property and if the vulnerable adult does not give consent, the court will not have authority to proceed further and the court must dismiss the case.

⁶⁵ HAW. REV. STAT. § 346-240(d) (2009).

⁶⁶ HAW. REV. STAT. § 346-240(e) (2009).

⁶⁷ HAW. REV. STAT. § 346-240(f) (2009).

⁶⁸ HAW. REV. STAT. § 346-241(a) (2009). Section (b) provides that the proposed protective order may include any of the provisions set forth in section 346-231, and, in addition may include an order that:

(1) The person inflicting abuse on the vulnerable adult participate in counseling or therapy as the court deems appropriate;

(2) Any party report to the department any violation of the protective order or protective services plan;

preparing such a proposed protective order, the DHS must seek to impose the least restrictive limitation on the freedom and liberties of the vulnerable adult.⁶⁹ The law provides that to the greatest extent possible, the vulnerable adult should be permitted to participate in decisions concerning the vulnerable adult's person, or property, or both.⁷⁰

Except for good cause shown, the court sets each case for a review hearing not later than six months after the date a protective order and protective services plan are ordered by the court.⁷¹ Thereafter, the court reviews the matter at intervals of not longer than six months until the court's jurisdiction has been terminated.⁷²

Long Term Care Ombudsman

The State of Hawaii Office of the Long-Term Care Ombudsman was established in the Hawaii State Executive Office on Aging to protect the health, safety, welfare, and rights of residents of long-term care facilities⁷³ in accordance with state and federal law.⁷⁴ The long-term care ombudsman represents the interests of residents of long-term care facilities, individually and as a class, to protect their health, safety, welfare, and rights and to promote improvement in the quality of care they receive and their quality of life.⁷⁵

The long-term care ombudsman also has the authority to identify, investigate, and resolve complaints, including complaints against providers of long-term care services and their representatives, made by or on behalf of residents of long-term care facilities relating to actions, inactions or decisions that may adversely affect the health, safety, welfare, or rights of residents of long-term care facilities, including the appointment and activities of guardians and representative payees.⁷⁶

A long-term care facility is required to permit the long-term care ombudsman or designee with immediate access to the long-term facility and the residents of the long-term care facility at

(3) The department make periodic home visits to the vulnerable adult; and

(4) The department monitors compliance with the order.

(c) The proposed protective services plan shall set forth the following:

(1) Specific services or treatment to be provided to the vulnerable adult and the specific actions the parties shall take;

(2) Specific responsibilities that the parties shall assume;

(3) Period during which the services shall be provided;

(4) Dates by which the actions shall be completed;

(5) Specific consequences that may be reasonably anticipated to result from a party's failure to comply with any terms and conditions of the plan; and

(6) Steps that shall be necessary to terminate the court's jurisdiction.

⁶⁹ HAW. REV. STAT. § 346-241(d) (2009).

⁷⁰ *Id.*

⁷¹ HAW. REV. STAT. § 346-242 (2009).

⁷² *Id.*

⁷³ "Long-term care facility" means any:

(1) Skilled nursing facility as defined in section 1819(a) of the Social Security Act, as amended;

(2) Nursing facility, as defined in section 1919(a) of the Social Security Act, as amended;

(3) Adult residential care home, including any expanded adult residential care home;

(4) Assisted living facility;

(5) Intermediate care facility as defined in section 1905(c) of the Social Security Act, as amended; and

(6) Other similar facility licensed by the State serving elders.

See HAW. REV. STAT. § 349-21(f) (2007).

⁷⁴ HAW. REV. STAT. § 349-21(a) (2007).

⁷⁵ HAW. REV. STAT. § 349-21(b) (2007).

⁷⁶ HAW. REV. STAT. § 349-21(c) (2007).

any time deemed necessary and reasonable, by the long-term care ombudsman, for the performance of the duties and functions under this part.⁷⁷ The facility is also required to permit access by the long-term care ombudsman or designee to all resident records or portions thereof necessary for the long-term care ombudsman to evaluate the merits of any complaint; provided that resident records shall be divulged only with the written consent of the resident or the resident's legal representative.⁷⁸ The long-term care ombudsman reports violations of these provisions to the Department of Health.⁷⁹

Residents, care facility employees and other persons who may seek advocacy assistance of the long-term care ombudsman or who may make a complaint concerning a long-term care facility are protected from retaliation.⁸⁰ Any act of retaliation by a facility or its employees is a misdemeanor.⁸¹ Each act of retaliation is considered a separate incident and each day that an act continues constitutes a separate offense.⁸²

Medicaid Investigations Division

The Medicaid Investigations Division of the Department of the Attorney General of the State of Hawaii (the "Division") has the power to investigate and prosecute alleged incidents of abuse in health care facilities that receive Medicaid funding.⁸³ Under state law, the Division has the power to investigate alleged abuses occurring in any state nursing facility.⁸⁴ When findings of abuse, neglect, or exploitation of a vulnerable adult are made, the Division has the authority to criminally prosecute the nursing facility involved.⁸⁵ However, in claims pursued by the Division it must be proven that conduct rises to the level of criminal intent. This is an extremely high standard that is rarely met in vulnerable adult abuse cases.⁸⁶ As mandated reporters under the Adult Protective Services Act however, even when conduct does not reach criminal levels, investigators are required to forward the report to the Department of Human Services.⁸⁷

Other Departments

The Department of Health ("DOH") and the Department of Commerce and Consumer Affairs ("DCCA") helps assure the safety of many older persons in nursing facilities through their regulatory powers. For example, all nursing facilities in Hawaii must be licensed by DOH.⁸⁸ If a facility fails to "substantially . . . conform to the required [licensing] standards[,] the license may be revoked or suspended.⁸⁹ Currently, standards require all facilities to have a written policy prohibiting the mistreatment, neglect, or abuse of a resident.⁹⁰ Thus, intervention can also be initiated by filing a complaint with the DCCA.⁹¹ DCCA will investigate all complaints, and take appropriate action where

⁷⁷ HAW. REV. STAT. § 349-22(a) (2007).

⁷⁸ HAW. REV. STAT. § 349-22(b) (2007).

⁷⁹ HAW. REV. STAT. § 349-22(c) (2007).

⁸⁰ HAW. REV. STAT. § 349-23 9(a) and (b) (2007).

⁸¹ HAW. REV. STAT. § 349-23(e) (2007).

⁸² *Id.*

⁸³ See HAW. REV. STAT. § 28-91 (1993). This office is called the Medicaid Fraud Control Unit in many other jurisdictions.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ Mike Gordon, Elder abuse bills take spotlight, HONOLULU ADVERTISER at B8 (Feb. 27, 2003).

⁸⁷ HAW. REV. STAT. § 346-224 (1993).

⁸⁸ HAW. REV. STAT. § 457B-3 (1993).

⁸⁹ HAW. REV. STAT. § 457B-6(3) (1993).

⁹⁰ See 11 Haw. Admin. R. § 11-94-15(c)(5) (1985).

⁹¹ HAW. REV. STAT. § 457B-6(5) (1993).

violations of standards are found.⁹² Any person found in violation of the licensing standards will be fined “not more than \$500 for a first offense[,]” and “not more than \$1000, or imprisonment not more than one year, or both,” for subsequent offenses.⁹³ Remedies or penalties are cumulative to those available under other state laws, unless otherwise provided.⁹⁴ Certain statutes which come under the purview of the DCCA do have an age component attached to them as will be discussed in the following section.

Elder Laws

While the old DAPSA and the new APS laws did not provide specific protections for older persons, the Hawaii State Legislature passed several laws which provide additional protections specifically for older persons. These protections exist in a variety of different areas of the law.

Hawaii Penal Code

Most acts of elder abuse are offenses described under various provisions of the Hawaii Penal Code. The Hawaii Penal Code provides harsher punishment against a criminal defendant where a child, an elderly person, or a disabled person is victim of a crime.

Haw. Rev. Stat. § 706-660.2, “Sentence of Imprisonment for Offenses Against Children, Elder Persons, or Handicapped Persons,” imposes a mandatory minimum term of imprisonment upon appropriate offenders.⁹⁵ In order to subject a particular defendant to such sentencing, the defendant must:

in the course of committing or attempting to commit a felony, causes the death or inflicts serious or substantial bodily injury upon a person who is:

- (1) Sixty years of age or older;
- (2) Blind, a paraplegic, or a quadriplegic; or
- (3) Eight years of age or younger[.]⁹⁶

In addition, the disability must be known or reasonably should be known to the defendant.⁹⁷

Under Haw. Rev. Stat. § 706-662, the State must first prove beyond a reasonable doubt that imposition of an extended term of imprisonment upon a defendant is necessary for the protection of the public.⁹⁸ The defendant must be proven to be: (1) a persistent offender; (2) a professional criminal; (3) a dangerous person; (4) a multiple offender; (5) an offender against the elderly, handicapped, or a minor; or (5) a hate crime offender.⁹⁹

Relevant here, Haw. Rev. Stat. § 706-662(5) delineates a defendant is an offender against the elderly, handicapped, or a minor if:

- (a) The defendant attempts or commits any of the following crimes: murder, manslaughter, a sexual offense that constitutes a felony under chapter 707, robbery, felonious assault, burglary, or kidnapping; and
- (b) The defendant, in the course of committing or attempting to commit the crime, inflicts serious or substantial bodily injury upon a person who has the status of being:
 - (i) Sixty years of age or older;
 - (ii) Blind, a paraplegic, or a quadriplegic; or
 - (iii) Eight years of age or younger; and

⁹² *Id.*

⁹³ HAW. REV. STAT. § 457B-12 (1993).

⁹⁴ HAW. REV. STAT. § 457B-13 (1993).

⁹⁵ HAW. REV. STAT. § 706-660.2 (2007).

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ HAW. REV. STAT. § 706-662 (2007).

⁹⁹ *Id.*

(iv) The person's status is known or reasonably should be known to the defendant[.]¹⁰⁰

Haw. Rev. Stat. § 706-620, "Authority to Withhold Sentence of Imprisonment," makes a convicted offender against the elderly ineligible to receive a sentence of probation in place of a sentence of imprisonment.¹⁰¹

Haw. Rev. Stat. § 706-620 provides:

[a] defendant who has been convicted of a crime may be sentenced to a term of probation unless:

- (1) The crime is first or second-degree murder or attempted first or second-degree murder;
- (2) The crime is a class A felony, except class A felonies defined in chapter 712, part IV, and by section 707-702;
- (3) The defendant is a repeat offender under section 706-606.5;
- (4) The defendant is a felony firearm offender as defined in section 706-660.1(2); or
- (5) The crime involved the death of or the infliction of serious or substantial bodily injury upon a child, an elder person, or a handicapped person under section 706-660.2.¹⁰²

In July 2011, the Hawaii State Legislature enacted Senate Bill 1025,¹⁰³ later codified as Haw. Rev. Stat. § 708-812.55, that created the offense of Unauthorized Entry in a Dwelling in the First Degree, a class B felony, thereby providing harsher penalties against a defendant who unlawfully enters the home of an elderly person. The bill also amended the existing offense of Unauthorized Entry in a Dwelling, making it Unauthorized Entry in a Dwelling in the Second Degree, a class C felony.¹⁰⁴

A person violates Haw. Rev. Stat. § 708-812.55, "Unauthorized Entry in a Dwelling in the First Degree", if the person, (1) intentionally or knowingly; (2) enters unlawfully into a dwelling; and (3) another person was, at the time of the entry, lawfully present in the dwelling who, (a) was sixty-two years of age or older; (b) was an incapacitated person; or (c) had a developmental disability.¹⁰⁵

The new law, classified as a class B felony, is punishable by a ten year maximum sentence of imprisonment¹⁰⁶ which is far more serious than a misdemeanor charge that carries a one year maximum term of imprisonment.¹⁰⁷

¹⁰⁰ HAW. REV. STAT. § 706-662(5) (2007). If the defendant satisfies the criteria set forth in HAW. REV. STAT. § 706-662, the court shall impose the maximum length of sentence as follows:

- (1) For murder in the second degree--life without the possibility of parole;
- (2) For a class A felony--indeterminate life term of imprisonment;
- (3) For a class B felony--indeterminate twenty-year term of imprisonment; and
- (4) For a class C felony--indeterminate ten-year term of imprisonment.

Here, unlike mandatory minimum sentences imposed pursuant to HAW. REV. STAT. § 706-660, the minimum length of imprisonment is determined by the Hawaii Paroling Authority, pursuant to HAW. REV. STAT. § 706-669.

¹⁰¹ HAW. REV. STAT. § 706-620 (2007).

¹⁰² HAW. REV. STAT. § 706-620 (2007).

¹⁰³ S.B. 1025, 2011 *available at*

http://www.capitol.hawaii.gov/measure_indiv.aspx?billtype=SB&billnumber=1025 (last retrieved May 6, 2012).

¹⁰⁴ HAW. REV. STAT. § 708-812.6 (2011).

¹⁰⁵ HAW. REV. STAT. § 708-812.55 (2011).

¹⁰⁶ HAW. REV. STAT. § 706-660 (2011).

These penal provisions provide the backbone for the different counties, including the County of Hawaii and City and County of Honolulu to establish Elder Abuse/Justice Units within their respective Office of the Prosecuting Attorney.¹⁰⁸

Hawaii's Own "Elder Justice Act"

Hawaii's so-called Elder Justice Act, which took effect in 2003, authorizes the attorney general, on behalf of the State, to pursue a civil action against certain caregivers who have been found guilty of abusing¹⁰⁹ a dependent elder.¹¹⁰ The action can be for the purposes of prevention, restraint, or remedy.¹¹¹ The statute defines neglect as "the reckless disregard for the health, safety or welfare of a dependent elder . . . that results in injury[.]"¹¹² To illustrate the range of actions that constitute neglect, the statute reads, "'Neglect' includes, but is not limited to . . . [f]ailure to provide or arrange for necessary . . . health care; except when such failure is in accordance with the dependent elder's [health care] directive[.]"¹¹³ If a dependent elder lacks sufficient capacity to communicate a responsible decision, abuse occurs when the individual is "exposed to a situation or condition which poses an imminent risk of death or risk of serious physical harm[.]"¹¹⁴

In the event that abuse or negligence is found, a mandatory civil penalty will be ordered in an amount "not less than \$500 nor more than \$1,000 for each day that the abuse occurred . . . [plus] costs of investigation."¹¹⁵ The statute does not specify a maximum amount.¹¹⁶ The law provides limited protection and to qualify, an offense must be committed against a resident who is sixty-two years of age or older, has a mental or physical impairment, and is dependent upon another for personal health, safety, or welfare due to the impairment.¹¹⁷ Those who can be held liable as caregivers include "any person who has undertaken the care, custody, or physical control of, or who has a legal or contractual duty to care for the health, safety, and welfare of a dependent elder, including . . . owners, operators, employees, or staff of . . . [l]ong-term care facilities[.]"¹¹⁸ There is a significant limitation imposed under the law, or more accurately, perhaps carved out of the original proposed legislation. As originally drafted, the proposed legislation would have covered individual caregivers in addition to institutional caregivers. The legislature was later persuaded that enactment of such a law covering individual caregivers would serve to limit the number of individuals who would be attracted to serve as

¹⁰⁷ HAW. REV. STAT. § 706-663 (2011).

¹⁰⁸ In its inaugural pamphlet, the Honolulu Office of the Prosecuting Attorney stated that it "was committed to fighting elder abuse and improving the quality of life for all seniors in the State of Hawaii" and created the Elder Abuse/Justice Unit was created to accomplish that goal. Abuse is Getting Old Pamphlet, Message from Prosecuting Attorney Peter B. Carlisle, (2008). "To enhance awareness, prevention, and prosecution of crimes affecting the elderly." See also Hawaii Tribune Herald, Grant Awarded for Elder Abuse Unit, available at <http://www.hawaiitribune-herald.com/sections/news/local-news/grant-awarded-elder-abuse-unit.html> (last visited December 3, 2012). According to a written statement from Prosecutor Charlene Iboshi, the unit is tasked with "expediting the prosecution of elder abuse and financial exploitation cases and enhances awareness and prevention of elder abuse through inter-agency collaborations." *Id.*

¹⁰⁹ HAW. REV. STAT. § 28-94(a) (2003). The statute defines abuse as "actual or imminent physical injury, psychological abuse or neglect, sexual abuse, financial exploitation, negligent treatment, or maltreatment." *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ HAW. REV. STAT. § 28-94(b) (2003).

¹¹⁴ HAW. REV. STAT. § 28-94(b) (5) (2003).

¹¹⁵ HAW. REV. STAT. § 28-94(a) (2003).

¹¹⁶ *Id.*

¹¹⁷ HAW. REV. STAT. § 28-94(b) (2003).

¹¹⁸ *Id.*

caregivers.¹¹⁹ However, a significant advantage to claims brought by the attorney general is the statutory exemption that excludes actions brought by the State from a statute of limitation.¹²⁰

Consumer Protection Laws

The DCCA has the responsibility to investigate reports of consumer fraud and to impose penalties, including enhanced penalties for fraud directed against elders.¹²¹

Financial institutions in Hawaii are required to report any suspected financial abuse committed against a senior citizen age sixty-two or older to the DHS or a local law enforcement agency.¹²² This law imposes a mandatory duty on any financial institution to report any such suspected incident of financial abuse immediately by telephone to DHS, followed by a written report within five business days.¹²³ The Commissioner of Securities is allowed to impose an extra \$50,000 fine per violation to be added to any existing civil or administrative fine levied for securities violations against a person sixty-two years or older.¹²⁴

The State may impose fines of up to \$10,000 for each violation by mortgage brokers and solicitors committed against elders, defined as consumers sixty-two years or older.¹²⁵

Other Resources, Interventions and Remedies

There are a host of other laws and resources to address elder abuse, depending on the particular situation. For example, if someone is stealing checks from an older person's mailbox, the federal Postal Inspector, the county police and prosecutor can step forward to investigate and intervene. The victim, family members, and caregivers may also formulate a plan for electronic direct deposit of checks. A private practice attorney can seek restitution through a civil fraud action in court.

The Hawaii Disability Rights Center may be able to assist certain disabled victims. Also, domestic violence organizations may be able to assist victims who are abused by household members. Private legal remedies, including actions for breach of contract, and tort and civil fraud may also be pursued.

¹¹⁹ Comment of Senator Suzanne Chun Oakland during *Kupuna* Caucus Meeting, June 18, 2006, notes on file with author. *Kupuna* is the Hawaiian term for older person.

¹²⁰ HAW. REV. STAT. § 657-1.5 (1993).

¹²¹ HAW. REV. STAT. § 480-13.5 (1998) provides:

(a) Additional civil penalties for consumer frauds committed against elders.

If a person commits a violation under section 480-2 which is directed toward, targets, or injures an elder, a court, in addition to any other civil penalty, may impose a civil penalty not to exceed \$10,000 for each violation.

(b) In determining the amount, if any, of civil penalty under subsection (a), the court shall consider the following:

(1) Whether the person's conduct was in willful disregard of the rights of the elder;

(2) Whether the person knew or should have known that the person's conduct was directed toward or targeted an elder;

(3) Whether the elder was more vulnerable to the person's conduct than other consumers because of age, poor health, infirmity, impaired understanding, restricted mobility, or disability;

(4) The extent of injury, loss, or damages suffered by the elder; and

(5) Any other factors the court deems appropriate.

(c) As used in this chapter, "elder" means a consumer who is sixty-two years of age or older.

¹²² HAW. REV. STAT. § 412: 3-114 (2011).

¹²³ *Id.*

¹²⁴ HAW. REV. STAT. § 486-27 (2011).

¹²⁵ HAW. REV. STAT. § 454-4.5 (2011).

A “Temporary Restraining Order” (“TRO”) from the District or Family Court may be obtained to protect a victim from an abusive individual. The Family Court will hear cases in which the abuser is a relative, former spouse, dating partner, someone with whom the victim had a child or someone with whom the victim has lived. Otherwise, the District Court may be able to hear the case.

Prevention of abuse, including caregiver abuse can be part of the overall solution to the problem. A one-stop source for information, assistance, and access to community resources and services for older adults, people with disabilities, and family caregivers can be found through a relatively new resource, the Hawaii Aging and Disability Resource Center.¹²⁶

While Hawaii may not have an overall “elder abuse” law to protect older persons, as outlined in this article, it has what one may call “a constellation of laws” and interventions that can help assist older persons who may be victims of abuse. However, the inherent weakness in these laws may lie in the impact on the victims themselves who may never be helped. As City and County of Honolulu Deputy Prosecutor Scott Spallina observed, many cases of abuse go unreported “. . .only about two out of every five -- because victims might depend on care from the abuser or fear retaliation. Some victims also feel too ashamed to report the abuse or fear family members will put them into a care home or take away access to their money if they learn about the abuse.”¹²⁷

A singular solution two centuries ago may have been King Kamehameha’s decree, “disobey and die,” for perpetrators who harmed the kingdom’s women, children and the elderly. Times have changed and perhaps a new approach needs to be taken to address the escalating problems society encounters with abuse. In the meantime, having knowledge of the wide array of laws, interventions and resources available in Hawaii can help the legal practitioner formulate an approach when faced with issues of elder abuse.

¹²⁶ See <http://www.hawaiiadrc.org/>, last visited December 3, 2012.

¹²⁷ See note 3 *supra*.