



## TESTIMONY OF THE STATE ATTORNEY GENERAL TWENTY-FOURTH LEGISLATURE, 2008

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**ON THE FOLLOWING MEASURE:**

H.B. NO. 2558, H.D. 1, RELATING TO CHILD PROTECTION.

**BEFORE THE:**

HOUSE COMMITTEE ON JUDICIARY

**DATE:** Tuesday, February 12, 2008 **TIME:** 2:05 PM

**LOCATION:** State Capitol Room 325

*Deliver to:* , Room 302, 5 copies

**TESTIFIER(S):** Mark J. Bennett, Attorney General  
or Jay K. Goss, Deputy Attorney General

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Chair Waters and Members of the Committee:

The Attorney General believes that this bill presents significant constitutional concerns under the searches and seizures provisions of the Fourth Amendment. If the bill is amended as explained below, these concerns may be lessened. Given the complexity of Fourth Amendment law and its application in the context of child welfare laws, however, any attempt to require random home visits following a child's return to the parent's home raises the possibility of a court challenge.

In order to comply with the Fourth Amendment, random or "suspicionless" searches generally must be justified by the government's "special needs, beyond the normal need for law enforcement[.]" United States v. Scott, 450 F.3d 863, 868 (9th Cir. 2005). These non-law enforcement "special needs" may include, for example, protecting children from the dangers of drug abuse and trafficking, Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646 (1995), or, as in this case, the State's compelling interest in protecting children from abuse.

It is an open question whether a random home visit of homes following a child's return to the home is constitutional. To lessen the constitutional concerns, we urge the Committee to amend the bill by:

1. Clearly articulating, in a purpose section, the special needs (beyond law enforcement) that this proposal seeks to address. These interests must be concrete, and closely related to the harms the bill seeks to address. Hypothetical concerns may be insufficient. Scott, 450 F.3d at 870.

2. Supporting the bill with concrete information and evidence demonstrating a marked and documented problem of child abuse among the group identified here (prior conviction for child abuse, and child recently returned to the home) over and above the same problem among the general population. A demonstrated problem among this particular group helps to justify the home visits proposed here.

3. Not using the program for law enforcement purposes. This should be explained both in the statutory terms and as implemented by the Department. For example, if the major goal of the provision is to enable prosecutions for child abuse, the special needs requirement will not be met.

4. Adding a time limit to the convictions referenced in subsection (a)(1) of the new section being added by section 1 of the bill. As it stands, even a 20-year-old misdemeanor conviction might be enough to trigger the home visits. More recent convictions (say, within the last five or ten years) better justify the need for additional home visits following a child's return to the home.

5. Subsection (a)(2) is unclear about when and how this subsection is to apply. Our suggestion would be to amend this section to specify this subsection would apply after a court, under Chapter 587, Hawaii Revised Statutes, terminates jurisdiction pursuant to section 587-71(b) or 587-72(b)(1), Hawaii Revised Statutes. The provision could read, for example, "When the court terminates jurisdiction pursuant to section 587-71(b) or 587-72(b)(1) for at least three months but not more than six months . . . ." This would identify the type of "return" contemplated in the bill.

6. Including statutory wording urging the Department of Human Services, in adopting rules, to use the least intrusive means in all aspects of the home visits program. This should include maximizing individuals' privacy in conducting the home visits, and restricting the use of the information obtained. The more that the families' privacy is maintained (both in the way the home visits are administered and in how the information obtained is used or disseminated), the greater the chance that this measure would withstand constitutional scrutiny.

As noted above, the constitutionality of this proposal is an open question. Amending the bill as suggested above should lessen the constitutional concerns posed here. Given the complexity of this area of law, however, a court challenge is possible even if the bill is amended as suggested.

We also note that as currently drafted, subsection (a)(1) appears to limit the prior convictions included to abuse of the same child as has been returned to the home. If this is not the desired result, the phrase "relating to child abuse or neglect against the child . . ." should be corrected to read "a child." This change would bring prior convictions for child abuse of any child within this provision, even if the prior conviction relates to a different child than was recently returned to the home under this proposal.

**JUDtestimony**

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**From:** Jeannine Johnson [REDACTED]  
**Sent:** Sunday, February 10, 2008 6:16 PM  
**To:** JUDtestimony  
**Cc:** Rep. Barbara Marumoto; Rep. Lyla B. Berg; Rep. Gene Ward; Sen. Fred Hemmings; Sen. Sam Slom; Dana.Viola@hawaii.gov  
**Subject:** Testimony in Strong Support of HB3040 (sex offenders), HB3041 (murderers), HB2558,HD1 (child abuse/neglect) and HB2999 (gun safety devices)

COMMITTEE ON JUDICIARY

Rep. Tommy Waters, Chair  
Rep. Blake K. Oshiro, Vice Chair

HB 3040            RELATING TO PUBLIC SAFETY  
HB 3041            RELATING TO CRIME  
HB 2558, HD1    RELATING TO CHILD PROTECTION  
HB 2999            RELATING TO FIREARMS

DATE: Tuesday, February 12th, 2008  
TIME: 2:05pm  
PLACE: Conference Room 325

Aloha Chair Waters and Vice Chair Oshiro,

Mahalo for providing a hearing on these vital bills.

I wholly support each of the above-stated bills which strengthen our criminal laws and protect our most precious treasures, our keiki.

Mahalo for your support of each of these excellent bills.

*Jeannine*

Jeannine Johnson  
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*"PUPUKAHI HOLOMUA"*  
*(Unite in Order to Progress)*

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