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THE HONORABLE CLAYTON HEE, CHAIR
SENATE COMMITTEE ON JUDICIARY AND LABOR
Twenty-Sixth State Legislature
Regular Session of 2012
State of Hawai`i

January 31, 2012

RE: S.B. 2062; RELATING TO USE OF FORCE BY PERSONS WITH SPECIAL RESONSIBILITY FOR CARE, DISCIPLINE, OR SAFETY OF OTHERS.

Chair Hee, Vice-Chair Shimabukuro, and members of the Senate Committee on Judiciary and Labor, the Department of the Prosecuting Attorney of the City and County of Honolulu submits the following testimony in support of Senate Bill 2062.

The purpose of Senate Bill 2062 is to amend Section 703-309, Hawaii Revised Statutes, to place more reasonable limits on a defense commonly referred to as the "parental discipline defense," which allows a "parent, guardian, or other responsible person" to use force against a minor, for purposes of "safeguarding or promoting the welfare of the minor."

Based on legislative reports, it appears that prior amendments to the parental discipline defense were intended to limit the "permissable level of injury" that would be justifiable under this defense, and thus "limit the amount of force that parents and guardians can legally use in disciplining their children to that which is reasonable or moderate." State v. Matavale, 115 Haw. 149, 166 P.3d 322 (2007), quoting Sen. Stand. Comm. Rep. No. 2208, in 1992 Senate Journal, at 1022-23. Nevertheless, Hawai'i's courts have found that "[t]he plain language of the statute specifically ties the defense to...the nature of the force used as opposed to the result of such use of force." State v. Dowling, 125 Haw. 406, 263 P.3d 116 (App. 2011) (quoting Kikuta, 125 Haw. 78, 88-89, 253 P.3d 639, 649-50 (2011)).

Essentially, the defense is valid, and a parent or guardian's actions deemed justified, if it is found that the parent acted with the (subjective) purpose of deterring or punishing the minor's misconduct, and did not (subjectively) intend or (subjectively) know that their actions would cause substantial bodily injury, disfigurement, extreme pain or mental distress, or neurological damage. "Substantial bodily injury" is a rather critical level of injury, defined in HRS §707-703 as a major

avulsion, laceration, or penetration of the skin; burn of at least second degree severity; bone fracture; serious concussion, or a tearing, rupture, or corrosive damage to the esophagus, viscera, or other internal organ (emphasis added). Extreme pain or extreme mental distress would be of such a level that the minor is "unable to cope with" the level of pain or mental distress, or of such trauma comparable to the other injuries specified.

Moreover, the parental discipline defense may be available even if it is uncontested that a parent's actions resulted in substantial bodily injury (or other listed injuries) to the minor, so long as there is evidence the use of force was not "designed [by the defendant] to cause or known [by the defendant] to create a risk of causing substantial bodily injury." State v. Kikuta, 123 Haw. 299, 233 P.3d 719 (App. 2010). In Kikuta, the defendant's argument with his 14-year old stepson, about whether the minor could remove a pet stain from the carpet, led the defendant to "push[his stepson] backward against a door jamb or glass door...tackle[] him twice, punch[] him in the face anywhere from two to ten times, and...punch[] him in the back of the head two or three times." As a result, the right side of the minor's face was swollen, his nose was broken, three of his teeth were chipped, his wrist was put in a splint, his right forearm area was bruised, he had a bruise below his right eye, and he had a bump on the back of his head. Because it was unclear at what point (in the confrontation) these injuries occurred, the Intermediate Court of Appeals found that the jury should have been allowed to consider the parental discipline defense asserted by the defendant.

The Department recognizes that 1992 amendments to the parental discipline defense also added a requirement that the defendant's actions must be "reasonably related" to the disciplinary purpose, and further recognizes that our courts have held some actions to be so excessive that the parental discipline defense was not applicable. However, the facts of those cases were so severe, and set a bar for "unjustifiable" discipline so high[1], that many cases since then have applied the parental discipline defense to permit "disciplinary action" that would be practically uninimagineable to the general public. S.B. 2062 aims to establish a reasonable limit to the parental discipline defense, while maintaining a parent's general right to safeguard and promote the welfare of their child. The proposed amendments are fashioned after similar statutory limitations found in Arkansas, Delaware, Washington and other states.

For all of the foregoing reasons, the Department of the Prosecuting Attorney of the City and County of Honolulu strongly supports Senate Bill 2062. Thank you for the opportunity to testify on this matter.

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[1] Cases in which parental discipline defense was not permitted include: State v. Crouser, 81 Haw. 5, 911 P.2d 725 (1996) (14-year old special education student forgot to bring home daily progress report from teachers, and attempted to modify an old report to show her mother; as a result, the mother's boyfriend hit the minor across both sides of the face, threw her face down on the bed, struck her bare buttocks with his hand, then used a plastic bat to strike her bare buttocks, arm, thighs, and torso until the bat broke, over the course of approximately thirty minutes; due to ongoing pain, the minor was unable to sit down at school for weeks); State v. Tanielu, 82 Haw. 373, 922 P.2d 986 (App. 1996) (14-year old violated father's orders not to see her verbally and physically abusive 18-year old boyfriend; as a result, father kicked daughter in the shin, slapped her six to seven times, punched her in the fact five to ten times, stomped on her face, and pulled her ears, resulting in multiple lacerations and contusions); and State v. Miller, 105 Haw. 394, 98 P.2d 265 (App. 2004) (11-year old exited his uncle's vehicle at a gas station and called his grandfather to come pick him up, because uncle continued tickling the minor after repeated requests to stop; uncle initially drove away, then returned to the gas station, where he repeatedly attempted to pick up the minor by his ear and hair, kicked him, and hit him at least five times with a fist to the face, ribs and possibly back; this resulted in scratches to the right side of minor's face and ears, pain to his head, back and ribs, and a lump that was something smaller than a golf ball on the back of his head).

Testimony of the Office of the Public Defender
State of Hawaii
to the Senate Committee on Judiciary and Labor

January 31, 2012

S.B. No. 2062: RELATING TO USE OF FORCE BY PERSONS WITH SPECIAL RESPONSIBILITY FOR CARE, DISCIPLINE, OR SAFETY OF OTHERS

Chair Hee and Members of the Committee:

We oppose passage of S.B. No. 2062. This measure seeks to prohibit the use of certain types of force under the parental discipline law. Among the types of force included in this prohibition are: throwing, kicking, burning, biting, cutting, and striking with a closed fist. The bill would prohibit these types of force "where it is likely to cause bodily harm greater than transient pain or minor temporary marks."

We feel this measure is unnecessary to the efficient application of the parental discipline law and is vague to the point that it is likely to cause tremendous confusion among litigants in court. Under the current parental discipline law, a parent can only use disciplinary force which is not designed to cause "substantial bodily injury, disfigurement, extreme pain or mental distress, or neurological damage." This provision already prohibits many of the acts specified in the bill. For instance, burning or cutting a child would definitely be designed to cause either "substantial bodily injury," "disfigurement" (scarring), or "extreme pain."

The parental discipline law also currently requires a parent or guardian to employ force "with due regard to he age and size of a minor." Thus the law already currently prevents the shaking of an infant, or the punching or throwing of a young child. Such acts would obviously not be in compliance with the "due regard to age and size" requirement.

Moreover, the provision of the bill requiring likelihood to cause "bodily injury greater than transient pain or minor temporary marks" is very vague and confusing. What is "transient pain?" If it means temporary or momentary pain, there is no indication how temporary the pain must be. In the case of many punches, the pain can be momentary followed by the appearance of a bruise. The same problem exists with the term "minor temporary marks." One could bite someone and state that his or her intention was to only cause temporary marks. The bill would exempt that person from prosecution.

Finally, threatening someone with a deadly weapon can already be prosecuted as felony Terroristic Threatening and interfering with breathing, if it is a choking situation, can be prosecuted as felony Abuse of Household Member.

Thank for the opportunity to comment on this measure.

January 29,2012
Conference Room #016

To: Senate Committee on Judiciary and Labor
Senator Clayton Hee, Chair
Senator Maile S.L. Shimabukuro, Vice Chair

From: Nina Davis,

Re: Bill SB2062 Bill Title [SB2062 RELATING TO USE OF FORCE BY PEARSONS WITH SPECIAL RESPONSIBILITY FOR CARE, DISCIPLINE, OR SAFTEY OF OTHERS]

In Support of SB2062

Chairs & Committee Members:

I Nina Davis support SB2062 for the following reasons:

When I was growing up I have distinct and vivid memories of being "disciplined" by my father with his belt. My "spankings" were relatively mild as I come to learn as adult and compare to the "discipline" other children received. However as a nine-year-old girl the sound of the snapping belt before punishment began turned by blood ice cold and I swore my heart stopped. What I felt was fear, not concern over whatever misdeed I have done, but pure fear that I was about to feel pain and I could not escape.

When I think of my life today as an adult if my boss were to hit me with a belt to discipline me for poor work performance my boss would be arrested for assault. As adult I have the right to have no one lay hands on me even the police cannot inflict physical punishment if I were to be arrested for that is a violation of my civil rights. For some reason we do not extend these same rights to our children. There is this deep laying myth that children only respond to physical punishment. That line of thinking is purely a myth. Others believe we need to be respectful of cultural practices not hitting children in any cultural context is unacceptable.

I have two children of my own ages 8 and 10. My husband and I from the moment my daughter was born made a commitment to her to never spank her. We would find a better way a more humane way to disciple our children. To this day we continue to stick to our commitment.

Bill 2062 is a beginning to ending the violence against children. SB2062 beings to establish limits of discipline and in doing so protects our children. I know in Hawaii we love our children more then life its self. Please prove to Hawaii's children that they are loved and respected and please pass SB2062.

Thank you for the opportunity to submit testimony.

Respectfully,
Nina Davis