

# SB 2404

Measure Title: RELATING TO OFFENSES AGAINST THE PERSON.

Report Title: Assault; Excessive Discipline of a Minor

Description: Creates an offense of excessive discipline of a minor by using certain disciplinary actions against a minor under the age of eighteen years. Makes it punishable by a first, second, or third degree assault, depending on severity of injury to the minor. Effective 1/1/2013.

Companion:

Package: None

Current Referral: HMS, JDL

Introducer(s): ESPERO

DEPARTMENT OF THE PROSECUTING ATTORNEY  
**CITY AND COUNTY OF HONOLULU**

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**THE HONORABLE SUZANNE CHUN OAKLAND, CHAIR  
SENATE COMMITTEE ON HUMAN SERVICES**

**Twenty-sixth State Legislature  
Regular Session of 2012  
State of Hawai'i**

February 7, 2012

**RE: S.B. 2404; RELATING TO OFFENSES AGAINST THE PERSON.**

Chair Chun-Oakland, Vice Chair Ihara, and members of the Senate Committee on Human Services, the Department of the Prosecuting Attorney, City and County of Honolulu, supports the intent of, and suggests amendments to, Senate Bill 2404.

The Department agrees that it may be appropriate to create a specialized offense for excessive discipline of a minor (ie child abuse). Moreover, correlating the level of offense to the level of injury inflicted on the child would require prosecutors to obtain a doctor's opinion as to the severity of the injuries, before a felony could be charged; this also seems appropriate, given that felony assault statutes have similar requirements.

However, it is unlikely that the new offense will be effective, unless the "parental discipline defense" (HRS §703-309(1)) is repealed or prohibited from use. Even if the Department asserts that the parental discipline defense should not be applicable to this particular charge, given the limited definition of "discipline" in subsection (3), it is very possible that courts would permit the parental discipline defense in these types of cases.

Contrary to the proposed offense of "excessive discipline of a minor," which focuses more on a parent's actions and the results of those actions, the "parental discipline defense" focuses almost exclusively on the subjective intent or knowledge of the parent or guardian. Though it appears that legislators intended for the parental discipline defense to limit the level of force that could be justified against a minor, our courts have stated that "[t]he plain language of [HRS §703-309] specifically ties the defense to...the nature of the force used as opposed to the result of such use of force" (see 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, a parent's actions are justifiable if done with the (subjective) purpose of deterring or punishing the minor's misconduct, and the parent did not (subjectively) intend or (subjectively) know that their actions would cause substantial bodily injury, disfigurement, extreme pain, extreme mental distress, or neurological damage. Even if it is uncontested that a parent's actions resulted in substantial bodily injury to the minor, the courts have held that the parental discipline defense should be considered, so long as there is evidence that 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).<sup>1</sup>

The Department recognizes that the parental discipline defense also requires a defendant's actions be "reasonably related" to the disciplinary purpose, and further recognizes that our courts have held some cases to be so excessive that there was no reasonable relation, such that the parental discipline defense did not apply. However, the facts of those cases were so severe, and set a bar for "unjustifiable" discipline so high<sup>2</sup>, that many cases since then have applied the parental discipline defense to permit actions against a minor that would be practically unimaginable to the general public.

As stated by the Hawaii Supreme Court, in one of its most-referenced parental discipline cases:

[T]he permissibility of corporal punishment reflects a societal judgment that falls well within the parameters of legitimate and constitutional legislative policy-making. In this regard, the legislature has expressed its judgment, for better or worse, through the parental discipline defense, as enacted in HRS §703-309(1). What, in its wisdom, the legislature has codified, it is free to amend or repeal. But as long as HRS §703-309(1) remains the law of this state, we are bound to construe and enforce it.

State v. Matavale, 115 Haw. 149, 166 P.3d 322 (2007). If HRS §703-309(1) were repealed, defendants would still be able to assert other defenses, such as self defense, defense of others, defense of property, mistake of fact, choice of evils and so forth. Moreover, "excessive discipline of a minor" is self-limiting, to the extent that it only applies when there is: (1) the "use [of] force to punish or to enforce obedience," and (2) the use of an implement or object, as

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<sup>1</sup> 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 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. Even so, the defendant asserted, and our Intermediate Court of Appeals agreed, that the jury should have been allowed to consider his parental discipline defense.

<sup>2</sup> 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, attempted to modify an old report to show her mother instead; as a result, the mother's boyfriend hit the minor across both sides of her 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); and 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 face five to ten times, stomped on her face, and pulled her ears, resulting in multiple lacerations and contusions).

opposed to using one's own body (e.g. open hand, closed fist, foot, mouth, etc.), to impose such discipline.

In addition to recommending that HRS §703-309(1) be repealed, we would also recommend several changes to the language of the proposed offense. First, the term "hard manmade" objects appears to be too limited, where it is not uncommon to see other items, such as soft rubber or plastic hoses, or a length of bamboo or wooden branch, being used to whip minors. A more suitable term would be "foreign" object.

Also, the Committee may wish to consider revising or clarifying the term: "injury to the body," found in page 1, line 11, as this may be confused with the term "bodily injury" (already stated in page 1, line 6), which merely requires physical pain.

Finally, we note that the new offense does not specify a requisite state of mind, which means that the state of mind would automatically be interpreted as "intentionally, knowingly or recklessly" (see HRS §702-204) for all elements. If an "absolute liability"-type of standard is intended, this should be stated explicitly.

For the reasons above, the Department of the Prosecuting Attorney of the City and County of Honolulu supports the intent of S.B. 2404, with suggested amendments, also noted above. Thank for you the opportunity to testify on this matter.

## ChunOakland2 - Tyrell

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**From:** adeese@preventchildabusehawaii.org  
**Sent:** Monday, February 06, 2012 2:19 PM  
**To:** HMS Testimony  
**Subject:** Support of Senate Bill 2404

**Importance:** High

Testimony Submittal Date: Monday, February 6, 2012

Bill#: SB 2404

Definitely support this bill

Committee Name, Hearing Date/Time, Rm.#: Committee on Human Service, Hearing date is Tuesday February 7, 2012 at 1:30 PM in Room 015

Submitted by: Name/ Organization or Individual: Aileen Deese, Program Director of Prevent Child Abuse Hawaii

Testifier will be present: No. Sorry I cannot be present

Email: [adeese@preventchildabusehawaii.org](mailto:adeese@preventchildabusehawaii.org)

Phone number: 4974140

Comments: Prevent Child Abuse Hawaii, the Hawaii Chapter of Prevent Child Abuse America, definitely supports this bill that will make it safer for the children of Hawaii.

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**From:** mailinglist@capitol.hawaii.gov  
**Sent:** Wednesday, January 25, 2012 5:28 PM  
**To:** HMS Testimony  
**Cc:** toddhairgrove@hotmail.com  
**Subject:** Testimony for SB2404 on 2/7/2012 1:30:00 PM

Testimony for HMS 2/7/2012 1:30:00 PM SB2404

Conference room: 016  
Testifier position: Oppose  
Testifier will be present: Yes  
Submitted by: Todd Hairgrove  
Organization: Individual  
E-mail: [toddhairgrove@hotmail.com](mailto:toddhairgrove@hotmail.com)  
Submitted on: 1/25/2012

Comments:

February 6, 2012

Attn: State of Hawaii Twenty-Sixth Legislature  
Committee on Human Services

RE: SB 2404

Relating to Offenses against the Person.

Report Title: Assault; Excessive Discipline of a Minor

Description: Creates an offense of excessive discipline of a minor by using certain disciplinary actions against a minor under the age of eighteen years. Makes it punishable by a first, second, or third degree assault, depending on severity of injury to the minor.

Effective 1/1/2013.

Testimony in Opposition of this bill

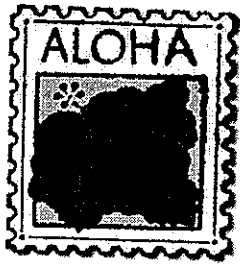
Dear Senator Chun Oakland and Senator Ihara,

I am writing to oppose the passing of this bill to the next committee. This bill as it reads is absolutely confusing and vague. The current Hawaii statute 703-309 addresses child discipline in a very similar manner and as it stands to this very day provides for individual interpretation as to substantial or serious bodily injury. Another HUGE problem with this bill as written is that it asks for a class 3 misdemeanor assault to cause 'bodily injury'. A swat to the bottom with an open hand will constitute 'bodily injury'. Another issue I have is with the wording, rather the list of items that cannot be used to strike a child to 'punish' or 'enforce obedience'. I find this ridiculous and rather insulting as there is no mention of use of a fist which in my opinion is what should be listed first.

I don't believe this change is reasonable nor is it prosecutable as it is too subjective in its wording and does not add to the current statute in a positive manner. Who will be assigned to interpret what is serious, substantial or just plain old 'bodily' injury?

Respectfully,

Julie McFarland



# Holly J. Huber

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(808) 554-7692 • hollyjhuber@gmail.com

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**TO:** Senate Committee on Human Services  
Hearing on February 7th in room 16 @ 1:30 PM

**FROM:** Holly J. Huber

**DATE:** February 6, 2012

**RE:** In support of SB2404  
*Creates an Offense of Excessive Discipline of a Minor*

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Please vote in favor of SB2404 which creates an offense of excessive discipline of a minor.

Under current law, KIDS are the only people it is okay to hit!

Adults can protect themselves. Adults can leave an abusive situation. Children cannot!

How would you feel if someone so much bigger than you are, someone you trust, the person who is supposed to care for you, hauled off and smacked you?

It's not a fair fight.

No one has a right to excessively discipline a child; there are other, more effective methods.

Please support SB2404 to protect the smallest and most vulnerable members of society, our children!