Testimony of the Office of the Public Defender
State of Hawaii
to the House Committee on Judiciary

January 25, 2013

H.B. No. 231: RELATING TO USE OF FORCE BY PERSONS WITH SPECIAL RESPONSIBILITY FOR CARE, DISCIPLINE, OR SAFETY OF OTHERS

Chair Rhoads and Members of the Committee:

We oppose passage of H.B. No. 231. This measure would create an irrebuttable presumption that certain types of force are unjustifiable 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 also alter the state of mind with respect to other types of force to impose a requirement that the force used "does not intentionally, knowingly or recklessly or negligently create a risk of causing substantial bodily injury, disfigurement, extreme pain or mental distress, or neurological damage. The current state of mind involves force which is "designed to cause or known to cause" the aforementioned types of injury.

We feel this measure is not necessary 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 prevents such acts as the shaking of an infant, or the punching or throwing of a young child. These incidents would obviously not be in compliance with the "due regard to age and size" requirement.

Irrebuttable presumptions are generally frowned upon in the criminal law because they take decisions away from the trier of fact and add an element of "strict liability" to the offense. Moreover, a mandatory presumption or inference may have an impermissible burden-shifting effect. State v. Bumanglag, 63 Haw. 596, 618 (1981). One of the acts which would be presumed unjustifiable is "kicking." While kicking an infant would no doubt be prohibited under current law when you take into account the age and size of the minor, a similar kick to the leg of a 17 year old who is rebelling in a physical way might be appropriate as a form of discipline. Another act which would be presumed

unjustifiable is “striking on the face” which would include a slap. Again, such a slap might be an appropriate form of discipline on a teenager.

Currently, the decision on whether a form of corporal punishment is permissible under the parental discipline law is made, in most cases, by a jury. This is the appropriate body to decide on this issue. A jury, by its very makeup, brings community values and morals to each case. Corporal punishment is a controversial issue with many differing opinions regarding when, if ever, it should be employed. The legislature should leave the decision on this issue to the people in the form of juries.

The proposed amendment to the defense which would alter the state of mind is also troublesome. The measure includes reckless and negligent conduct. Such conduct would only have to create a risk of causing substantial bodily injury, disfigurement, extreme pain or mental distress, or neurological damage. Thus if a child is spanked and the parent is deemed to have negligently created a risk of mental distress, the defense would be unavailable.

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

Thank for the opportunity to comment on this measure.

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TESTIMONY IN SUPPORT OF
H.B. NO. 231
A BILL FOR AN ACT RELATING TO USE OF FORCE BY PERSONS WITH SPECIAL RESPONSIBILITY FOR CARE, DISCIPLINE, OR SAFETY OF OTHERS

Justin F. Kollar, Prosecuting Attorney
County of Kaua'i

House Committee on Judiciary

Friday, January 25, 2013
2:00 p.m., Room 325

Honorable Chair Rhoads, Vice-Chair Har, and Members of the House Committee on Judiciary, the Office of the Prosecuting Attorney, County of Kaua'i submits the following testimony in support of House Bill No. 231.

The purpose of House Bill No. 231 is to amend Section 703-309, Hawai'i Revised statutes, 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." Currently as written, HRS Section 703-309 vaguely states that force may be employed to prevent or punish a minor's misconduct.

House Bill No. 231 distinctly defines the "type" of force that would be considered "unjustifiable" in this defense such as: throwing, kicking, burning, biting, cutting, striking with a closed fist, shaking...etc. Furthermore, the proposed bill adds language that clarifies the parental defense to be invalid if the force against the minor is done in a manner that was "intentionally, knowingly, recklessly, or negligently" carried out.

For these reasons, we strongly support House Bill No. 231. Thank you for the opportunity to testify on this matter.

Respectfully,

Justin F. Kollar
Prosecuting Attorney
County of Kaua'i

IMUA ALLIANCE

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TESTIMONY FOR HOUSE BILL 231, RELATING TO USE OF FORCE BY PERSONS WITH SPECIAL RESPONSIBILTY FOR CARE, DISCIPLINE, OR SAFETY OF OTHERS

House Committee on Judiciary
Hon. Karl Rhoads, Chair
Hon. Sharon E. Har, Vice Chair

Friday, January 25, 2013, 2:00 PM
State Capitol, Conference Room 325

Honorable Chair Rhoads and committee members:

I am Kris Coffield, representing the IMUAlliance, a nonpartisan political advocacy organization that currently boasts over 150 local members. On behalf of our members, we offer this testimony in strong support of House Bill 231, relating to the use of force by persons with special responsibility for the care, discipline, or safety of others.

Section 703-309, Hawaii Revised Statutes, defines our state's "parental discipline defense," which is intended to limit the amount of force legally permissible in "safeguarding or promoting the welfare of a minor, including the prevention or punishment of the minor's misconduct" to reasonable levels. Yet, in State v. Dowling, 125 Haw. 406, 263 P.3d 116 (App. 2011), the Intermediate Court of Appeals of Hawaii held that "the plain language of the statute specifically ties the defense to criminal liability to the *nature of the force used as opposed to the result of such use of force*." In practice, therefore, the permissible level of bodily injury justifiable under this defense has been dictated by parental subjectivity with regard to punitive purpose and intent or knowledge about the consequence of corporeal discipline, adumbrating the law's original intent. Put simply, a parent deemed to have been attempting to deter a minor's misconduct without knowing that his or her actions would result in or intending to cause "substantial bodily injury, disfigurement, extreme pain or mental distress, or neurological damage," per 703-309(1)(b), could use the parental discipline statute, as currently composed, as a valid defense against prosecution. For reference, "substantial bodily injury," an elevated degree of injury, is defined in HRS 707-700 as "bodily injury which causes:

(1) A major avulsion, laceration, or penetration of the skin;

(2) A burn of at least second degree severity;

(3) A bone fracture;

(4) A serious concussion; or

(5) A tearing, rupture, or corrosive damage to the esophagus, viscera, or other internal organs."

Confusion over the application of the parental discipline defense, when explained and utilized in court, has led to divergent juridical outcomes. In 2011, the Honolulu Star-Advertiser reported that when attempting to discern whether or not corporal punishment rises to the level of abuse, juries have reached the following, seemingly disingenuous verdicts:

- A boyfriend of the mother of a 17-year-old boy kicked and slapped the teen when he failed to correctly grate cheese for tacos. DISCIPLINE.
- A mother hit her 14-year-old daughter with a backpack, a plastic hanger, a small brush and a tool's plastic handle. The girl was doing poorly in school and was hanging out with friends instead of attending tutoring. DISCIPLINE.
- A boyfriend of the mother of a 14-year-old girl hit the teen on both sides of her face, knocked her to the ground, threw her on a bed, pulled off her pants and underwear, hit her buttocks and hit her with a plastic baseball bat until it broke. The girl had falsified a school report of her grades and attendance. ABUSE.
- A father kicked his 14-year-old daughter in the shin, slapped her face five to 10 times, stomped on her face and pulled her ears. The girl had run away with her boyfriend the day she was to take a pregnancy test. She was beaten after she didn't respond when confronted about her relationship with the boyfriend. ABUSE.
- A father hit his 17-year-old daughter above the knees with a belt and cut her waist-long hair. The girl's friends were at the home after he warned her not to have them over. DISCIPLINE.
- A father slapped his daughter in the face, repeatedly punched her in the shoulders and slapped her again. The girl had used profanity. DISCIPLINE.
- An uncle hit his 11-year-old nephew five times, kicked him and pulled him by the ear and hair. The boy was angry at his uncle and left him when they were stopped at a gas station. ABUSE *("Judges split on ruling on parental discipline," Star-Advertiser, June 20, 2011).*

Clearly, the disparity in these verdicts evinces a need for further clarity in the state's parental discipline defense law.

Perhaps the most significant recent case involving the parental discipline defense was State v. Kikuta, 123 Haw. 299, 233 P.3d 719 (App. 2010). In this case, Cedric Kikuta, 46, was charged with second-degree assault for punching his stepson, after the minor rebuffed demands that he remove a floor stain resulting from feeding a dog. According to Kikuta, he pushed his stepson with two hands after the youth slammed a door, but lost his balance and, in the process, dropped a crutch. Kikuta maintained that, in an effort to prevent his stepson from attacking him with the dropped crutch, he punched the youth twice. The minor involved in the altercation alleged that he did not attack his stepfather, however, who punched him repeatedly in the face and back of the head, fracturing his nose, chipping three of his teeth, and leaving his wrist in need of a splint. During the course of Kikuta's trial, the trial judge refused to allow the jury to consider the parental discipline defense. Ultimately, on this basis, the Intermediate Court of Appeals and Hawaii State Supreme Court upheld Kikuta's appeal, affirming his right to have presented such a defense, despite the "substantial bodily injury" caused to the minor and no matter how tenuous the affirming evidence may have been.

This bill would prohibit specific physical acts, such as kicking or striking with a closed fist (punching), from being justified as defensible parental discipline, effectively criminalizing the use of these acts to discipline minors and elucidating what constitutes abuse of family or household members. We further note that this bill amends HRS 707-309(1)(b) by enumerating mens rea—"intentionally, knowingly, recklessly, or negligently"—to eliminate confusion over the subjective intent of applying disciplinary force. Adding recklessness and negligence to the parental discipline defense statute protects against conscious dismissal of the consequences of disciplinary actions (foreseeing the possibility of substantial bodily injury, but consciously taking the risk of inflicting such injury), as well as carelessness with regard to the application of punitive force (disregarding the risk that substantial bodily injury will result from corporal punishment).

To echo President Obama's recent violence-prevention speech, "This is our first task as a society: keeping our children safe." Accordingly, we encourage lawmakers to discharge this responsibility by passing HB 231 and strengthening the state's efforts to combat child abuse. Mahalo for the opportunity to testify <u>in strong support</u> of this bill.

Sincerely,
Kris Coffield
Legislative Director
IMUAlliance

Kris Coffield **(808) 679-7454** **imuaalliance@gmail.com**

To: Hawaii State Legislature JUD Committee
RE: Opposition to HB231

Aloha mai kākou,

While the title and intent of this bill appear legitimate, further reading of the proposal raises some serious and troubling questions about its scope and potential ramifications. Specific reference to item 7, this portion of the bill would allow literally any employee of any company to assault a member of the public based on their own "belief" of justifiable force, with item 6 giving even further indemnity to potential assailants by allowing them to claim an "erroneous" understanding of the law or their orders.

If this bill is honestly about protecting children or the public at large, then why the need to include provisions such as these? This type of legislation will undoubtedly lead to more assaults against members of the public at the hands of private security guards and other similar agencies or actors who often times have undertrained and/or overzealous employees on their payroll. The exisiting wording in this bill allows for an overly broad interpretion which will undoubtedly be used as a justification for unnecessary assault and intimidation against members of the public, that would otherwise fall well outside the legal boundaries of what constitutes an assault.

Violence has no place in a civilized society, regardless of the perpetrator, and I strongly urge this committee to review the referenced language found in items 6 and 7, and either strike the language or reject this bill in its entirety.

Mahalo nui loa,

Robert Fread