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DEPARTMENT OF THE PROSECUTING ATTORNEY
CITY AND COUNTY OF HONOLULU

ALII PLACE
1060 RICHARDS STREET • HONOLULU, HAWAII 96813
PHONE: (808) 547-7400 • FAX: (808) 547-7515

KEITH M. KANESHIRO
PROSECUTING ATTORNEY

ARMINA A. CHING
FIRST DEPUTY PROSECUTING ATTORNEY



THE HONORABLE KARL RHOADS, CHAIR
HOUSE COMMITTEE ON JUDICIARY
Twenty-Seventh State Legislature
Regular Session of 2013
State of Hawai'i

January 25, 2013

**RE: H.B. 231; RELATING TO USE OF FORCE BY PERSONS WITH SPECIAL
RESONSIBILITY FOR CARE, DISCIPLINE, OR SAFETY OF OTHERS.**

Chair Rhoads, Vice-Chair Har and members of the House Committee on Judiciary, the Department of the Prosecuting Attorney of the City and County of Honolulu submits the following testimony in support of H.B. 231. This bill is part of the Department's 2013 legislative package.

The purpose of H.B. 231 is to amend Section 703-309, Hawaii Revised Statutes, to place reasonable limits on a defense commonly referred to as the "parental discipline defense." These amendments would clarify the defense to better inform juries, courts, our Department, and ultimately the public, as to what types of force simply are not appropriate for "the purpose of safeguarding or promoting the welfare of the minor." The Department strongly believes that this is within the purview of the Legislature, just as the Legislature can establish the level of blood-alcohol content that is not appropriate for someone driving a vehicle, or the level of force that is not appropriate against a spouse.

In 1992, the Senate Committee articulated its desire to "reduc[e] the permissible level of injury to that which is less than 'substantial' as defined in section 707-700 of the Hawaii Penal Code." Sen. Stand. Comm. Rep. No. 2208, in 1992 Senate Journal. The House Committee had intended to take it a step further, such that "the use of force is justifiable by a parent, guardian, or other responsible person upon a minor only if it is necessary to avert danger to life or health, or to save valuable property." House Stand. Comm. Rep. No. 828-92, in 1992 House Journal.

Nevertheless, courts have interpreted the current language of HRS §703-309(a) such that the parental discipline defense may apply even if it is uncontested that a parent caused substantial bodily injury (or the other injuries listed) to the minor, 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). 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." Id. As a result, the right side of the minor's face was swollen, his nose broken, three teeth chipped, his wrist put in a splint, his right forearm bruised, he had a bruise below his right eye and a bump on the back of his head. Although this constituted substantial injury, the Intermediate Court of Appeals ultimately reversed the conviction on the basis that the jury *must* consider the parental discipline defense asserted by the defendant, "so long as there is some evidence in the record to support each element, no matter how weak, inconclusive, or unsatisfactory that evidence may be." Id.

The Department does recognize that 1992 amendments to the parental discipline defense added a requirement that a defendant's actions must be "reasonably related" to the disciplinary purpose, and further recognizes that our courts have held some cases to be so excessive that the parental discipline defense was not applicable. However, most of those cases were so severe, and set a bar for "unjustifiable" discipline so high¹, that many cases since then have applied the parental discipline defense to allow "disciplinary action" of such a level that would be practically unimaginable to the general public. Even if a defendant is found guilty by a jury, many cases are reversed on appeal.

The list of acts contained in H.B. 231 is derived from similar statutory limitations found in Arkansas, Delaware, Washington and other states (see statutes attached), and aims to establish a reasonable limit to the parental discipline defense, while maintaining a parent's ability to utilize reasonable and moderate levels of force for discipline.

For all of the foregoing reasons, the Department of the Prosecuting Attorney of the City and County of Honolulu strongly supports House Bill 231. Thank you for the opportunity to testify on this matter.

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, attempted to modify an old report to show her mother; thus, 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 and deep reddish-purple bruises, the minor was unable to sit down at school for weeks, waddled stiffly); 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; thus, 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 bruising, 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 uncle 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).

WASHINGTON STATE LEGISLATURE

RCW 9A.16.100

Use of force on children — Policy — Actions presumed unreasonable.

It is the policy of this state to protect children from assault and abuse and to encourage parents, teachers, and their authorized agents to use methods of correction and restraint of children that are not dangerous to the children. However, the physical discipline of a child is not unlawful when it is reasonable and moderate and is inflicted by a parent, teacher, or guardian for purposes of restraining or correcting the child. Any use of force on a child by any other person is unlawful unless it is reasonable and moderate and is authorized in advance by the child's parent or guardian for purposes of restraining or correcting the child.

The following actions are presumed unreasonable when used to correct or restrain a child: (1) Throwing, kicking, burning, or cutting a child; (2) striking a child with a closed fist; (3) shaking a child under age three; (4) interfering with a child's breathing; (5) threatening a child with a deadly weapon; or (6) doing any other act that is likely to cause and which does cause bodily harm greater than transient pain or minor temporary marks. The age, size, and condition of the child and the location of the injury shall be considered when determining whether the bodily harm is reasonable or moderate. This list is illustrative of unreasonable actions and is not intended to be exclusive.

[1986 c 149 § 1.]

<http://apps.leg.wa.gov/RCW/default.aspx?cite=9A.16.100>

Section 468, Chapter 4, Title 11 of the Delaware Code: JUSTIFICATION -- USE OF FORCE BY PERSONS WITH SPECIAL RESPONSIBILITY FOR CARE, DISCIPLINE OR SAFETY OF OTHERS

The use of force upon or toward the person of another is justifiable if it is reasonable and moderate and:

(1) The defendant is the parent, guardian, foster parent, legal custodian or other person similarly responsible for the general care and supervision of a child, or a person acting at the request of a parent, guardian, foster parent, legal custodian or other responsible person, and:

a. The force is used for the purpose of safeguarding or promoting the welfare of the child, including the prevention or punishment of misconduct; and

b. The force used is intended to benefit the child, or for the special purposes listed in paragraphs (2)a., (3)a., (4)a., (5), (6) and (7) of this section. The size, age, condition of the child, location of the force and the strength and duration of the force shall be factors considered in determining whether the force used is reasonable and moderate; but

c. The force shall not be justified if it includes, but is not limited to, any of the following: Throwing the child, kicking, burning, cutting, striking with a closed fist, interfering with breathing, use of or threatened use of a deadly weapon, prolonged deprivation of sustenance or medication, or doing any other act that is likely to cause or does cause physical injury, disfigurement, mental distress, unnecessary degradation or substantial risk of serious physical injury or death;

<http://codes.lp.findlaw.com/decode/11/4/468>

**2010 Arkansas Code
Title 9 - Family Law
Subtitle 3 - Minors
Chapter 27 - Juvenile Courts And Proceedings
Subchapter 3 - Arkansas Juvenile Code
9-27-303. Definitions.**

(3) (A) "Abuse" means any of the following acts or omissions by a parent, guardian, custodian, foster parent, person eighteen (18) years of age or older living in the home with a child, whether related or unrelated to the child, or any person who is entrusted with the juvenile's care by a parent, guardian, custodian, or foster parent, including, but not limited to, an agent or employee of a public or private residential home, child care facility, public or private school, or any person legally responsible for the juvenile's welfare:

(i) Extreme or repeated cruelty to a juvenile;

(ii) Engaging in conduct creating a realistic and serious threat of death, permanent or temporary disfigurement, or impairment of any bodily organ;

(iii) Injury to a juvenile's intellectual, emotional, or psychological development as evidenced by observable and substantial impairment of the juvenile's ability to function within the juvenile's normal range of performance and behavior;

(iv) Any injury that is at variance with the history given;

(v) Any nonaccidental physical injury;

(vi) Any of the following intentional or knowing acts, with physical injury and without justifiable cause:

(a) Throwing, kicking, burning, biting, or cutting a child;

(b) Striking a child with a closed fist;

(c) Shaking a child; or

(d) Striking a child on the face; or

(vii) Any of the following intentional or knowing acts, with or without physical injury:

(a) Striking a child six (6) years of age or younger on the face or head;

(b) Shaking a child three (3) years of age or younger;

(c) Interfering with a child's breathing;

(d) Urinating or defecating on a child;

(e) Pinching, biting, or striking a child in the genital area;

(f) Tying a child to a fixed or heavy object or binding or tying a child's limbs together;

(g) Giving a child or permitting a child to consume or inhale a poisonous or noxious substance not prescribed by a physician that has the capacity to interfere with normal physiological functions;

(h) Giving a child or permitting a child to consume or inhale a substance not prescribed by a physician that has the capacity to alter the mood of the child, including, but not limited to, the following:

(1) Marijuana;

(2) Alcohol, excluding alcohol given to a child during a recognized and established religious ceremony or service;

(3) Narcotics; or

(4) Over-the-counter drugs if a person purposely administers an overdose to a child or purposely gives an inappropriate over-the-counter drug to a child and the child is detrimentally impacted by the overdose or over-the-counter drug;

(i) Exposing a child to chemicals that have the capacity to interfere with normal physiological functions, including, but not limited to, chemicals used or generated during the manufacturing of methamphetamine; or

(j) Subjecting a child to Munchausen syndrome by proxy, also known as factitious illness by proxy, when reported and confirmed by medical personnel or a medical facility.

(B) (i) The list in subdivision (3)(A) of this section is illustrative of unreasonable action and is not intended to be exclusive.

(ii) No unreasonable action shall be construed to permit a finding of abuse without having established the elements of abuse.

(C) "Abuse" shall not include:

(i) Physical discipline of a child when it is reasonable and moderate and is inflicted by a parent or guardian for purposes of restraining or correcting the child; or

(ii) Instances when a child suffers transient pain or minor temporary marks as the result of a reasonable restraint if:

(a) The person exercising the restraint is an employee of an agency licensed or exempted from licensure under the Child Welfare Agency Licensing Act, 9-28-401 et seq.;

(b) The agency has policies and procedures regarding restraints;

(c) No other alternative exists to control the child except for a restraint;

(d) The child is in danger of hurting himself or herself or others;

(e) The person exercising the restraint has been trained in properly restraining children, de-escalation, and conflict resolution techniques;

(f) (1) The restraint is for a reasonable period of time; and

(2) The restraint is in conformity with training and agency policy and procedures.

(iii) Reasonable and moderate physical discipline inflicted by a parent or guardian shall not include any act that is likely to cause and that does cause injury more serious than transient pain or minor temporary marks.

(iv) The age, size, and condition of the child and the location of the injury and the frequency or recurrence of injuries shall be considered when determining whether the physical discipline is reasonable or moderate;

<http://law.justia.com/codes/arkansas/2010/title-9/subtitle-3/chapter-27/subchapter-3/9-27-303/>