

STATE OF HAWAI‘I  
**OFFICE OF THE PUBLIC DEFENDER**

**Testimony of the Office of the Public Defender,  
State of Hawai‘i to the House Committee on  
Judiciary & Hawaiian Affairs**

February 17, 2023

H.B. No. 781 HD1: RELATING TO CHILDREN

Chair Tarnas, Vice Chair Takayama, and Members of the Committee:

The Office of the Public Defender supports H.B. No. 781 HD1 in part and oppose in part.

**Access to Legal Counsel**

We strongly support the requirement that any child under the age of eighteen have access to legal counsel before waiving any constitutionally protected right and before any custodial interrogation. Children require special and additional legal protections and assistance to help them understand, process, and participate in any kind of custodial interrogation where constitutional rights are impacted. Children are particularly vulnerable to the pressures and complications of adult situations and interactions. Care and consideration should be taken to ensure that any child asked to waive a constitutional right fully understands that decision and the consequences of that decision and that child should be guaranteed access to legal counsel.

A 2012 study on exonerations in the United States found that false confessions were obtained in **74%** of exonerated minors who were **11-14 years of age** at the time of the interrogation and **34%** of the minors who were **15-17 years of age** at the time of the interrogation, while only 8% of the adults without known mental disabilities falsely confessed when interrogated.<sup>1</sup>

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<sup>1</sup> Samuel R. Gross and Michael Shaffer, “Exonerations in the United States, 1989-2012: Report by the National Registry of Exonerations.” The National Registry of Exonerations, (2012)), available at [https://www.law.umich.edu/special/exoneration/Documents/exonerations\\_us\\_1989\\_2012\\_full\\_report.pdf](https://www.law.umich.edu/special/exoneration/Documents/exonerations_us_1989_2012_full_report.pdf) (last visited, February 15, 2023) (The discussion and data regarding false confessions by juveniles can be found on page 59-60).

Recently, the State of California enacted similar legislation in 2017. *See* Section 625.6 of the Welfare and Institutions Code, relating to juveniles. In enacting the statute, the Legislature of the State of California, in Senate Bill No. 395 (2017 Cal SB 395), found and declared the following:

(a) Developmental and neurological science concludes that the process of cognitive brain development continues into adulthood, and that the human brain undergoes “dynamic changes throughout adolescence and well into young adulthood” (*see* Richard J. Bonnie, et al., *Reforming Juvenile Justice: A Developmental Approach*, National Research Council (2013), page 96, and Chapter 4). As recognized by the United States Supreme Court, children “generally are less mature and responsible than adults” (*J.D.B. v. North Carolina* (2011) 131 S.Ct. 2394, 2397, quoting *Eddings v. Oklahoma* (1982) 455 U.S. 104, 115); “they ‘often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them’” (*J.D.B.*, 131 S.Ct. at 2397, quoting *Bellotti v. Baird* (1979) 443 U.S. 622, 635); “they ‘are more vulnerable or susceptible to... outside pressures’ than adults” (*J.D.B.*, 131 S.Ct. at 2397, quoting *Roper v. Simmons* (2005) 543 U.S. 551, 569); they “have limited understandings of the criminal justice system and the roles of the institutional actors within it” (*Graham v. Florida* (2010) 560 U.S. 48, 78); and “children characteristically lack the capacity to exercise mature judgment and possess only an incomplete ability to understand the world around them” (*J.D.B.*, 131 S.Ct. at 2397).

(b) Custodial interrogation of an individual by the state requires that the individual be advised of his or her rights and make a knowing, intelligent, and voluntary waiver of those rights before the interrogation proceeds. ***People under 18 years of age have a lesser ability as compared to adults to comprehend the meaning of their rights and the consequences of waiver.*** Additionally, a large body of research has established that adolescent thinking tends to either ignore or discount future outcomes and implications, and disregard long-term consequences of important decisions (*see, e.g.,* Steinberg et al., “Age Differences in Future Orientation and Delay Discounting,” *Child Development*, vol. 80 (2009), pp. 28-44; William Gardner and Janna Herman, “Adolescents’ AIDS Risk Taking: A Rational Choice Perspective,” in *Adolescents in the AIDS Epidemic*, ed. William Gardner et al. (San Francisco: Jossey Bass, 1990), pp. 17, 25-26; Marty Beyer, “Recognizing the Child in the Delinquent,” *Kentucky Children’s Rights Journal*, vol. 7 (Summer 1999), pp. 16-17;

National Juvenile Justice Network, “Using Adolescent Brain Research to Inform Policy: A Guide for Juvenile Justice Advocates,” September 2012, pp. 1-2; Catherine C. Lewis, “How Adolescents Approach Decisions: Changes over Grades Seven to Twelve and Policy Implications,” *Child Development*, vol. 52 (1981), pp. 538, 541-42). Addressing the specific context of police interrogation, the United States Supreme Court observed that events that “would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens” (*Haley v. Ohio* (1948) 332 U.S. 596, 599 (plurality opinion)), and noted that “*no matter how sophisticated, a juvenile subject of police interrogation ‘cannot be compared’ to an adult subject*” (*J.D.B.*, 131 S.Ct. at 2403, quoting *Gallegos v. Colorado* (1962) 370 U.S. 49, 54). The law enforcement community now widely accepts what science and the courts have recognized: *children and adolescents are much more vulnerable to psychologically coercive interrogations and in other dealings with the police than resilient adults experienced with the criminal justice system.*

(c) For these reasons, in situations of custodial interrogation and prior to making a waiver of rights under *Miranda v. Arizona* (1966) 384 U.S. 436, youth under 18 years of age should consult with legal counsel to assist in their understanding of their rights and the consequences of waiving those rights.

(Emphasis added).

### **Admissibility of Statements**

The Office of the Public Defender has concerns with the provision set forth under SECTION 2, subsection (d) of this measure:

- (d) This section shall not apply to the admissibility of statements of a child under eighteen years of age if:
  - (1) The officer who questioned the child reasonably believed that the information was necessary to protect life or property from an imminent threat; and
  - (2) The officer’s questions were narrowly tailored to obtain the information sought in paragraph (1).

(See Page 3, line 19 to page 4, line 7).

Regardless of a statutory provision, any statements made by a child in violation of this measure will be subject to constitutional attack:

Miranda warnings must precede any police questioning which subjugates an individual to the will of the examiner and thereby undermines the privilege against self-incrimination. ***The test to determine if a custodial interrogation had taken place is whether the investigating officer should have known that his or her words or conduct were reasonably likely to evoke an incriminating response.***

State v. Roman, 70 Haw. 351, 357, 772 P.2d 113, 116 (1989) (emphasis added).

Thus, this provision will not excuse any officer from interrogating a child without first advising the child of his Miranda rights, including the right to remain silent and his right to counsel. Moreover, any interrogation regarding “information necessary to protect life or property from an imminent threat” that takes place between the police officer and child will likely be a part of a fuller interrogation on other matters, including any involvement of an alleged crime. Therefore, despite the inclusion of the aforementioned provision, any statement, including “information necessary to protect life or property from an imminent threat,” will be subject to a constitutional challenge.

Thank you for the opportunity to comment on H.B. No. 781 HD1.

# COMMUNITY ALLIANCE ON PRISONS

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## COMMITTEE ON JUDICIARY & HAWAIIAN AFFAIRS

Rep. David Tarnas, Chair

Rep. Gregg Takayama, Vice Chair

February 16, 2023

Room 325

2:00 PM

### **STRONG SUPPORT FOR HB 781 HD1 - MINOR'S RIGHT TO COUNSEL**

Aloha Chair Tarnas, Vice Chair Takayama and Members of the Committee!

My name is Kat Brady and I am the Coordinator of Community Alliance on Prisons, a community initiative promoting smart justice policies in Hawai'i for more than two decades. This testimony is respectfully offered on behalf of the 4,043 Hawai'i individuals living behind bars<sup>1</sup> and under the "care and custody" of the Department of Public Safety/Corrections and Rehabilitation on any given day. We are always mindful that 918 of Hawai'i's imprisoned people are serving their sentences abroad - - thousands of miles away from their loved ones, their homes and, for the disproportionate number of incarcerated Kanaka Maoli, far, far from their ancestral lands.

Community Alliance on Prisons appreciates this opportunity to testify in strong support of HB 781 HD1 that requires that when an officer has custody of a child under the age of eighteen for an alleged violation of law, the child shall have contact with legal counsel and, to the extent practicable, a parent or legal guardian before the child waives any constitutional rights and before any custodial interrogation.

Some persons under the age of 18 lack the ability to assert their rights when they are arrested. Coercion and fear can motivate a young person to go along with the story presented to them, when they don't understand their rights.

Community Alliance on Prisons supports this measure that a child under the age of 18 years has the right to consult with counsel before waiving his/her rights before any custodial interrogation.

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<sup>1</sup> Department of Public Safety, Weekly Population Report, February 6, 2023.

[https://dps.hawaii.gov/wp-content/uploads/2023/02/Pop-Reports-Weekly-2023-02-06\\_George-King.pdf](https://dps.hawaii.gov/wp-content/uploads/2023/02/Pop-Reports-Weekly-2023-02-06_George-King.pdf)



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## TESTIMONY IN SUPPORT OF HB 781 BEFORE THE JUDICIARY & HAWAIIAN AFFAIRS COMMITTEE

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*February 16, 2023*

Dear Chairman Tarnas and Members of the Committee:

Human Rights for Kids respectfully submits this testimony for the official record to express our support for HB 781. We are grateful to Representative John Mizuno for his leadership in introducing this bill and appreciate the Hawaii Legislature's willingness to address the important issue of protecting children's Constitutional and human rights when they come into contact with the criminal justice system.

Human Rights for Kids is a Washington, D.C.-based non-profit organization dedicated to the promotion and protection of the human rights of children. We use an integrated, multi-faceted approach which consists of research & public education, coalition building & grassroots mobilization, and policy advocacy & strategic litigation to advance critical human rights on behalf of children in the United States. A central focus of our work is advocating in state legislatures and courts for comprehensive justice reform for children consistent with the U.N. Convention on the Rights of the Child. We also work to inform the way the nation understands Adverse Childhood Experiences (ACEs) from a human rights perspective, to better educate the public and policymaker's understanding of the relationship between early childhood trauma and negative life outcomes.

Human Rights for Kids supports HB 781 because, if it is signed into law, it will ensure that children under 18 consult with legal counsel before they are able to waive their Miranda Rights or are interrogated by law enforcement. Protecting these children's rights will reduce incidents of false confessions by youth and better align Hawaii's policies with juvenile brain and behavioral development science.

### **High Rates of False Confessions**

Children are particularly susceptible to giving false confessions because they are not as sophisticated as adults when interacting with the criminal justice system and being interrogated by law enforcement.

Children under 16 rarely have an understanding of the consequences and implications of law enforcement interrogations on their due process rights and the impact they may have during trial. The chart below, from the National Registry of Exonerations at the University of Michigan,

highlights the incredibly high rates of false confessions that children under 16 gave during interrogation.

## **AGE AND MENTAL STATUS OF EXONERATED DEFENDANTS WHO CONFESSED**

**NATIONAL REGISTRY OF EXONERATIONS  
12/31/2017; N = 2,145**

<b>AGE AND MENTAL STATUS OF THE EXONERATED DEFENDANTS</b>	<b>PROPORTION WHO FALSELY CONFESSED</b>
<b>Under 18 Years Old at Time of Crime (71/188)</b>	<b>38%</b>
<i>16 and 17 year olds (42/141)</i>	<i>30%</i>
<i>14 and 15 years old (23/40)</i>	<i>58%</i>
<i>Under 14 years old (6/7)</i>	<i>86%</i>

As you can see, nearly all children under 14 who were later exonerated of having committed a crime had falsely confessed. Similarly, nearly 60 percent of 14 and 15-year-old children in the same situation gave a false confession.

One important aspect of HB 781 is safe-guarding children’s rights to ensure that no child in Hawaii falsely confesses to a crime he or she did not commit because they don’t fully understand how the justice system works or their Constitutional Rights.

### **Juvenile Brain & Behavioral Development Science**

Studies have shown that children’s brains are not fully developed. The pre-frontal cortex, which is responsible for temporal organization of behavior, speech, and reasoning continues to develop into early adulthood. As a result, children rely on a more primitive part of the brain known as the amygdala when making decisions. The amygdala is responsible for immediate reactions including fear and aggressive behavior. This makes children less capable than adults to regulate their emotions, control their impulses, evaluate risk and reward, and engage in long-term planning. This is also what makes children more vulnerable, more susceptible to peer pressure, being heavily influenced by their surrounding environment, and being more easily manipulated, brainwashed, or deceived.

Children’s underdeveloped brains, proclivity for irrational decision-making, and inability to understand the gravity of their decisions is why society does not allow children to vote, enter into contracts, work in certain industries, get married, join the military, or use alcohol or tobacco products. These policies recognize that children are impulsive, immature, and lack solid decision-making abilities until they’ve reach adulthood. It is for these same reasons that we also have policies in place to protect children everywhere – except in the criminal justice system. HB 781 will put in place greater protections for young children at the point of entry, to ensure they speak with legal counsel before they waive their Miranda Rights or are subject to interrogation.

Nelson Mandela once said, *“There is no keener revelation of a society’s soul than the way in which it treats its children.”* It is our responsibility as a society to safeguard and protect the

rights of our children. Nowhere is that more evident or needed than in the criminal justice system where the consequences of failing to do so can have a profound, life-altering impact. Children are not as sophisticated as adults when it comes to interacting with the justice system. They can easily be manipulated into confessing to crimes they did not commit. It is for these reasons, that HB 781 is critical. Under the bill, children will be required to consult with counsel before being interrogated or waiving their Miranda Rights. Failure on the part of the state to do so becomes a factor in a judge's determination on whether or not any statement made shall be admissible. The bill provides exceptions in the case of imminent threats.

This is a common-sense, reasonable bill to protect the rights of our most vulnerable citizens – our children. We strongly urge this committee to vote favorably upon HB 781 to ensure that we do everything we can to protect both the Constitutional and Human Rights of Hawaii's children. Thank you for your consideration.

With hope and love,

A handwritten signature in black ink, appearing to read 'James L. Dold', with a long horizontal flourish extending to the right.

James. L. Dold  
President & Founder  
Human Rights for Kids



**HB-781-HD-1**

Submitted on: 2/14/2023 2:30:46 PM

Testimony for JHA on 2/16/2023 2:00:00 PM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Testify</b>
Michael EKM Olderr	Individual	Support	Written Testimony Only

Comments:

I support this bill, children and minors cannot be afforded the chance to have their rights waived before they have a chance to defend themselves. Police tactics can be manipulative and have often times been shown to bring out false confessions. So we have to take measures to make sure that our children, guilty or not, have their rights protected.

**HB-781-HD-1**

Submitted on: 2/14/2023 4:03:48 PM

Testimony for JHA on 2/16/2023 2:00:00 PM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Testify</b>
Dana Keawe	Individual	Support	Written Testimony Only

Comments:

Support

**HB-781-HD-1**

Submitted on: 2/14/2023 7:20:37 PM

Testimony for JHA on 2/16/2023 2:00:00 PM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Testify</b>
Patricia Mcmanaman	Individual	Support	Written Testimony Only

Comments:

This bill ensures that children consult with legal counsel before they waive their Miranda Rights or are interrogated by law enforcement. Protecting these children's rights will reduce incidents of false confessions by youth and better align Hawai'i's policies with juvenile brain and behavioral development science.

Thank you,

Pat McManaman

**HB-781-HD-1**

Submitted on: 2/15/2023 10:38:25 AM

Testimony for JHA on 2/16/2023 2:00:00 PM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Testify</b>
Ruth Love	Individual	Oppose	Written Testimony Only

Comments:

This is placing an undue burden on law enforcement to refrain from questioning until council is present and/or parent(s) are present. This will delay crime investigation.

Questioning should be allowed by law enforcement of minors after they have been read their Miranda rights.

**HB-781-HD-1**

Submitted on: 2/15/2023 11:48:34 AM

Testimony for JHA on 2/16/2023 2:00:00 PM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Testify</b>
Dara Carlin, M.A.	Individual	Support	Written Testimony Only

Comments:

Stand in Support