



**TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
THIRTY-FIRST LEGISLATURE, 2022**

ON THE FOLLOWING MEASURE:

S.B. NO. 2092, RELATING TO CHILD TORTURE.

BEFORE THE:

SENATE COMMITTEE ON JUDICIARY

DATE: Friday, February 18, 2022

TIME: 9:30 a.m.

LOCATION: State Capitol, Via Videoconference

TESTIFIER(S): Holly T. Shikada, Attorney General, or
Cheuk Fu Lui, Deputy Attorney General

Chair Rhoads and Members of the Committee:

The Department of the Attorney General (Department) appreciates the intent of this bill, and provides the following comments.

The purpose of this bill is to enact a new offense of Child Torture in the Penal Code, by adding a new section to chapter 709, Hawaii Revised Statutes (HRS). One of the elements of the new offense is the intent to cause or risk of causing mental anguish to the minor.

The Department is concerned with the lack of definition for "mental anguish". The Supreme Court of Hawaii has concluded that "mental anguish" is synonymous with "emotional distress" and "mental distress". See *First Ins. Co. of Hawai'i, Ltd. v. Lawrence*, 77 Hawai'i 2, 7 n.9, 881 P.2d 489, 494 n.9 (1994). The purpose of the bill is to prevent the torturing of minors that would cause longlasting mental effects, and not mere emotional or mental distress. Therefore, a specific and a more heightened definition is needed. We recommend amending the bill by adding to the new section being added to chapter 709, HRS, either as a new subsection or as an addition to subsection (2), the definition of "mental anguish" as follows:

As used in this section, "mental anguish" means mental pain and distress that is more than mere worry, anxiety, vexation, resentment, embarrassment, or anger and is of such a nature, duration, and severity that it causes a substantial disruption in the minor's daily routine.

In addition, the Department is concerned with the wording of some of the enumerated acts constituting torture. We recommend amending subsection (2)(d), page 2, lines 4 through 6, to read as follows:

- (d) [Withholding from the minor adequate food, clothing, shelter, psychological care, physical care, medical care, or supervision;] Depriving the minor of necessary food, clothing, shelter, or medical care for a grossly unreasonable period of time;

As the term "adequate" can vary widely, the proposed amendments in subsection (2)(d) would ensure that the factfinder applies a reasonable person standard, and that a finding of guilt would be based on a gross deviation from that standard of providing necessities to a minor.

As to subsection (2)(f), we recommend the following changes, on page 2, lines 12 and 13:

- (f) Physically restraining the minor [under circumstances that expose the minor to the risk of bodily injury] in a manner that interferes substantially with the child's liberty in a grossly unreasonable manner that serves no legitimate parental purpose.

Similar to the proposed amendments to subsection (2)(d), the amendments in subsection (2)(f) would ensure that only gross deviations from a reasonable person standard be prosecuted. Furthermore, any physical restraint, whether warranted or not, could expose a minor to the risk of bodily injury, i.e., pain. The amendments would instead cover situations where minors are being unreasonably restrained, e.g., being confined in a space not suitable for a person.

The Department appreciates the opportunity to provide its comments.

STATE OF HAWAI‘I
OFFICE OF THE PUBLIC DEFENDER

**Testimony of the Office of the Public Defender,
State of Hawai‘i to the Senate Committee on Judiciary**

February 18, 2022

S.B. No. 2092: RELATING TO CHILD TORTURE

Chair Karl Rhoads, Vice Chair Jarret Keohokalole and Members of the Committee:

The Office of the Public Defender (OPD) respectfully opposes S.B. No. 2092, which would create a new class A felony offense dealing with child torture. While the OPD understands that the intent of the bill is to protect children from the type of heinous victimization recently described in the media, we believe that this bill is too broad in its scope.

Reckless state of mind

The language of this bill precludes any parent, legal guardian or person with recurring access to a minor from intentionally, knowingly or *recklessly* torturing a minor with the intent, knowledge or *reckless disregard* of causing mental anguish to the minor. Torture of the minor in sections (a), (b) and (c) includes the infliction or threat to inflict “bodily injury”, or threatening the minor with imminent death, or that another person or a pet will imminently be subjected to death, serious bodily injury or substantial bodily injury. The language in these sections is too broad and would promote unfair prosecution.

The main problem with this bill is the use of the “**reckless**” state of mind, because it creates the possibility of actions being interpreted or mis-interpreted as being torturous, as opposed to an easier understanding when such actions are committed with the purpose of being, or knowledge that they are torturous. This becomes a problem with notice to the public as to what is prohibited and what is not. It is easy to understand that one cannot intentionally or knowingly torture a child, but it becomes a much more troubling issue, when one is prohibited from *consciously disregarding the risk that their action may be in reckless disregard of a substantial and unjustifiable risk of causing mental anguish to a minor.*

For example, a parent using acceptable corporal punishment or the threat of such punishment to correct the unacceptable behavior of a child, can recklessly cause

mental anguish to that child, which could be prosecuted as torture under this measure. A discussion with children in the household of how children in other homes are punished or subjected to acceptable or even unacceptable corporal punishment can recklessly cause mental anguish to the child. Even a discussion about how the misbehaving actions of a child could endanger others, including pets, could be interpreted as recklessly making threats of death or serious or substantial injury which can recklessly cause mental anguish to a child.

“Mental Anguish”

The term “mental anguish” is not defined, and it is unclear as to whether an objective standard or a subjective standard is to be used. Thus, what might be thought of as a teaching moment, or a hope of creating an empathetic understanding for one child, might be considered torture for another. Furthermore, as any parent will tell you, the sensitivity of each child is different and changes with each stage of growth and socialization, and understanding those sensitivities is a learning process. Indeed, most children that are physically punished or threatened with physical punishment, for acceptable disciplinary reasons, suffer some level of mental anguish.

Overbroad

When one compares the specific language defining prohibitions in sections (d) and (e) to sections (a) through (c), it is clear that the language in sections (a) through (c) is too broad. An act, such as a parent striking a child out of frustration or anger, that is now appropriately punished as a misdemeanor offense as abuse of family household member, could now be considered child torture. An act, such as a parent threatening to harm the child, that is appropriately punished as a misdemeanor offense as terroristic threatening could now be considered child torture. Section (f) is very concerning as well. It could be considered child torture, if a child is restrained even to prevent harm to self or others, which exposes said child to “bodily injury,” (meaning any pain, illness, or impairment regardless of the duration), if said restraint recklessly causes mental anguish.

State v. Modica

Finally, because many of the acts sought to be prevented by this bill can be prosecuted under other statutes, the creation of the offense of child torture, as set forth in this bill, may potentially make it effectively impossible to convict a defendant of child torture under many of the circumstances contemplated. In State

v. Modica, 58 Haw. 249, 567 P.2d 420 (1977), the Hawai‘i Supreme Court held that where the same act under the same circumstances is punishable either as a felony or misdemeanor under either of two statutory provisions and elements of proof essential to either are exactly the same, conviction under the felony statute violates due process and equal protection. In other words, *if the same conduct by the defendant is punishable under either a greater or lesser offense, charging or convicting the defendant under the greater offense would violate the defendant’s rights to due process and equal protection.*

If this bill is enacted as written, a Modica violation may occur. Under this bill, a parent inflicting bodily injury upon a minor can be charged as a misdemeanor offense of abuse of family or household member or child torture. A parent threatening a minor of inflicting bodily injury, imminent death, or harming another person or pet can be charged with the misdemeanor offense of terroristic threatening 2nd degree or child torture. A parent withholding adequate food, clothing, shelter, psychological care, physical care, medical care, or supervision from the minor can be charged with the misdemeanor offense of endangering the welfare of a minor 2nd degree or child torture. Under Modica, it would violate the defendant’s due process and equal protection rights to be charged or convicted of the greater offense of child torture as the same conduct would be punishable under the lesser offense. As a result, child torture charges, under a variety of circumstances, would potentially violate Modica and be dismissed.

Conclusory remarks

The concept and intent of S.B. No. 2092 is laudable, but its current language needs to be greatly narrowed to prevent injustice. Furthermore, the acts sought to be prevented in this bill, can be prosecuted under a host of existing statutes.

Thank you for the opportunity to comment of S.B. No. 2092.

LATE

DEPARTMENT OF THE PROSECUTING ATTORNEY
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THE HONORABLE KARL RHOADS, CHAIR
SENATE COMMITTEE ON JUDICIARY
Thirty-First State Legislature
Regular Session of 2021
State of Hawai`i

February 18, 2021

RE: S.B. 2092 RELATING TO CHILD TORTURE.

Chair Rhoads, Vice-Chair Keohokalole and members of the Senate Committee on Judiciary, the Department of the Prosecuting Attorney of the City and County of Honolulu ("Department") submits the following testimony in strong support of S.B. 2092. This bill is part of the Department's 2022 legislative package, and we thank you for hearing it.

The purpose of S.B. 2092 is to create the new offense of child torture, to address incidents of child abuse that are of such a cruel or degrading nature that it would be expected to cause the child mental anguish. We believe this bill appropriately recognizes the need to protect a vulnerable segment of our community and closes a gap within, Hawaii's Penal Code.

Tragically, child abuse is an all-too-common occurrence across our nation, which spans all races and genders.¹ Out of all cases involving child maltreatment, it is estimated that 1-2% fall into the category of "child torture."² Currently, the only relevant references to "torture" found in Hawaii's Penal Code are in section 706-657, Hawaii Revised Statutes ("HRS"), as a sentencing enhancement for second degree murder,³ or HRS §711-1100, in relation the offense

¹ According to American Bar Association, Criminal Justice Section's Report to the House of Delegates, Resolution (January 2019), Child Protective Services agencies across the nation received 4.1 million referrals of suspected child abuse in 2016, involving approximately 7.4 million children; approximately 676,000 children were substantiated as victims of child abuse or neglect. *See* ABA Resolution 109D, page 2; internal citations omitted. Available online at: https://www.nccasp.org/files/ugd/81c210_dfa98423165c49db8c4970795dc40287.pdf; last accessed February 17, 2022.

² *Id.*, at 3.

³ In relevant part, HRS §706-657 states: "As used in this section, the phrase "especially heinous, atrocious, or cruel, manifesting exceptional depravity" means a conscienceless or pitiless crime which is unnecessarily torturous to a victim..."

of Cruelty to Animals in the First Degree.⁴ Despite these references—and despite the fact that at least thirty-three other states across the nation have criminal codes addressing both the physical and mental aspects of child torture—Hawaii continues to be without any child torture statute.

In 2019, the American Bar Association issued ABA Resolution 109D, urging all states to “amend existing laws or enact new laws to ensure that a felony charge exists for cases of child torture that does not result in severe physical injury.”⁵ While child torture, or “intrafamilial child torture” (“ICT”) has become a widely recognized category of child maltreatment, there is currently no uniform medical or legal definition of the term. Generally speaking, ICT differs from other forms of child abuse, in that it encompasses a more systematic or deliberate infliction of pain and suffering, which may last over a long or short period of time. Contrary to common belief, many of these cases do not result in severe *physical* injury to the child, but the long-term developmental, psychological, and behavioral ramifications in these cases can be devastating.

Because our statutes do not yet address the heinous and atrocious types of actions that are known to be inflicted upon some children—where such acts do not result in severe physical injury or death—S.B. 2092 aims to provide more protection for this vulnerable population, and address this unique form of child maltreatment and neglect that is occurring in our communities. The Department notes that this bill intentionally places greater emphasis on the mental anguish that would be expected to result from these types of conduct, rather than the specific nature of the conduct itself.

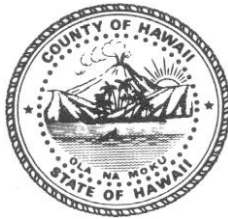
For all of the foregoing reasons, the Department of the Prosecuting Attorney strongly supports the passage of S.B. 2092. Thank you for this opportunity to testify on this matter.

⁴ In relevant part, HRS §711-1108.5(1)(a) states: “ A person commits the offense of cruelty to animals in the first degree if the person intentionally or knowingly...tortures, mutilates, or poisons or causes the torture, mutilation, or poisoning of any pet animal or equine animal resulting in serious bodily injury or death of the pet animal or equine animal.” As defined in HRS §711-1100: "Torture" includes every act, omission, or neglect whereby unjustifiable physical pain, suffering, or death is caused or permitted.”

⁵ American Bar Association, Criminal Justice Section’s Report to the House of Delegates, Resolution (January 2019). Available online at: https://www.nccasp.org/files/ugd/81c210_dfa98423165c49db8c4970795dc40287.pdf; last accessed February 17, 2022.

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OFFICE OF THE PROSECUTING ATTORNEY

TESTIMONY IN SUPPORT OF SENATE BILL 2092

A BILL FOR AN ACT
RELATING TO CHILD TORTURE

COMMITTEE ON JUDICIARY
Senator Karl Rhoads, Chair
Senator Jarrett Keohokalole, Vice Chair

Friday, February 18, 2022 at 9:30 a.m.
Via Videoconference

Honorable Chair Rhoads, Vice-Chair Keohokalole and Members of the Committee on Judiciary. The County of Hawai'i, Office of the Prosecuting Attorney submits the following testimony in support of Senate Bill 2092

The intent of this bill is to allow all counties across the State to specifically investigate and prosecute perpetrators who specifically and intentionally harm and torture some of the most vulnerable people in our community, our keiki. This bill will help close any caps in our current laws that may allow perpetrators to sometimes receive lenient sentences for these horrific and inhumane abuses. Most importantly, however, this bill is proactive and geared towards prevention of child homicides. This bill will help identify keiki before they are severely harmed at the hands of a parent or caregiver and will enable child welfare and prosecutors to intervene earlier to address the safety of the child and resource needs of the family.

The County of Hawai'i, Office of the Prosecuting Attorney remains committed to the pursuit of justice with integrity and commitment. The willful abuse of a child should not be tolerated nor should any child in our State have to endure this or any type of abuse. For the foregoing reasons, the, County of Hawai'i, Office of the Prosecuting Attorney Supports the passage of Senate Bill No. 2092. Thank you for the opportunity to testify on this matter.

SB-2092

Submitted on: 2/16/2022 6:54:45 PM

Testimony for JDC on 2/18/2022 9:30:00 AM

Submitted By	Organization	Testifier Position	Remote Testimony Requested
Marilyn Yamamoto	Testifying for Hawaii Family Advocacy Team	Support	No

Comments:

Senator Rhoads,

I received notification of this hearing 15 hours before the deadline to submit a testimony. I would have rather had some time to look at the Hawaii penal code, but since child abuse and its issues in the law are important to me, I will testify in support of this bill.

SB-2092

Submitted on: 2/14/2022 11:50:22 AM

Testimony for JDC on 2/18/2022 9:30:00 AM

Submitted By	Organization	Testifier Position	Remote Testimony Requested
Dara Carlin, M.A.	Individual	Support	No

Comments:

Stand in STRONG Support!

SB-2092

Submitted on: 2/15/2022 8:00:01 PM

Testimony for JDC on 2/18/2022 9:30:00 AM

Submitted By	Organization	Testifier Position	Remote Testimony Requested
Wendy Wilsey-Magers	Individual	Support	No

Comments:

I feel children must be protected from child endangerment at all cost. We must protect those that can not protect themselves

SB-2092

Submitted on: 2/15/2022 8:09:29 PM

Testimony for JDC on 2/18/2022 9:30:00 AM

Submitted By	Organization	Testifier Position	Remote Testimony Requested
david magers	Individual	Support	No

Comments:

I believe children should be protected from from child endangerment because children can't protect themselves.

SB-2092

Submitted on: 2/15/2022 10:25:45 PM

Testimony for JDC on 2/18/2022 9:30:00 AM

Submitted By	Organization	Testifier Position	Remote Testimony Requested
Johnnie-Mae L. Perry	Individual	Support	No

Comments:

Strongly SUPPORT SB 2092 Child Torture

Johnnie-Mae L. Perry

SB-2092

Submitted on: 2/16/2022 9:46:09 PM

Testimony for JDC on 2/18/2022 9:30:00 AM

Submitted By	Organization	Testifier Position	Remote Testimony Requested
tristin manuel	Individual	Support	No

Comments:

Aloha,

My name is Tristin, Kailua Resident and Native Hawaiian. I support this BILL. Please show that you care about Hawaii's Children by passing this into law. My children go to MHPCharter School a few feet away from Ariel Sellers (Isabella Kalua) home where she was being tortured, starved and beaten! We see her shrine every day, and when she went missing, my daughter who is 6 asked what happened to the little girl. I had to delicately explain how those people hurt her & now we cant find her. So When we drive pass we all look at the house, and she'll say "Hi Ariel, we'll find you'. my son goes to that charter school and hes 13, he said "i cant believe that was happening right there, we pass it everyday mom!". Children are so vulnerable, so fragile,she was only 6! She couldn't fight back, she was probably so scared,in pain, weak, suffering and wondering what did she do that was so wrong?! Why dont they love me?? We have to stand up for ALL Hawaii's Keiki! Stop giving these monsters Slap on the Wrist Plea Deals!!!! People who prey on the weak are sick fucks and must be punished to the maximum extent of the law. So please pass this bill into law.

Chair Karl Rhoads
Vice Chair Jarrett Keohokalole

Senate Committee on Judiciary

Testimony in support of SB2092 - Relating to Child Torture

Date: Friday, February 18, 2022

Time: 9:30 AM

Place: Via Videoconference

Aloha mai e Chair Rhoads, Vice Chair Keohokalole, and esteemed members of the Senate Committee on Judiciary,

Thank you for the opportunity to present testimony on SB2092 - Relating to Child Torture. My name is Jomarie Pua, I am a Junior Social Work student at the University of Hawaii at Manoa. I am testifying as an individual in **strong support** of this measure.

SB2092 is proposing an amendment by adding a new section in Chapter 709 of the Hawaii Revised Statutes that defines child torture, the penalty for committing it, and the classification of it being as a Class A crime. Every child is unique and special; they do not deserve to be mistreated by their own family or to live in an abusive environment with those close to them. This bill clarifies what constitutes child torture and defines what activities are considered abusive to children.

By passing this bill, children will be protected and will have the assurance that even if the perpetrator is a member of their direct family or someone close to them, they will not be exempted from legal action. It would give children an essential safe atmosphere where they are free from harm and violence.

As a UH undergrad, having my own children is still a long way off for me. But it does not mean that I should not be concerned about issues like this, because we were all children once, and we all know what it is like to be vulnerable in society. Children must be safeguarded, secured and cared for. As an adult, I firmly believed that we needed to show the next generation the value of aloha to our keiki because they are the hope and future of this aina.

Thank you for your consideration, and for the opportunity to testify on this bill.

Mahalo nui,
Jomarie Pua

SB-2092

Submitted on: 2/16/2022 11:28:11 PM

Testimony for JDC on 2/18/2022 9:30:00 AM

Submitted By	Organization	Testifier Position	Remote Testimony Requested
Shannonn	Individual	Support	No

Comments:

I am supporting SB2092 because of the brutal torture of 6 year old Ariel Sellers AKA Isabella Kalua that led to her murder.

SB-2092

Submitted on: 2/17/2022 12:22:02 AM

Testimony for JDC on 2/18/2022 9:30:00 AM

Submitted By	Organization	Testifier Position	Remote Testimony Requested
Maria RothTijerina	Individual	Support	No

Comments:

I hope this bill passes because I am sick and tired of seeing Hawaii become a safe haven for predators!

SB-2092

Submitted on: 2/17/2022 9:42:40 AM

Testimony for JDC on 2/18/2022 9:30:00 AM

Submitted By	Organization	Testifier Position	Remote Testimony Requested
Charles E. Murray III	Individual	Support	No

Comments:

Senators,

I write to you in support of SB2092, which I believe is an absolutely vital piece of legislation, that will strengthen the ability to prosecute and punish the most heinous acts committed against the children of this state, by the very people entrusted with their care, support, and development. I write to you as a private citizen on my own behalf, but informed from my experiences as a Deputy Prosecuting Attorney in Hawaii County. In over six years in my position I have become aware of a range of crimes committed against children, often by their parents or guardians. I have personally prosecuted dozens of such cases. Some of these cases have included: the chaining of a child to a lanai overnight for nearly a year; depriving a child of needed medical care or food; preventing a child from being able to use the bathroom; threatening the loss of a pet or relative; and physically harming a child, while telling them how worthless they are and that no one will believe them.

The worst case I have prosecuted involved the death of a six-year-old boy at the hands of his guardians, witnessed by his twin brother, following months of torture, both physical and mental, of him and his siblings. The defendants had been entrusted with the care and support of the children, but instead of nurturing them, they built a house of horrors. The children were beaten, choked, forced to beat and choke each other, forced to watch each other be beaten, had scalding water poured on them, and generally threatened physically and mentally on an almost daily basis. They were isolated and cut off from the rest of the world, and found their only reprieve from the torture at school, for those old enough to attend. And yet, aside from the charges related to the death of the six-year old, none of the other charges rose above the level of a C-level felony. Nothing else was applicable under the law. In the end, one defendant was convicted of Manslaughter and three counts of felony abuse (a C-level felony), while the other defendant was convicted of three counts of felony abuse and Hindering Prosecution in the First Degree (also a C-level felony). A C-level felony, with a maximum sentence of five years, was hardly just or appropriate given the level of trauma and pain inflicted on the surviving children. That pain and trauma is something they will carry with them for the rest of their lives, not just five years.

Child torture is very real, it occurs in our communities all too often. It devastates our future by fueling cycles of violence, drug addiction, learning disabilities, and mental health struggles. And as the law stands today, it is not taken nearly serious enough, nor is it punished in proportion to its horrendous impact on our society. For these reasons, I hope you will pass SB2092.

Thank you for taking the time to consider this letter.

Charles E. Murray III

February 17, 2022

Dear Senators,

I am writing in support of Senate Bill 2092 which tightens the legal protections for children who are vulnerable to abuse. A dear friend of mine is a prosecuting attorney, and from her I have heard of many cases in which endangered children are not identified until it is too late. Enabling prosecutors and child welfare officials to intervene earlier may help these children. Providing adequate resources to meet the needs of families may also help.

Thank you.

Kathy Ferguson
2154 Booth Road
Honolulu, HI. 96813

To: Chair Karl Rhoads, Vice Chair Jarrett Keohokalole, and Committee members of the Judiciary Committee

Date: Thursday February 17, 2022

In support for S.B. NO. 2092, Relating to Child Torture

Position: My name is Destiny-Rose Bataya, a resident of District 38 and District 17. I am testifying as a student of UH Mānoa training to become a social worker. I **strongly support** the bill S.B. NO. 2092 in relation to Child Torture.

Purpose: The purpose of this bill is to add a new section to Chapter 709, HRS, to establish the class A felony offense of child torture. The chapter that is added onto the bill entails redefining the persons who can be categorized as person who can commit the offense and what torture entails as well.

When one explains the definition of torture to a child, one may say that torture causes a great amount of physical or emotional pain internationally. However, TDCAA defined child torture as a longitudinal experience that can be characterized by at least two physical assaults or one extended assault. This can be seen in psychological maltreatment, and neglect resulting in prolonged suffering, and permanent disfigurement or dysfunction. Often, worse cases entail death. According to Barbara L. Knox, out of the about 93% of children were beaten and exhibited cutaneous injury, 21% had fractures. In addition, there were about 25 victims of isolation, as well as 61% who were physically restrained and 89% who are restricted from food or water. Within these many statistical backgrounds, there are about half of these victims having a history of prior referrals to CPS.

One case that comes to mind when reading this bill chapter addition, is the case of Isabella Kalua. As you may already know, Isabella Kalua was a missing six-year-old in which her foster parents tortured, deprived of food, and was kept in a cage. Isabella was kept in a dog cage in a bathroom, with her mouth and nose duct-taped repeatedly, and starved. Isabella will not be able to grow up to graduate from high school, decide on her college opportunities, and get married and have kids, if she decided. I believe that for this case, it would have been hard to identify the case of Isabella's torture is it has not been addressed, but with this chapter added, it can strongly help avoid another child like Isabella die in the hands of torture.

In conclusion to my testimony, I independently am urging the support in allowing the addition of this chapter to establish the class A felony offense of child torture. I urge the Judiciary committee to pass S.B. No 2092. Thank you for this opportunity to testify.

Resident of House District 38, and Senate District 17.