

JON N. IKENAGA
STATE PUBLIC DEFENDER

DEFENDER COUNCIL
1130 NORTH NIMITZ HIGHWAY
SUITE A-254
HONOLULU, HAWAII 96817

HONOLULU OFFICE
1130 NORTH NIMITZ HIGHWAY
SUITE A-254
HONOLULU, HAWAII 96817

APPELLATE DIVISION
TEL. NO. (808) 586-2080

DISTRICT COURT DIVISION
TEL. NO. (808) 586-2100

FAMILY COURT DIVISION
TEL. NO. (808) 586-2300

FELONY DIVISION
TEL. NO. (808) 586-2200

FACSIMILE
(808) 586-2222



STATE OF HAWAII
OFFICE OF THE PUBLIC DEFENDER

HAYLEY Y.C. CHENG
ASSISTANT PUBLIC DEFENDER

HILO OFFICE
275 PONAHAWAI STREET
SUITE 201
HILO, HAWAII 96720
TEL. NO. (808) 974-4571
FAX NO. (808) 974-4574

KONA OFFICE
75-1000 HENRY STREET
SUITE #209
KAILUA-KONA HI 96740
TEL. NO. (808) 327-4650
FAX NO. (808) 327-4651

KAUA'I OFFICE
3060 EIWA STREET
SUITE 206
LIHUE, HAWAII 96766
TEL. NO. (808) 241-7128
FAX NO. (808) 274-3422

MAU'I OFFICE
81 N. MARKET STREET
WAILUKU, HAWAII 96793
TEL. NO. (808) 984-5018
FAX NO. (808) 984-5022

Testimony of the Office of the Public Defender to the House Committee on Judiciary and Hawaiian Affairs re: H.B. 388: RELATING TO TORTURE

Chair David A. Tarnas, Vice-Chair Mahina Poepoe and Members of the Committee:

The Office of the Public Defender respectfully **opposes HB 388**.

HB 388 seeks to create new statutory prohibitions specifically related to torture, because of the belief that current criminal statutes do not adequately address this issue. The OPD believes that current statutory prohibitions dealing with kidnapping, assault, attempted murder, murder and felony abuse of family or household members, along with enhanced sentencing possibilities contained in HRS section 706 adequately address the issues outlined in this bill. Furthermore, some of the language contained in this proposed bill is too broad and can lead to confusion and prosecutorial abuses.

The proposed language and prohibitions of HB 388 listed in proposed subsections (1) (a)-(c) are all acts that are currently prohibited and more easily prosecuted under current criminal law and are all crimes for which enhanced sentencing can be used to insure adequate punishment. The OPD has specific concerns regarding subsection (1)(b), wherein a person who recklessly causes serious bodily injury or substantial bodily injury to another person (now punishable by 5 years in prison), will now face 20 years in prison if it can be proven that said person had also “previously engaged in a pattern or practice of physically abusing the other person”, with no clear definitions for “physically abusing”, “pattern” or “practice”. It is not clear if this proposed statutory language will require prior convictions for abuse of a household member, or just allegations of said abuse, which will have to be proven, along with the terms: “pattern” and “practice” beyond a reasonable doubt as elements of this new proposed offense. The OPD is concerned that certain cases of Abuse of a

Household Member could end up being charged as Class A felonies under the new title of Torture. Subsections (c) (iv)-(viii) are concerning, because without more specific definitions of prohibited conduct the discretion to arrest and prosecute will lie with law enforcement and the related prosecutorial office. For example: (iv) reads “Depriving the minor or vulnerable person of necessary food, water or clothing”. These prohibitions are too broad, specifically the definition regarding the term “necessary”. Does “necessary” mean necessary to survive, live happily or to be totally free of hunger or thirst? (vi) reads “forcing the minor or vulnerable person to remain in an area unsuitable for human habitation, such as areas where urine or feces are actively present”. Within this subsection there is no definition of “remain” nor is it clear whether the parent or guardian is requiring the minor to “live” in the affected area. What if a parent or guardian wishes for the child or vulnerable person to clean or learn to clean a bathroom that they have misused, and have said person “remain” for a period of time therein to appreciate the necessity to clean? (vii) reads “forcing a minor or vulnerable person to ingest mind-altering drugs”, without a definition as to what substances are prohibited, or for what purpose they are being forced upon the minor or vulnerable person. Numerous medications dealing with hyperactivity, anxiety disorders or other medical conditions could be considered mind-altering, but also necessary medical treatments. This bill does not contain any section which exempts conduct intended to properly treat, teach or discipline a child or vulnerable person.

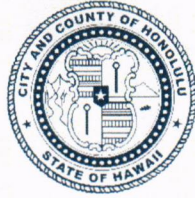
Subsection (2) states that “proof that the victim suffered pain is not an element of a violation of subsection (1)(c) of this offense”, thus making “torture” a strict liability crime (meaning that it can be prosecuted without proof of any physical or psychological harm). Furthermore, subsection (4) states that “Torture is a class A felony” punishable by 20 years of incarceration. The OPD believes that this would be too severe a penalty for some of the prohibited acts listed in HB 388. The OPD has specific concerns regarding as currently proposed.

The OPD understands that recently reported cases uncovered possible evidence that the prohibitions contained in HB 388 seem necessary to protect the vulnerable within our community, and to adequately punish those that commit such acts. However, it would be better to add some of the prohibited conduct contained within this proposed bill to the current definitions of assault, abuse of a household member and other currently defined crimes, instead of creating an entirely new section to prohibit such conduct. Furthermore, current penalties contained in HRS section 706 would adequately punish any individual that were to commit said crimes.

Thank you for the opportunity to comment on this measure.

HONOLULU POLICE DEPARTMENT
KA 'OIHANA MĀKA'I O HONOLULU
CITY AND COUNTY OF HONOLULU

801 SOUTH BERETANIA STREET • HONOLULU, HAWAII 96813
TELEPHONE: (808) 529-3111 • WEBSITE: www.honoluluupd.org



RICK BLANGIARDI
MAYOR
MEIA

ARTHUR J. LOGAN
CHIEF
KAHU MĀKA'I

KEITH K. HORIKAWA
RADE K. VANIC
DEPUTY CHIEFS
HOPE LUNA NUI MĀKA'I

OUR REFERENCE VL-BT

February 7, 2025

The Honorable David A. Tarnas, Chair
and Members
Committee on Judiciary and Hawaiian Affairs
House of Representatives
415 South Beretania Street, Room 325
Honolulu, Hawai'i 96813

Dear Chair Tarnas and Members:

SUBJECT: House Bill No. 388, Relating to Torture

I am Vince Legaspi, Captain of the Criminal Investigation Division of the Honolulu Police Department (HPD), City and County of Honolulu.

The HPD supports House Bill No. 388, Relating to Torture.


Currently, there is no clear legal definition of torture in the state, even though it should be explicitly prohibited. It is essential to distinguish between abuse and torture, as they differ in severity, and the penalties should reflect that distinction. In 2024, there were several cases involving the torture of children; however, existing laws provided no framework to charge and penalize the perpetrators appropriately. Passing this bill would establish charges that accurately reflect the severity of such acts, ensuring that offenders are held accountable for the magnitude of their crimes.

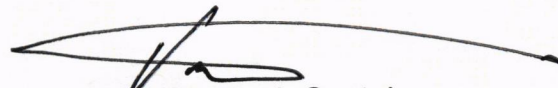
The HPD urges you to support House Bill No. 388, Relating to Torture.

Thank you for the opportunity to testify.

APPROVED:

Sincerely,


Arthur J. Logan
Chief of Police


Vince Legaspi, Captain
Criminal Investigation Division

KELDEN B.A. WALTJEN
PROSECUTING ATTORNEY

STEPHEN L. FRYE
FIRST DEPUTY
PROSECUTING ATTORNEY



655 KĪLAUEA AVENUE
HILO, HAWAII 96720
PH: (808) 961-0466
FAX: (808) 961-8908

64-1067 MAMALAHOA HWY
KAMUELA, HAWAII 96743
PH: (808) 887-3017
FAX: (808) 887-3016

74-675 KEALAKEHE PARKWAY
KAILUA-KONA, HAWAII 96740
PH: (808) 322-2552
FAX: (808) 322-6584

OFFICE OF THE PROSECUTING ATTORNEY

TESTIMONY IN SUPPORT OF HOUSE BILL NO. 388 WITH COMMENTS

**A BILL FOR AN ACT
RELATING TO TORTURE**

**COMMITTEE ON
JUDICIARY & HAWAIIAN AFFAIRS**
Representative David Tarnas, Chair
Representative Mahina Poepoe, Vice Chair

Friday, February 7, 2025 at 2:05 p.m.
Via Videoconference and
State Capitol Conference Room 016
415 South Beretania Street

Honorable Chair Tarnas, Vice-Chair Poepoe, and Members of the Committee on Judiciary & Hawaiian Affairs. The County of Hawai'i, Office of the Prosecuting Attorney submits the following testimony in support of House Bill No. 388, with comments.

In recent years, the Office of the Prosecuting Attorney for the County of Hawai'i has seen and prosecuted multiple cases involving child victims who suffered acts of torture, including at the hands of parents or guardians. In such cases, the heinous nature of the crime and its life-altering effects on the victims and the community may not be adequately reflected by the criminal charges and remedies previously available.

This bill was drafted with the intention to create a new class A felony offense of Torture. This new offense would serve as an enhanced charge for certain acts that might otherwise be charged as lesser offenses under the current penal code, and also would serve to punish some types of torture that current law does not adequately address. This bill reflects the need to hold individuals accountable for acts of torture, particularly when committed against minors or vulnerable persons.

The Office of the Prosecuting Attorney, County of Hawai'i, further adds the following comments as to possible ways to strengthen and clarify this bill:

- HB 388 could be strengthened by reducing the number of occasions of acts of torture that must be proven beyond a reasonable doubt under subsection (1)(c). The current bill requires three or more occasions within a period of two years. It can be difficult,

particularly where torture is ongoing or continuous over a long period of time, or where a child victim is involved, to clearly separate the history of torture into three or more distinct occasions. In addition, certain acts of torture such as branding or electrocution are especially heinous and deserve enhancement even when committed on a single occasion.

- HB 388 could be strengthened by increasing the lookback period under (1)(c). The current bill requires proof of three or more occasions within a limited lookback period of two years. For comparison, the general statute of limitations for a class A felony is six years, with additional time for certain offenses involving child victims. Increasing the lookback period beyond two years would give more flexibility to address cases involving a long history of concealed torture.
- HB 388 could be clarified by altering the language under subsection (1)(c)(viii) pertaining to exposure to the elements. The current bill requires proof that the victim was exposed to “extreme temperatures.” Other aspects of exposure to the natural elements may be more hazardous than temperature in Hawai‘i, especially precipitation, wind, or sun exposure. The Office of the Prosecuting Attorney, County of Hawai‘i, suggests that this language be modified to more generally criminalize “denying the minor or vulnerable person adequate shelter sufficient to protect the minor or vulnerable person from the natural elements.”
- HB 388 could be strengthened by adding the act of confining or restraining a child or vulnerable person within a cage to the acts specified under subsection (1)(c).
- HB 388 could be clarified by including a definition for “strangling” under subsection (1)(c)(i). Current law makes it a class C felony offense to intentionally or knowingly cause bodily injury to a family or household member by impeding the normal breathing or circulation of the blood by (a) applying pressure on the throat or the neck with any part of the body or a ligature; (b) blocking the nose and mouth; or (c) applying pressure to the chest, provided that infliction of visible bodily injury is not required to establish an offense. HRS § 709-906(9). Use of a similar definition would be appropriate here.

The County of Hawai‘i, Office of the Prosecuting Attorney remains committed to pursuing justice with integrity and commitment. For the foregoing reasons, the County of Hawai‘i, Office of the Prosecuting Attorney supports the passage of House Bill No. 388, with comments. Thank you for the opportunity to testify on this matter.

DEPARTMENT OF THE PROSECUTING ATTORNEY
KA 'OIHANA O KA LOIO HO'OPI'I
CITY AND COUNTY OF HONOLULU

ALII PLACE
1060 RICHARDS STREET • HONOLULU, HAWAII 96813
PHONE: (808) 768-7400 • FAX: (808) 768-7515 • WEBSITE: www.honoluluProsecutor.org

STEVEN S. ALM
PROSECUTING ATTORNEY
LOIO HO'OPI'I



THOMAS J. BRADY
FIRST DEPUTY PROSECUTING ATTORNEY
HOPE MUA LOIO HO'OPI'I

THE HONORABLE DAVID A. TARNAS, CHAIR
HOUSE COMMITTEE ON JUDICIARY AND HAWAIIAN AFFAIRS
Thirty-Third State Legislature
Regular Session of 2025
State of Hawai'i

February 4, 2025

RE: H.B. 388; RELATING TO TORTURE.

Chair Rhoads, Vice Chair Gabbard, and members of the Senate Committee on Judiciary, the Department of the Prosecuting Attorney for the City and County of Honolulu submits the following testimony in **strong support** of H.B. 388. This bill is part of the Department's 2025 legislative package, and we thank you for hearing it.

H.B. 388 defines and prohibits the offense of torture. More than 25 states have laws prohibiting torture.¹ But Hawai'i currently only punishes torture as an aggravating circumstance for murder.² Even application of that sentence has been substantially weakened because the prosecution must prove the torture inflicted was "unnecessary."³

Hawai'i lacks adequate laws protecting children and vulnerable adults from torture. In its 2020 report card on child torture laws, the National Center for Child Abuse Statistics and Policy awarded Hawai'i a failing grade.⁴ Under Hawai'i law, abuse of a family or household member is a misdemeanor.⁵ That may be an appropriate penalty for a parent who rashly beats a child in a moment of anger. But it is far too lenient a response to calculated, malignant, deliberate abuse.

¹ See, e.g., CAL. PENAL CODE § 206; CONN. GEN. STAT. ANN. § 53-20(a)(1), (b)(1); FLA. STAT. § 827.03(a); KAN. STAT. § 21-5602(a)(1); MICH. COMP. LAWS SERV. § 750.85; MISS. CODE ANN. § 97-5-39(a); OHIO REV. CODE ANN. § 2919.22(B)(2); S.D. CODIFIED LAWS § 26-10-153; WASH. REV. CODE 9A.36.120(1)(a)(ii)(B).

² HRS § 706-657.

³ *State v. Young*, 93 Hawai'i 224, 227, 234-38, 999 P.2d 230, 233, 240-44 (2000) (finding insufficient evidence of torture where Burger King employee was bludgeoned to death with a hammer).

⁴ *State Criminal Code Failures: 2020 Report & Report Card*, NATIONAL CENTER FOR CHILD ABUSE STATISTICS AND POLICY, available at <https://www.nccasp.org/fighting-child-torture>.

⁵ HRS § 709-906(5).

In drafting this bill, the Department examined statutes and judicial decisions from Hawai‘i and across the United States. We reviewed academic literature and case studies of torture, as well as a guide prepared for law enforcement by the FBI’s Behavioral Analysis Unit.⁶ Based on this study, we focused on present inadequacies in Hawai‘i law and the most urgent scenarios presenting heightened danger to victims.

The Department has prosecuted and continues to prosecute murder cases where victims have been tortured as defined by H.B. 388. To illustrate legal principles, we refer to published Hawai‘i cases. But when describing specific factual scenarios, we have selected cases from outside Hawai‘i to avoid extrajudicial comment on evidence in pending prosecutions.⁷

A. Not all forms of torture can be prosecuted as abuse of a family or household member, endangering the welfare of a minor, assault, or attempted murder.

All degrees of assault under the Hawai‘i Penal Code require proof of bodily injury.⁸ The same holds true for abuse of a family or household member⁹ and endangering the welfare of a minor.¹⁰ “Bodily injury,” in turn, “means physical pain, illness, or any impairment of physical condition.” But some methods of torture do not necessarily inflict bodily injury.

Likewise, torture often cannot be prosecuted as attempted murder. Attempted murder requires proof of the intent to kill.¹¹ But many torturers lack this homicidal goal: they want the victim alive precisely to elongate the suffering.¹²

⁶ Joy Lynn E. Shelton, James E. Hardie, Barbara L. Knox, & Taylor E. Burd, *Child Torture as a Form of Child Abuse: A Guide for Recognition and Response*, FEDERAL BUREAU OF INVESTIGATION (Aug. 2024).

⁷ Hawai‘i Rules of Professional Conduct Rule 3.6 (governing trial publicity)

⁸ See, e.g., HRS § 707-710(1)(a) (“A person commits the offense of assault in the first degree if the person intentionally or knowingly causes [s]erious bodily injury to another person[.]”); HRS § 707-711(1)(b) (“A person commits the offense of assault in the second degree if the person [r]ecklessly causes serious bodily injury to another[.]”); HRS § 707-712(1)(a) (“A person commits the offense of assault in the third degree if the person [i]ntentionally, knowingly, or recklessly causes bodily injury to another person[.]”).

⁹ See *State v. Basnet*, 131 Hawai‘i 286, 291-92, 299, 318 P.3d 126, 131-32, 139 (2013) (affirming jury instruction that physical abuse means causing bodily injury to another person).

¹⁰ HRS § 709-903.5 (except in cases of drug ingestion, endangering the welfare of a minor in the first degree requires proof of serious or substantial bodily injury); HRS § 709-904(1)(a) (except in cases of drug ingestion, endangering the welfare of a minor in the second degree requires proof of serious or substantial bodily injury).

¹¹ See *Briones v. State*, 74 Haw. 442, 450-52, 848 P.2d 966, 971-72 (1993).

¹² Cf. *Commonwealth v. Powell*, 956 A.2d 406, 415-16 (Pa. 2008) (defendant arguing that long history of battering six-year-old son proved he lacked intent to kill because he could have killed the child if he wanted during the prior beatings.).

Starvation illustrates both problems. Food and water deprivation is a common method of child torture.¹³ In one nationwide study of extreme child abuse, 89% of the child victims were starved and 79% were fluid-restricted.¹⁴ But starvation does not always cause pain,¹⁵ because hunger selectively inhibits inflammatory pain.¹⁶ So a requirement to prove “bodily injury” will thwart prosecution of deliberate starvation as assault, abuse of a family or household member, or endangering the welfare of a minor.

Similarly, torture by starvation cannot be prosecuted as murder or attempted murder in cases of intermittent feeding. In one North Carolina case,¹⁷ the defendant fed his four-year-old stepson only once a day, while deliberately allowing the boy waste away from malnutrition.¹⁸ On appeal, he argued that intermittent feeding proved he lacked the intent to kill.¹⁹ Starvation, he claimed, required complete deprivation of nutrition.²⁰ His argument did not succeed in North Carolina. But under our statute, intermittent feeding could defeat an attempted murder prosecution.

It is illegal to starve a dog in Hawai‘i.²¹ But it remains legal to starve a child. Only when hunger has ended the child’s life can the prosecution finally prove homicidal intent.

B. Hawai‘i does not permit prosecution of assault or physical abuse as a continuing offense.

A continuing offense aggregates the individual episodes of a crime as a unified course of conduct with a common state of mind. Theft is a classic example. In *State v. Shaw*,²² the defendant falsely padded tips on 105 customer receipts. Rather than hold dozens of individual trials on each theft, the law permitted aggregation of the thefts as a single continuing offense.²³

But Hawai‘i does not permit prosecution of assault as a continuing offense.²⁴ In other words, the prosecution must charge each assault as a distinct episode. Former Hawai‘i Supreme

¹³ See, e.g., *State v. Cheeks*, 858 S.E.2d 566 (N.C. 2021); *People v. Jennings*, 237 P.3d 474 (Cal. 2010);

¹⁴ Barbara L. Knox, et al., *Child Torture as a Form of Child Abuse*, 7 J. CHILD & ADOLESCENT TRAUMA 37, 39 (2014).

¹⁵ See, e.g., Karen Kaplan & Rosie Mestel, “Ceasing Food and Fluid Can Be Painless,” LOS ANGELES TIMES (Mar. 23, 2005), available at <https://www.latimes.com/archives/la-xpm-2005-mar-23-sci-schiavodeath23-story.html>.

¹⁶ Amber L. Alhadeff, et al., *A Neural Circuit for the Suppression of Pain by a Competing Need State*, 173 Cell 140, 141 (2018).

¹⁷ *State v. Cheeks*, 858 S.E. 2d 566, 567-73 (N.C. 2021)

¹⁸ *Id.* at 576

¹⁹ *Id.*

²⁰ *Id.*

²¹ HRS § 711-1109(1)(b) (“A person commits the offense of cruelty to animals in the second degree if the person intentionally, knowingly, or recklessly deprives a pet animal of necessary sustenance or causes that deprivation.”).

²² *State v. Shaw*, 150 Hawai‘i 56, 59, 497 P.3d 71, 74 (2021).

²³ *Id.* at 61-63, 497 P.3d at 76-78.

²⁴ *State v. Decoite*, 132 Hawai‘i 436, 441, 323 P.3d 80, 85 (2014) (categorically refusing to treat repeated abuse as a continuing offense).

Court Justice Pollack dissented from that holding.²⁵ He argued that the abuse of family or household members statute suggests a continuing offense.²⁶ As a matter of law, however, the majority disagreed.

For victims of torture, specific occasions may be impossible to parse. H.B. 388 would permit prosecution of these repeated assaults as a continuing offense. Prosecution of the continuing offense will permit evidence regarding the unified course of conduct. For similar reasons, Hawai‘i has long recognized that sexual assault of a child can be prosecuted as a continuing offense.²⁷

C. H.B. 388 identifies torture in circumstances indicating (1) the abuser exercises pervasive control over the victim and (2) the abuser can inflict greater harm to the victim.

This bill identifies specific aggravating acts and circumstances that heighten the suffering of victims and the cruelty of their torment. Torture is characterized by the pervasive control the abuser exercises over the victim. We identified three contexts of heightened danger to victims: (a) first-degree assault combined with forcible restraint or forcible restriction of movement;²⁸ (b) felony assault preceded by prior assaults;²⁹ and (c) specific forms of cruel and degrading treatment repeatedly inflicted against minors or vulnerable persons.³⁰

The first category recognizes that forcible restraint permits torturers to inflict greater injury on the victim. For example, restraint facilitates burning or scalding the victim, because flinching from the heat is not possible.³¹ The second category focuses on cases where intermittent assaults escalate to severe injuries. It allows prosecution of these crimes as continuing offenses. The third category focuses on persons vulnerable to repeated degrading treatment, especially children. Borrowing from California’s torture statute,³² this category does not require proof of bodily injury. It therefore covers cases such as electrocution, starvation, suspension, or forced ingestion of feces that currently cannot be prosecuted as assault.

²⁵ *State v. Decoite*, 132 Hawai‘i 436, 441 (Pollack, J., dissenting).

²⁶ *Id.* at 444-45.

²⁷ HAW. CONST. art. I, § 25; HRS § 707-733.6. *See also State v. Tran*, 154 Hawai‘i 211, 549 P.3d 296 (2024) (upholding constitutionality of the continuous sexual assault statute).

²⁸ H.B. 388, p. 1, ll. 15-16.

²⁹ H.B. 388, p. 2, ll. 1-4.

³⁰ H.B. 388, p. 2, l. 5 to p.3, l. 7.

³¹ *Burn Injuries in Child Abuse: Portable Guide to Investigating Child Abuse*, U.S. DEPARTMENT OF JUSTICE (June 2001), available at <https://www.ojp.gov/pdffiles/91190-6.pdf>.

³² CAL. PENAL CODE § 206 (“The crime of torture does not require any proof that the victim suffered pain.”)

D. H.B. 388 does not create strict liability. Nor does it eliminate standard defenses such as choice of evils or reasonable parental discipline.

Lastly, to dispense with some scarecrows. This bill does not create strict liability; it specifies a state of mind for each class of offenses.³³ Mistakes, accidents, and episodes of innocent automatism do not fall within the ambit of this law. Nor does the bill impair or abolish standard defenses available to all defendants.

Choice of evils, or the defense of necessity, remains a standard defense that the prosecution must exclude beyond reasonable doubt.³⁴ For example, although the law generally prohibits felons from possessing firearms,³⁵ Hawai'i courts recognize that a felon may temporarily use a gun in self-defense.³⁶ The law excuses a technical crimes when necessary to avoid a greater harm. That would not change with passage of H.B. 388. The prosecution must still disprove this defense beyond reasonable doubt.

The law also allows parents and guardians to use reasonable force for the care, discipline, and safety of minors or incompetents.³⁷ Hawai'i law provides robust protection to parents who use physical discipline on misbehaving children. For example, in *State v. Dowling*,³⁸ as punishment for repeated lying, the defendant punched his eleven-year-old son hard enough to leave bruises. The Intermediate Court of Appeals held that these injuries did not lead to extreme mental distress.³⁹ It also found the use of force reasonably related to the welfare of the child.⁴⁰ The legal defense of reasonable parental discipline is not changed by H.B. 388. The prosecution must still disprove this defense beyond reasonable doubt.

This bill is urgently needed to protect the most vulnerable members of our community from the very worst class of sadists. The Department strongly encourages passage of H.B. 388.

Thank you for the opportunity to testify.

³³ See HRS § 702-212; *State v. Gonzalez*, 128 Hawai'i 314, 321, 288 P.3d 788, 795 (2012) (explaining that strict liability requires plain legislative intent to eliminate state of mind requirement).

³⁴ HRS § 703-302.

³⁵ HRS § 134-7.

³⁶ *State v. Padilla*, 114 Hawai'i 507 (App. 2007).

³⁷ HRS § 703-309.

³⁸ 125 Hawai'i 406, 263 P.3d 116 (App. 2011)

³⁹ *Id.* at 411-12, 263 P.3d at 121-22.

⁴⁰ *Id.* at 413, 263 P.3d at 123.

HB-388

Submitted on: 2/5/2025 9:09:31 PM

Testimony for JHA on 2/7/2025 2:05:00 PM

Submitted By	Organization	Testifier Position	Testify
Jacob Wiencek	Individual	Support	Written Testimony Only

Comments:

Aloha Committee Members,

It is alarming that the state has maintained such lax laws concerning torture. Frankly, when I saw this bill was up for a hearing I was totally shocked. I congratulate the Committee on identifying this weakness in our laws and proposing a swift remedy.

Needless to say, I strongly encourage this Committee to SUPPORT this bill!

LEAVITT, YAMANE & SOLDNER

ATTORNEYS AT LAW
A LAW CORPORATION

PACIFIC GUARDIAN CENTER – MAUKA TOWER
737 BISHOP STREET, SUITE 1740
HONOLULU, HAWAII 96813

TELEPHONE: (808) 521-7474
FACSIMILE: (808) 521-7749

NICOLE KALAKAU
RAFAEL K. RENTERIA
E. KAUI YAMANE

JAMES T. LEAVITT, JR.
JOHN D. YAMANE
WOODRUFF K. SOLDNER
MICHAEL R. CRUISE

OF COUNSEL:
R. AARON CREPS
STUART M. KODISH

February 6, 2025

Dear Chair Tarnas, Vice Chair Poepoe and members of the House Committee on Judiciary and Hawaiian Affairs,

My name is Rafael Kiichiro Renteria and I am writing in support of HB388.

As an attorney with the personal injury law firm of Leavitt, Yamane & Soldner and as a former supervisor for the felony domestic violence and child abuse unit with the City and County of Honolulu's Department of the Prosecuting Attorney, I have had too many occasions in which I had to advocate for minors, vulnerable persons, and other victims of abuse. Many of those victims were subject to horrific conduct which would be encompassed by the proposed changes contained in HB388. Although many instances of torture have recently come to light in the news media, the sad reality is that far more cases work their way through the courts and go without being highlighted in the media and even more cases of torture slip through the cracks of our current penal code. The hope is that HB388 will shore up our criminal justice system and protect victims through appropriate punishment and deterrence.

In order to protect victims of abuse who cannot otherwise speak for themselves, and for the safety of our community, I ask that you pass HB388.

Sincerely,

Rafael K. Renteria

LEAVITT, YAMANE & SOLDNER

ATTORNEYS AT LAW
A LAW CORPORATION

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LEAVITT, YAMANE & SOLDNER

ATTORNEYS AT LAW
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