

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
Health and Human Services**

March 13, 2023

H.B. No. 781 HD2: RELATING TO CHILDREN

Chair San Buenaventura, Vice Chair Aquino, and Members of the Committee:

The Office of the Public Defender supports H.B. No. 781 HD2.

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.¹

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:

¹ 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 (last visited, February 15, 2023) (The discussion and data regarding false confessions by juveniles can be found on page 59-60).

(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).

Thank you for the opportunity to comment on H.B. No. 781 HD2.



HUMAN RIGHTS *for* KIDS

TESTIMONY IN SUPPORT OF HB 781 BEFORE THE HAWAII SENATE COMMITTEE ON HEALTH AND HUMAN SERVICES

March 13, 2023

Dear Chair San Buenaventura, Vice Chair Aquino, 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 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. 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 and around the world. Our work consists of: (1) Protecting children from harm; (2) Reforming justice systems to ensure we focus on rehabilitating children who come into conflict with the law; (3) Protecting immigrant, non-native children from harm and discrimination; (4) Promoting access to quality education for all children; and (5) Promoting healthy communities for children to ensure access to housing and health care.

Human Rights for Kids supports HB 781 because, if it is signed into law, it will ensure that children under 16 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

AGE AND MENTAL STATUS OF THE EXONERATED DEFENDANTS	PROPORTION WHO FALSELY CONFESSED
Under 18 Years Old at Time of Crime (71/188)	38%
<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 prefrontal 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 reached 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 to public safety.

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.

Sincerely,

Emily Virgin

Director of Advocacy & Government Relations

Human Rights for Kids

(405) 306-4294

evirgin@humanrightsforkids.org

COMMUNITY ALLIANCE ON PRISONS

P.O. Box 37158, Honolulu, HI 96837-0158

Phone/E-Mail: (808) 927-1214 / kat.caphi@gmail.com



COMMITTEE ON HEALTH AND HUMAN SERVICES

Sen. Joy SanBuenaventura, Chair

Sen. Henry Aquino, Vice Chair

Monday, March 13, 2023

Room 225 & Videoconference

1:00 PM

STRONG SUPPORT FOR HB 781 HD2 - MINOR'S RIGHT TO COUNSEL

Aloha Chair SanBuenaventura, Vice Chair Aquino 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 3,981 Hawai'i individuals living behind bars¹ and under the "care and custody" of the Department of Public Safety/Corrections and Rehabilitation on any given day. We are always mindful that 917 - 24.4% of the male imprisoned population² - 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 the opportunity to testify in strong support of HB 781 HD2 requiring 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, guardian, or legal custodian before the child waives any right against self-incrimination and before any custodial interrogation.

In re Gault, on May 15, 1967, the Supreme Court ruled that the state of Arizona violated the defendant's due-process rights under the Fourteenth Amendment, and that **Constitutional due-process rights apply to children as well as to adults**. Justice Abe Fortas's majority opinion, dubbed "the Magna Carta for juveniles" by Chief

¹ Department of Public Safety, End of Month Population Report, February 28, 2023.

https://dps.hawaii.gov/wp-content/uploads/2023/03/Pop-Reports-EOM-2023-23-28_George-King.pdf

² Why are 24.4% of Hawai'i's male prison population sent thousands of miles from home when the following prisons in Hawai'i have room here: Halawa is at 75%; Halawa Special Needs Facility is at 60%; Kulani is at 44%; Waiawa is at 53% of operational capacity.

Justice Earl Warren, stated that even in the case of juveniles, **“Due process of law is the primary and indispensable foundation of individual freedom.”**

In Justice Fortas’s opinion, this improvisational, *parens patriae* practice, no matter how well-intentioned, is the enemy of justice and individual rights. “[U]nbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure,” and “departures from established principles of due process have frequently resulted not in enlightened procedure, but in arbitrariness,” Fortas wrote.³

Children deemed eligible for legal counsel may choose to waive that right, but the [\[National Juvenile Defender Center\]](#) **NJDC argues that minors should be provided with counsel immediately upon arrest so they can make an informed, thoughtful decision to waive their rights. Forty-three states allow children to waive this right before actually speaking with a lawyer about the services they are waiving.** Scali said, “In many cases children are being asked by a judge, ‘Do you want a lawyer here today or should we just move forward?’ Our recommendation is let’s make sure the person having the conversation [about waiving right to counsel] with the child is a lawyer, who can say, ‘I’m here for you, this is what could happen today. Let’s walk into court together and the judge will ask you whether or not you’d like my assistance.”

Hawaii does not have a specific juvenile statute or rule addressing a youth’s waiver of counsel. Juvenile case law indicates that a youth may voluntarily, intelligently/knowingly waive his/her right to counsel if the youth fully understands the nature of the charges and potential consequences. *In re Doe*, 881 P.2d 533, 537 (Haw. 1994). The family court will determine the “extent of [his/her] understanding” by reviewing the “totality of the circumstances” pertaining to the youth’s waiver “with great care.” *In re Doe*, 881 P.2d 533, 537-38 (Haw. 1994). It is not necessary for a youth to consult with counsel before waiving his/her right. *In re Doe*, 881 P.2d 533, 537 (Haw. 1994).⁴

Community Alliance on Prisons urges the committee to pass this measure onto the Judiciary Committee so that our youth are not denied their due process rights for things they many not understand. The guidance of counsel is crucial to avoid the past mistakes that happened with cases such as the Central Park 5 youth who were all incarcerated for a crime they did not commit. Mahalo nui

³ The Children Being Denied Due Process, Most states fail to protect minors’ entitlement to counsel, By JESSICA LAHEY, MAY 22, 2017. <https://www.theatlantic.com/education/archive/2017/05/the-children-being-denied-due-process/527448/>

⁴ National Juvenile Defender Center, <https://njdc.info/practice-policy-resources/state-profiles/hawaii/>

HB-781-HD-2

Submitted on: 3/11/2023 4:16:45 PM

Testimony for HHS on 3/13/2023 1:00:00 PM

Submitted By	Organization	Testifier Position	Testify
Lisa Smith	Individual	Support	Written Testimony Only

Comments:

I support HB781, HD2, which will require the officer who as custody of a child under the age of 18, due to an alleged violation of law; that child shall have the right to contact legal counsel and a parent or guardian or legal custodian, before that child waives any right against self-incrimination.

Thank you for the opportunity to provide testimony in support of HB781, HD2.

HB-781-HD-2

Submitted on: 3/11/2023 4:48:15 PM

Testimony for HHS on 3/13/2023 1:00:00 PM

Submitted By	Organization	Testifier Position	Testify
Alan Garcia	Individual	Support	Written Testimony Only

Comments:

In support of HB781, HD2

The United Supreme court in its many decisions confirm that development and neurological science finds that the process of brain development continues into adulthood with dynamic changes throughout adolescence and well into adulthood.

Therefore, interrogations by law enforcement of a minor that require said child be advised of his or her rights to make a knowing, intelligent, well informed, and voluntary waiver of miranda rights should be allowed to consult with legal counsel before they waive their miranda rights.

This will protect these children's rights and reduce the incidents of false confessions by minors.

HB-781-HD-2

Submitted on: 3/12/2023 1:21:20 PM

Testimony for HHS on 3/13/2023 1:00:00 PM

Submitted By	Organization	Testifier Position	Testify
Jasmine Ramos	Individual	Support	Written Testimony Only

Comments:

Testimony in support of HB781, HD2

Both science and case law clearly affirm that minors do not have the complete understanding of laws until adulthood.

This bill will require the officer who has custody of a child under the age of 18, due to an alleged violation of law - will ensure that child shall have the right to contact legal counsel and a parent or guardian or legal custodian, before that child waives any right against self-incrimination.

This makes sense and will ensure child's rights are protected and reduce false confessions to law enforcement.

Thank you for the opportunity to provide testimony in support of HB781, HD2.

HB-781-HD-2

Submitted on: 3/12/2023 1:43:58 PM

Testimony for HHS on 3/13/2023 1:00:00 PM

Submitted By	Organization	Testifier Position	Testify
Tiffany Sims	Individual	Support	Written Testimony Only

Comments:

In support of HB781, HD2

According to a National study on exonerations of minors in the United States it was determined 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.

This bill ensures that minors are provided with legal counsel, parent(s), or a guardian, before waiving their miranda rights to a law enforcement officer.

This will protect these minors' rights while reducing false confessions by minors.