



**Office of the Public Defender
State of Hawaii
Timothy Ho, Chief Deputy Public Defender**



**Testimony of the Office of the Public Defender,
State of Hawaii to the Senate Committee on Judiciary and Labor**

March 18, 2016, 10:00 a.m.

H.B. No. 1668: RELATING TO THE USE OF A DOG IN JUDICIAL PROCEEDINGS

Chair Keith-Agaran and Members of the Committee:

This measure would permit, in certain circumstances, the use of a facility dog to provide emotional support to witnesses testifying in judicial proceedings. We believe that this measure will deny a defendant a right to a fair and impartial trial, and violates the Sixth Amendment of the United States Constitution, and Article I, Section 14 of the Constitution of the State of Hawaii.

This measure requires the trial court to make a finding that there is a compelling necessity for the use of a facility dog to facilitate the testimony of a vulnerable witness. The compelling necessity requirement is a result of current Hawaii case law which requires the State to establish a compelling necessity for a witness to testify with the accompaniment of a stuffed animal, victim witness counselor and sex abuse counselor. The Court has also found that the use of such aids unfairly bolsters the credibility of the witness. We also believe that the use of such aids unfairly prejudices the trier of fact, by invoking sympathy for the witness, and prejudice against the defendant.

In *State v. Palabay*, 9 Haw. App. 414 (1992), a twelve year old child was allowed to testify at trial while holding teddy bear. The Intermediate Court of Appeals of Hawaii held that absent any evidence to indicate a compelling necessity, it was error for the trial court to allow the child to testify while holding a teddy bear. In *State v. Rulona*, 71 Haw. 127 (1990), the trial court permitted an eight year old child to sit on the lap of a sexual abuse counselor while testifying at trial. The Hawaii Supreme Court held that the trial court abused its discretion by permitting the child to testify on the counselor's lap. It noted that most witnesses, even adults who appear in trial for the first time, are frightened. However, there was no evidence that the child could not testify without being seated on the counselor's lap. The final case is *State v. Suka*, 70 Haw. 472 (1989), where a Victim Witness Kokua advocate from the prosecutor's office was allowed stand next to the child witness with her hands on her shoulders while she testified. The Hawaii Supreme Court held that while the State established the need for the advocate to be present with the child while she testified, to allow her to place her hands on the child's shoulders unfairly bolstered her credibility, which resulted in denial of the defendant's right to a fair and impartial trial.

A criminal trial is inherently adversarial, and its participants, witnesses and attorneys, are sometimes placed in a stressful and angst filled environment. While it may be true that a dog, favorite doll or stuffed animal, or therapist or counselor would help a witness to overcome the anxiety and stress of testifying, it cannot be permitted to occur if it violates a defendant's constitutional right to a fair trial.

Sometimes, witnesses lie. Sometimes, defendants are falsely accused of a crime they did not commit. Sometimes, defendants are falsely accused by children. Sometimes, children falsely accuse adults of sexual assault or abuse. I have defended a few men who were falsely accused by children of sexual assault. Even armed with evidence which clearly established my client's innocence, there was always the chance that the child would be believed merely because of their age. In order to fairly evaluate the credibility of a witness, a jury must be able to observe the manner in which a witness testifies, how they react to the stress of cross-examination and make a judgment as to their credibility.

An instruction regarding credibility is given to jurors prior to deliberation. HAWJIC No. 19.2.9 states as follows:

It is your exclusive right to determine whether and to what extent a witness should be believed and to give weight to his or her testimony accordingly. In evaluating the weight and credibility of a witness's testimony, you may consider the witness's appearance and demeanor; the witness's manner of testifying; the witness's intelligence;

The witness's candor or frankness, or lack thereof; the witness's interest, if any, in the result of the case; the witness's relation, if any, to a party; the witness's temper, feeling, or bias, if any has been shown; the witness's means and opportunity of acquiring information; the probability or improbability of the witness's testimony; the extent to which the witness is supported or contradictory statements, whether in this hearing or at other times; and all other circumstances surrounding the witness and bearing upon his or her credibility.

Inconsistencies or discrepancies in the testimony of a witness, or between the testimonies of different witnesses, may or may not cause you to discredit such testimony. In weighing the effect of inconsistencies or discrepancies, whether they occur within one witness's testimony or as between different witnesses, consider whether they concern matters of importance or only matters of unimportant detail, and whether they result from innocent error or deliberate falsehood.

HAWJIC No. 19.2.10 also states as follows:

If you find that a witness has deliberately testified falsely to any important fact or deliberately exaggerated or suppressed any important fact, then you may reject the testimony of that witness except for those parts which you nevertheless believe to be true.

To permit a witness, especially a child witness, to testify while next to or holding a dog would prohibit a jury from properly evaluating the credibility of that witness. The dog would improperly bolster the credibility of the witness, and invoke sympathy and bias

toward that witness. The dog would also be a distraction, and not allow the trier of fact to properly observe the non-verbal communication being exhibited by the witness on the stand. A jury will be left to speculate on the reason why a witness was allowed to testify with a dog by his or her side. The inference that the defendant must be a really "bad" man cannot be overcome by any form of instruction by the court. To permit a witness to sit in the waiting room accompanied by a dog is one thing, but to testify with one by his or her side is another thing altogether. If a witness is having difficulty with stress while on the witness stand, it could be from reliving a heinous experience, but it could also be from being exposed as an untruthful person on cross-examination.

Thank you for the opportunity to provide testimony on this measure. The Office of the Public Defender respectfully opposes H.B. 1668.



The Children's Alliance
OF HAWAII, INC.

DATE: March 18, 2016

TO: The Honorable Gilbert S.C. Keith-Agaran, Chair
The Honorable Senator Maile S.L. Shimabukuro, Vice Chair
And the members of the Committee on Judiciary and Labor

FROM: Lisa Dunn, Executive Vice-President and Director of Programs
The Children's Alliance of Hawaii

RE: HB 1668, RELATING TO THE USE OF A DOG IN JUDICIAL
PROCEEDINGS.

POSITION: Strong Support

Chair Rhoads, Vice-Chair San Buenaventura, and Members of the
Committee on Judiciary:

Thank you for providing this opportunity to testify in strong support of HB
1668.

The Children's Alliance of Hawaii believes that each child is resilient, creative, courageous and strong and deserves every opportunity to thrive to their fullest potential. Children who have been traumatized by sexual abuse need special ongoing support to help them become healthy and successful adults. The Children's Alliance of Hawaii is dedicated to providing caring support for children who have been sexually abused, offering hope for the future.

We offer art and recreational therapeutic groups on Saturday for children who have been sexually abused. We have been extremely fortunate in that Pono, Honolulu's Courthouse Dog, needed a bit of volunteer work on Saturdays and so she comes in to our office. Pono was trained by Assistance Dogs of Hawaii and her primary handler is Dennis Dunn with Victim/Witness Kokua. Pono spends time cuddling the children, being a listening ear, and always participating as an enthusiastic group member! The children get to know Pono and Pono knows and recognizes each of them. Some of the children we serve feel lost in the foster care system and come in to group feeling as if they don't really matter to anyone; but Pono's greetings and wagging tail can turn their day around quite quickly.

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Pono also reassures the children that everything is alright and "normal." They often take their cues from her. She is calm, relaxed, content and generally happy. The children then model her same attitude. We have had several children who have gotten to know Pono through our services and then are later asked testify in court. These children invariably ask if they can have Pono come with them to court. They have told us outright that it won't be so scary if Pono is there, or that they know that they can trust Pono to be honest with them no matter what. Pono provides them with the comfort and security that they crave in a world that has turned their childhoods upside down.

I have also personally been present when Pono was with a child during the sentencing of her abuser. The abused child, her sibling and her family were all nervous wrecks in the waiting area. The family was emotionally divided as the abuser was also a family member. The waiting area was tense and no one was talking or looking at one another. But then Pono entered and the children's face's lit up. They were on the floor snuggling with Pono. Family members started asking questions about the dog and soon they were reminiscing about old family and childhood pets. For a brief time they were a united family again, enjoying each other's company.

They continued to pet and play with Pono as the case was called into court. They all rose and entered the courtroom. Pono joined them. The courtroom was quiet and respectful but some of the tension was gone. Only the courtroom staff, the child, her mother, and Pono's handler were really aware of Pono's presence. Pono quietly lay between the child and Pono's handler. The child would reach her hand down to pet Pono as she became more nervous to speak at the sentencing hearing. Pono remained with the girl, her true and quiet friend.

After the hearing ended and we left the courtroom Pono happily trotted along with the group. It was a somber time as the perpetrator was sentenced to serve many, many years. But all of the family took time to stop and thank Pono for coming. They all recognized that Pono had added that special animal quality that reminds us all of our own humanity.

I could tell you other stories – other child victims and witnesses of sexual abuse, abandoned children at court proceedings, and more. They all were helped through Pono's presence. We should strive to assure that vulnerable victims can readily access Pono or other trained facility dogs. We need to work towards making that access available without bureaucratic paperwork. All vulnerable witnesses should be able to have the benefit of a dog such as Pono during judicial proceedings.

Please pass HB 1668 out of your Committee.