

# **A REVIEW OF HAWAII'S DOMESTIC VIOLENCE AND ABUSE LAWS**

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## FOREWORD

This study was prepared in response to S.C.R. No. 184, S.D. 1 (1999). The Resolution directs the Legislative Reference Bureau to study Hawaii's domestic violence and abuse laws, including laws relating to protective orders and bail restrictions, in order to make recommendations to enhance victim protection and to provide for uniformity and consistency in domestic abuse laws. As part of the study, the Resolution requested the Bureau to consult with representatives from the following departments, agencies, and organizations: The Judiciary, the Department of the Attorney General, the State Public Defender, the office of the prosecuting attorney, and the police department in each of the counties, the Hawaii State Commission on the Status of Women, the Hawaii State Coalition Against Domestic Violence, Child and Family Services, Parents and Children Together, Domestic Violence Clearinghouse, and the Legal Hotline.

The Bureau wishes to extend its sincere appreciation to all who reviewed drafts of proposed statutory language or otherwise provided assistance and cooperation for this study. In particular, the Bureau wishes to thank the members of the Domestic Violence Working Group, convened by the Attorney General in response to H.C.R. No. 65, H.D. 1, and the Full Faith and Credit Committee, facilitated by the Department of the Attorney General, for permitting Bureau staff to attend their meetings and for providing valuable input for the Bureau's study. Finally, the Bureau wishes to acknowledge the assistance provided by Ms. Nancy Ralston, Criminal Justice Planning Specialist, Department of the Attorney General, and Mr. Tony Wong, Criminal Justice Planning Specialist, Department of the Attorney General.

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# FACT SHEET

## A REVIEW OF HAWAII'S DOMESTIC VIOLENCE AND ABUSE LAWS

### I. Highlights

Senate Concurrent Resolution No. 184 (1999) charged the Bureau with making recommendations for a recodification of Hawaii's domestic violence and abuse laws as necessary to enhance victim protection and provide for uniformity and consistency in these laws. The Bureau makes the following recommendations:

- (1) Undertake an extensive rewrite of chapter 586, Hawaii Revised Statutes (domestic abuse protective orders), as detailed in Chapter 2, that, among other things, would:
  - (a) Include “dating relationship” within the definition of “family or household member”;
  - (b) Extend the effective period of a protective order;
  - (c) Conform the penalties for violation of a protective order with those for violation of a temporary restraining order; and
  - (d) Add new statutory sections to ensure full faith and credit of foreign protective orders in compliance with federal law.
- (2) Maintain the authority to obtain a protective order under section 580-10(d), Hawaii Revised Statutes, in proceedings for annulment, divorce, or separation, but require that it comply with the requirements of chapter 586, as detailed in Chapter 3;
- (3) Restructure section 709-906, Hawaii Revised Statutes (abuse of family and household members), into a new part to chapter 709, as detailed in Chapter 4, that includes:
  - (a) Creation of a first (class C felony), second (misdemeanor), and third (petty misdemeanor) degree of the offense of abuse of family or household member;
  - (b) Authorization for a police officer to order a period of separation if the officer has reasonable grounds to believe abuse may be imminent;
  - (c) Creation of an enhanced sentencing provision for other felonies involving family or household members; and

- (d) Inclusion of the class C felony abuse of family or household member in the repeat offender statute.
- (4) Make conforming amendments, as detailed in Chapter 5, to:
  - (a) Section 604-10.5, Hawaii Revised Statutes (harassment), if the Legislature does not include “dating relationship” within the definition of “family or household member”; and
  - (b) Section 134-7(f).

Several of those representing the departments, agencies, and organizations with whom the Resolution requested the Bureau to consult expressed viewpoints conflicting with the Bureau’s foregoing recommendations. Accordingly, the Bureau, where appropriate, has included in the Study alternative proposed statutory language to accommodate these viewpoints.

## **II. Frequently Asked Questions**

- (1) Does the Study cover all protective orders?

Answer: No. Because of time constraints in completing this study, the Bureau limited the scope of the review of protective orders to those primarily viewed as relating to “domestic abuse” versus, for example, child abuse. Therefore, the study addresses protective orders found in: chapter 586, Hawaii Revised Statutes (domestic abuse protective orders); section 580-10(d), Hawaii Revised Statutes, providing for restraining orders in connection with the filing of a complaint for annulment, divorce, or separation, to prevent physical abuse, threats, or harassment; and section 604-10.5, Hawaii Revised Statutes, authorizing restraining orders to prevent harassment.

- (2) Does the Study recommend combining all domestic abuse protective orders into one chapter within the Hawaii Revised Statutes?

Answer: No. The Bureau proposes statutory language in the Study that would promote uniformity and consistency between the various domestic abuse protective orders, but concludes that there are cogent reasons for maintaining separate protective order provisions.

- (3) Do the proposed statutory amendments in the Study go beyond a “recodification” of the domestic abuse laws?

Answer: Possibly, if one relies upon a narrow sense of the term “recodification”. (A review of four standard dictionaries and one law dictionary failed to discover any actual definition of the term “recodification”.) However, given the volume of bills regularly introduced each legislative session to address problems relating to domestic violence and abuse laws or to strengthen their protections (over 100 such bills were introduced during the 1999 regular session alone), the Bureau believes it would be remiss in its duty to the Legislature if it submitted only a nonsubstantive rearrangement of statutory sections. Furthermore, discussions with legislative staff members indicated that a number of substantive bills relating to domestic abuse issues were held in committee to await the outcome of the Bureau’s Study. Such action hardly indicates that the Legislature expects a study merely recommending a nonsubstantive rearrangement of statutory sections. In addition, the Resolution, taken in its entirety, makes clear the Legislature’s intent that the Bureau conduct a “thorough review” of Hawaii’s domestic violence and abuse laws to identify the “pukas”, loopholes, and inconsistencies that prevent women and children from receiving the protection these laws are intended to afford. Consequently, in conducting this study, the Bureau focused more upon the Resolution’s phrasing “as necessary to enhance victim protection and provide for uniformity and consistency” in Hawaii’s domestic violence and abuse laws, than upon the single reference to recodification. Moreover, the Bureau notes that it would be difficult, if not impossible, to make recommendations to enhance victim protection and provide for uniformity and consistency without making substantive recommendations. Finally, the Bureau notes that that these are proposed statutory recommendations submitted by the Bureau at the request of the Legislature, which is free to take whatever action with respect to them that it deems advisable, including ignoring them.

- (4) Do the proposed statutory sections relating to full faith and credit resolve the issue completely?

Answer: No. Time constraints prevented a more thorough review of the issue; however, the Bureau included the proposed sections, based upon a proposed model act, to provide some minimal recognition that foreign protective orders are entitled to full faith and credit under Hawaii law. These provisions presently are under review by staff members of the Full Faith and Credit Project, Pennsylvania Coalition Against Domestic Violence. Their input may provide more effective language than that proposed in the Study.

(5) Does the Study address bail issues?

Answer: Yes, the study addresses the issue of bail amounts set for domestic violence cases (including abuse of family or household member cases and violations of protective orders); however, it does not recommend any statutory amendments with respect to the issue of bail.

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## **Chapter 1**

### **OBJECTIVE OF STUDY**

During the regular session of 1999, the Legislature adopted Senate Concurrent Resolution No. 184, S.D. 1 (hereafter referred to as S.C.R. No. 184), entitled “Requesting a Study of Hawaii’s Laws Relating to Domestic Violence”. (See Appendix A for full text of the resolution.) S.C.R. No. 184 requested the Legislative Reference Bureau (hereafter referred to as the Bureau) to study Hawaii’s domestic violence and abuse laws, including laws relating to protective orders and bail restrictions, in order to make recommendations to enhance victim protection and to provide for uniformity and consistency in domestic abuse laws.

### **Methodology of Study**

In conducting its study Bureau staff reviewed relevant statutory provisions, examined many of the domestic abuse bills introduced during the 1999 regular session, and researched domestic abuse laws from other states.

Bureau staff also solicited input from a number of sources with a stake in improving the laws relating to domestic abuse, including the judiciary, law enforcement community, victim advocates, and service providers. In addition, Bureau staff attended numerous meetings of the Domestic Violence Working Group (see Appendix B for listing of members) which was convened by the Attorney General in response to H.C.R. No. 65, H.D. 1, and the Full Faith and Credit Committee (see Appendix C for listing of members), also convened by the Attorney General. Bureau staff shared various working drafts of proposed recommended statutory amendments with the members of these groups and requested and received numerous comments. Bureau staff also attended a meeting of the Violence Against Women Act (VAWA) State Planning Committee (see Appendix D for listing of members), also convened under the auspices of the Attorney General, and shared drafted proposals with this group as well. Finally, copies of working drafts of proposed recommended statutory amendments were sent to the police chief and prosecuting attorney of each county and to the State Public Defender for comment.

### **Scope of Study**

Cases involving domestic violence may be charged under a variety of criminal statutes depending upon the circumstances of the case. The prosecutor determines the most appropriate charge, given the evidence against a suspect and the need to prove each element of a criminal offense beyond a reasonable doubt in order to obtain a conviction. For example, if a domestic violence case involves “substantial bodily injury” and the evidence shows it was committed with an intentional or knowing state of mind, it may be charged as assault in the first degree, which is a class B felony. Some cases involving domestic abuse also may be charged under sex abuse and child abuse statute cases. Furthermore, because domestic violence plays a role in a substantial number of homicide cases in Hawaii, some cases may be charged under the State’s murder or

manslaughter statutes. However, “domestic violence” is not an element of the criminal offense in any of these offenses. In other words, these offenses also may be committed against non-related acquaintances or strangers, as well as family or household members. Accordingly, this study will focus primarily on the following statutes that involve domestic violence as an element of the criminal offense: section 709-906, Hawaii Revised Statutes (abuse of family or household member) and sections 580-10(d), 586-4, and 586-11, Hawaii Revised Statutes (violations of protective orders).

Furthermore, S.C.R No. 184 specifically requested the Bureau to include in the study a review of those laws relating to protective orders and bail restrictions. Although protective orders are addressed in several different statutes, the Bureau, because of time constraints for completing this study, limited the scope of this review to those protective orders primarily viewed as relating to “domestic abuse” versus, for example, child abuse. Therefore, the study addresses protective orders found in: chapter 586, Hawaii Revised Statutes, entitled domestic abuse protective orders; section 580-10(d), Hawaii Revised Statutes, providing for restraining orders in connection with the filing of a complaint for annulment, divorce, or separation, to prevent physical abuse, threats, or harassment; and section 604-10.5, Hawaii Revised Statutes, authorizing restraining orders to prevent harassment.

## **Recommendations**

S.C.R. No. 184 charged the Bureau with making recommendations for a recodification of Hawaii’s domestic violence and abuse laws as necessary to enhance victim protection and provide for uniformity and consistency in these laws. Accordingly, the Bureau makes the following recommendations:

- Undertake an extensive rewrite of chapter 586, Hawaii Revised Statutes, as detailed in Chapter 2:
  - (1) Including “dating relationship” within the definition of “family or household member”;
  - (2) Extending the effective period of a protective order;
  - (3) Conforming the penalties for violation of a protective order with those for violation of a temporary restraining order; and
  - (4) Adding new statutory sections to ensure full faith and credit of foreign protective orders in compliance with federal law.
- Maintain the authority to obtain a protective order under section 580-10(d), Hawaii Revised Statutes, but require that it comply with the requirements of chapter 586, as detailed in Chapter 3;

*OBJECTIVE OF STUDY*

- Restructure section 709-906, Hawaii Revised Statutes, into a new part to chapter 709, as detailed in Chapter 4, that includes:
  - (1) Creation of a first (class C felony), second (misdemeanor), and third (petty misdemeanor) degree of the offense of abuse of family or household member;
  - (2) Authorization for a police officer to order a period of separation if the officer has reasonable grounds to believe abuse may be imminent;
  - (3) Creation of an enhanced sentencing provision for other felonies involving family or household members; and
  - (4) Inclusion of the class C felony abuse of family or household member in the repeat offender statute.
  
- Make conforming amendments, as detailed in Chapter 5, to:
  - (1) Section 604-10.5, if the Legislature does not include “dating relationship” within the definition of “family or household member”; and
  - (2) Section 134-7(f).

## Chapter 2

### ORDERS FOR PROTECTION

Senate Concurrent Resolution No. 184 requested the Bureau, in its study of Hawaii's domestic violence and abuse laws, to include a review of those laws relating to protective orders and to focus particularly on those laws in making recommendations for changes to enhance the protection of victims and provide for uniformity and consistency. This chapter focuses on chapter 586, Hawaii Revised Statutes, under which the majority of domestic abuse protective orders are obtained. This chapter contains a discussion of the individual sections of chapter 586, makes recommendations to enhance the protection of victims and provide for uniformity and consistency within the statutes, and presents proposed statutory language to effect the recommendations.

#### Section 586-1 Definitions

The scope of chapter 586 is directed at domestic abuse between family or household members, which is defined to include spouses or reciprocal beneficiaries, former spouses, or former reciprocal beneficiaries, persons who have a child in common, parents, children, persons related by consanguinity, and persons jointly residing or formerly residing in the same dwelling unit.<sup>1</sup> Although this is a fairly broad definition, a substantial number of commentators contended that it is insufficient to cover the growing number of domestic abuse situations occurring in dating relationships, particularly among teenagers and young adults who do not have a live-in relationship. Commentators cited estimates that as many as one-third of all high school and college age individuals may experience some form of violence in an intimate or dating relationship. In addition, many individuals in this age group are victims of emotional and verbal abuse, which is frequently a precursor to increasing physical violence.

Abuse victims who do not fall within the definition of family or household member under chapter 586 are restricted to filing for a restraining order in District Court under section 604-10.5, Hawaii Revised Statutes. Commentators cited several drawbacks for an abuse victim filing in this forum. First, the standard of proof is different. A petitioner under section 604-10.5 must meet a higher standard of proof than under chapter 586. Section 604-10.5(f) requires a showing of harassment by "clear and convincing proof" before the court will issue an injunction against the respondent. The standard of proof required by the Family Court under chapter 586 is a "preponderance of the evidence". Second, the types of orders the courts may issue are different. Each court may issue orders to prevent certain conduct and contact between the parties. However, the Family Court may issue additional orders aimed at preventing a reoccurrence of abuse, such as requiring the respondent to participate in domestic violence intervention services. This facilitates early intervention and consistent treatment, which is necessary to break the cycle of domestic violence. Such opportunity may not be realized in District Court because of the limited orders authorized under section 604-10.5. Finally, the judges in District Court are not as

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<sup>1</sup> Section 586-1, Hawaii Revised Statutes.

experienced as those in Family Court in recognizing the patterns of and responding to the dynamics of domestic abuse.

At least twenty-one states and the District of Columbia offer some protection in their family violence laws for persons abused within a “dating” relationship. The exact terms used are varied and include, among others: “intimate relationships”, “unmarried couple”, and “sexual relationship”. A substantial number of commentators urged that Hawaii’s domestic abuse laws be amended to include some form of a “dating relationship”. On the other hand, several other commentators objected to such an amendment, primarily on the basis that:

- The category does not involve persons who cohabit or exist in a family-type situation and, therefore, is inappropriate for Family Court jurisdiction; and
- Defining and proving a dating relationship is too difficult.

With respect to the first issue, the Bureau notes that the definition of family or household member already includes reciprocal beneficiaries and former reciprocal beneficiaries. The term reciprocal beneficiaries is defined under section 572C-3, Hawaii Revised Statutes, to mean “two adults who are parties to a valid reciprocal beneficiary relationship and meet the requisites for a valid reciprocal beneficiary relationship as defined in section 572C-4”. Under section 572C-4, the parties must:

- Be at least legal age and have given valid consent;
- Not be married or party to another reciprocal beneficiary relationship;
- Be legally prohibited from marrying one another; and
- Have signed a declaration of reciprocal beneficiary relationship as provided in section 572C-5.

This latter section provides that parties who meet the foregoing criteria may register their relationship as reciprocal beneficiaries by filing a signed notarized declaration of reciprocal beneficiary relationship with the director of health and the payment of a fee. Nowhere in chapter 572C is there any requirement that a reciprocal beneficiary relationship involve persons who cohabit or exist in a family-type situation. Accordingly, if reciprocal beneficiaries, as they are statutorily defined in chapter 572C, can be brought within the jurisdiction of the Family Court, it seems like only a small additional stretch of the Family Court’s jurisdiction to include dating relationships.

With respect to the second issue, the Bureau is cognizant of the difficulty of defining and proving a dating relationship for purposes of a criminal offense. Consequently, the Bureau does not recommend that dating relationship be added to the definition of family or household member for purposes of section 709-906, Hawaii Revised Statutes. However, the standard of proof for protective orders under chapter 586 is preponderance of the evidence, which is far less than proof beyond a reasonable doubt. Accordingly, the Bureau recommends that the definition

of family or household member be amended for purposes of the scope of protective orders under chapter 586 and section 586-1 be amended to include a narrow definition of “dating relationship”. The Bureau also proposes that a new section be added to chapter 586, requiring the court to make a written finding, based upon specific factors, that a “dating relationship” exists.

### *Legislative Reference Bureau’s Proposed Statutory Language*

“§586- Determination by court of dating relationship; written findings. If the petitioner alleges to be a family or household member on the basis that the petitioner is or was in a dating relationship with the respondent, the court shall make a determination whether the petition qualifies on this basis and include written findings in the order. In making this determination, the court shall consider the following factors:

- (1) The length of time the relationship has existed;
- (2) The nature of the relationship;
- (3) The frequency of interaction between the parties; and
- (4) If either party has terminated the relationship, the length of time elapsed since the termination.”

### *Legislative Reference Bureau’s Recommended Amendments*

**“§586-1 Definitions.** As used in this chapter:

“Dating relationship” means a romantic, courtship, or engagement relationship, often but not necessarily characterized by actions of an intimate or sexual nature, but does not include a casual acquaintanceship or ordinary fraternization between persons in a business or social context.

“Domestic abuse” means:

- (1) Physical harm, bodily injury, assault, or the threat of imminent physical harm, bodily injury, or assault, extreme psychological abuse or malicious property damage between family or household members; or
- (2) Any act [which] that would constitute an offense under section 709-906, or under part V or VI of chapter 707 committed against a minor family or household member by an adult family or household member.

“Extreme psychological abuse” means an intentional or knowing course of conduct directed at an individual that seriously alarms or disturbs consistently or continually bothers the individual[,] and that serves no legitimate purpose; provided that [such] the course of conduct would cause a reasonable person to suffer extreme emotional distress.

“Malicious property damage” means intentional or knowing damage to the property of another[,] person, without [his] the person’s consent, with an intent [to] thereby to cause emotional distress.

“Family or household member” means spouses or reciprocal beneficiaries, former spouses or former reciprocal beneficiaries, persons who have a child in common, parents, children, persons related by consanguinity, [and] persons jointly residing or formerly residing in the same dwelling unit[,] and persons in or formerly in a dating relationship.”



## **Section 586-2 Court Jurisdiction**

No substantive changes are recommended to this section.

“**§586-2 Court jurisdiction.** An application for relief under this chapter may be filed in any Family Court in the circuit in which the petitioner resides. Actions under this chapter shall be given docket priorities by the court.”

## **Section 586-3 Order for Protection**

With respect to the section title, the Bureau notes that the addition of the phrase “petition for order” to the section’s title would more accurately reflect the section’s subject matter. Also, the term “protective order” is used more frequently in chapter 586 than “order for protection”. For purposes of consistency and uniformity, only one term should be used.

Section 586-3(b)(1) authorizes a family or household member to file a petition for an “order of protection” on behalf of a family or household member who is a minor or incapacitated. Similarly, section 586-3(b)(2) authorizes a state agency to file such a petition on behalf of a person who is a minor, incapacitated, or physically unable to go to the appropriate place to complete or file a petition. Several commentators pointed out that a “dependent adult” should be added to those persons on whose behalf someone else may file.

Section 586-3(c) provides that petitions in Family Court for temporary restraining orders are to be made on forms provided by the court. The petition is to be accompanied by a separate affidavit made under oath or statement made under penalty of perjury containing specific facts and circumstances for which the petitioner is seeking relief. In actual practice, petitions are not accompanied by a separate affidavit made under oath. The Family Court’s pre-printed petition forms are designed so that the petitioner’s statement consists primarily of categorical items or options, regarding relationship status, types of domestic abuse and threats, and other background information. The petitioner indicates the specific facts and circumstances for which the petitioner is seeking relief primarily by checking-off or filling-in the blanks of the form. Therefore, commentators recommended that this section be amended to reflect actual practice.

## **Recommendation Summary**

Accordingly, the Bureau proposes the following amendments to section 586-3:

- (1) Add “Petition for order” to section title;
- (2) Change all references to “protective order”;
- (3) Add a reference in section 586-3(2) to include a dependent adult;

- (4) Delete the reference in section 586-3(3) to an affidavit made under oath; and
- (5) Clarify that the petition is made under penalty of perjury and contains allegations of specific acts of abuse from which the petitioner is seeking protection.

### ***Legislative Reference Bureau's Recommended Amendments***

“§586-3 [Order for protection.] **Protective order; petition for order.** (a) There shall exist an action known as a petition for [an] a protective order [for protection] in cases of domestic abuse.

(b) A petition for relief under this chapter may be made by:

(1) Any family or household [[]member[]] on [his or her] the member's own behalf or on behalf of a family or household member who is a minor, [or] who is incapacitated as defined in section 560:5-101(2), [or] who is a dependent adult as defined in section 346-222, or who is physically unable to go to the appropriate place to complete or file the petition; or

(2) Any state agency on behalf of a person who is a minor, [or] who is incapacitated as defined in section 560:5-101(2), [or a person] who is a dependent adult as defined in section 346-222, or who is physically unable to go to the appropriate place to complete or file the petition on behalf of that person.

(c) A petition for relief shall[:] be in writing and upon forms provided by the court[:] and shall allege, under penalty of perjury, that [a]:

(1) A past act or acts of abuse may have occurred[, that the threats];

(2) Threats of abuse make it probable that acts of abuse may be imminent[,]; or [that extreme]

(3) Extreme psychological abuse or malicious property damage is imminent[; and be accompanied by an affidavit made under oath or a statement made under penalty of perjury stating the specific facts and circumstances from which relief is sought].

(d) The family court shall designate an employee or appropriate nonjudicial agency to assist the person in completing the petition.”

### **Section 586-4 Temporary Restraining Order**

This section authorizes ex parte temporary restraining orders to provide protection to the petitioner until the respondent can be given notice and a hearing can be held on whether the court should grant a protective order. The section also indicates the specific acts from which the respondent may be enjoined and the penalties for violation of temporary restraining orders.

Present language in this section often refers to “either or both parties”, “the parties”, or “each other”. Commentators indicated that, although mutual restraining orders are generally discouraged, a few courts, relying upon this language, occasionally have granted mutual orders of protection to both the petitioner and the respondent. Commentators overwhelmingly urged

that it be clarified that chapter 586 requires a respondent to bring his or her own separate action by filing a petition for an order of protection and meeting the requirements under chapter 586 for a protective order. A person who is a respondent in an action and who wishes to obtain a protective order should not be permitted to “tack on” such a request to the petitioner’s action.

Much of the language in section 586-4(a) and (b) is duplicative and repetitive. For example:

- The specific acts that may be enjoined in the protective order are numerated at the end of both subsections (a) and (b); and
- Enjoined acts relating to contacting, threatening, or physically abusing the petitioner’s “household members” are separately listed, along with the petitioner’s family in subsection (b), in addition to being included in the two listings in subsections (a) and (b).

Also, the enjoined acts inconsistently refer in some places to “family or persons residing at the petitioner’s residence” and in other places refer to the defined term “family or household member”.

Under present law, violations of temporary restraining orders and protective orders under chapter 586 are misdemeanors. The court may sentence a person convicted of a misdemeanor to one or more of the following: up to a maximum of one-year imprisonment;<sup>2</sup> a fine up to \$2,000;<sup>3</sup> or probation for one year.<sup>4</sup> However, in the case of domestic abuse offenders, present law permits the court to impose up to two years of probation, rather than the one-year period generally permitted for misdemeanors.<sup>5</sup> As a condition of probation, the court may sentence a misdemeanor offender to a term of imprisonment not exceeding six months.<sup>6</sup> Persons violating temporary restraining orders under section 586-4(c), face mandatory domestic violence intervention and monetary fines. In addition, section 586-4(c)(1), imposes a mandatory minimum jail term of forty-eight hours for a first offense and section 586-4(c)(2) imposes a mandatory minimum jail term of thirty days for a second or subsequent offense. However, defendants in these cases are entitled to jury trials because of the maximum one-year jail term. Commentators maintained that jury trial convictions are difficult to obtain in the absence of a visible injury. In addition, several commentators expressed concern that the right to a jury trial for first offenses may contribute to a backlog of jury trial cases and, therefore, suggested that the maximum term of imprisonment in such cases be limited to thirty days.

Furthermore, section 586-4(c) also permits the court to suspend any jail sentence, except for those mandatory portions, upon certain conditions.<sup>7</sup> However, the conditions of the

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<sup>2</sup> Section 706-663, Hawaii Revised Statutes.

<sup>3</sup> *Id.* at section 706-640(1)(d).

<sup>4</sup> *Id.* at section 706-623(1)(c).

<sup>5</sup> *Id.* at section 706-623(1)(c).

<sup>6</sup> *Id.* at section 706-624(2)(a).

<sup>7</sup> Section 706-605(3), Hawaii Revised Statutes, permits the court to sentence a person convicted of a misdemeanor or petty misdemeanor to a suspended sentence.

suspension are listed in the alternative: the defendant must remain either “alcohol and drug-free, conviction-free, or complete court-ordered assessments or intervention”. Under the present wording, the defendant could complete court-ordered assessments or intervention, but not be conviction-free or not be alcohol and drug-free and still qualify for a suspended jail sentence. It is uncertain whether this was the original intent of the Legislature. Nonetheless, it seems much more logical that the defendant, in order to qualify for a suspended jail sentence, be required to be alcohol and drug-free, conviction-free, and complete court-ordered assessments or intervention.

### **Recommendation Summary**

Accordingly, the Bureau recommends the following changes to section 586-4:

- (1) Clarify that a temporary restraining order may be granted only to a petitioner who meets the requirements of chapter 586;
- (2) Move the location of the enumerated acts that may be enjoined to follow logically after the sentence in subsection (b) that states: “The order shall describe in reasonable detail the act or acts sought to be restrained.”;
- (3) Delete repetitive language from the end of both subsections (a) and (b);
- (4) Consolidate the enumeration of the enjoined acts to include prohibited acts relating to the petitioner’s family or household members;
- (5) Change the enjoined act “telephoning the petitioner” to “communicating in any manner, including: a written document; mail or other delivery service; telecommunications system; facsimile; or electronic mail transmission.”;<sup>8</sup>
- (6) Limit the maximum jail term for a first conviction of a violation of a temporary restraining order to “not more than thirty days”. The minimum mandatory jail term for a first offense would remain the present forty-eight hours and the minimum mandatory jail term for a second offense would remain thirty days, with the present maximum at one year; and
- (7) Change the “or” between the phrase “conviction-free” and “complete court-ordered assessments” to “and”.

### ***Legislative Reference Bureau’s Recommended Amendments***

**“§586-4 Temporary restraining order.** (a) Upon petition to a family court judge, [a] an ex parte temporary restraining order may be granted [without notice] to the petitioner to

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<sup>8</sup> Section 586-4(a)(3) and (b)(3), Hawaii Revised Statutes.

restrain [either or both parties] the respondent from contacting, threatening, or physically abusing [each other,] the petitioner, notwithstanding that a complaint for annulment, divorce, or separation has not been filed. The order may be granted to any person who, at the time [such] the order is granted, is a family or household member as defined in section 586-1 or who filed a petition on behalf of a family or household member. [The order shall enjoin the respondent or person to be restrained from performing any combination of the following acts:

- (1) Contacting, threatening, or physically abusing the petitioner;
  - (2) Contacting, threatening, or physically abusing any person residing at the petitioner's residence;
  - (3) Telephoning the petitioner;
  - (4) Entering or visiting the petitioner's residence; or
  - (5) Contacting, threatening, or physically abusing the petitioner at work.]
- (b) The family court judge may issue the ex parte temporary restraining order orally,

if the person being restrained is present in court. The order shall state that there is probable cause to believe that a past act or acts of abuse have occurred, or that threats of abuse make it probable that acts of abuse may be imminent. The order further shall state that the temporary restraining order is necessary for the [purpose] purposes of: preventing acts of abuse or preventing a recurrence of actual domestic abuse[.]; and [assuring] ensuring a period of separation of the parties involved. The order shall describe in reasonable detail the act or acts sought to be restrained. The order shall enjoin the respondent from performing any combination of the following acts:

- (1) Contacting, threatening, or physically abusing the petitioner;
- (2) Contacting, threatening, or physically abusing any family or household member of the petitioner's;
- (3) Communicating or attempting to communicate with the petitioner in any manner, including but not limited to: a written document, mail or other delivery service, telecommunications system, facsimile; or electronic mail transmission;
- (4) Entering or visiting the petitioner's residence; or
- (5) Contacting, threatening, or physically abusing the petitioner at work.

[Where] When necessary, the order may require [either or both of] the [parties involved] respondent to leave the premises during the period of the order[, and also may restrain the party or parties to whom it is directed from contacting, threatening, or physically abusing the applicant's family or household members]. The order shall not only be binding upon the [parties to the action,] respondent but also upon [their] the respondent's officers, agents, servants, employees, attorneys, or any other persons in active concert or participation with [them.] the respondent. [The order shall enjoin the respondent or person to be restrained from performing any combination of the following acts:

- (1) Contacting, threatening, or physically abusing the petitioner;
- (2) Contacting, threatening, or physically abusing any person residing at the petitioner's residence;
- (3) Telephoning the petitioner;
- (4) Entering or visiting the petitioner's residence; or
- (5) Contacting, threatening, or physically abusing the petitioner at work.]

(c) When a temporary restraining order is granted pursuant to this chapter and the respondent or person to be restrained knows of the order, a knowing or intentional violation of the restraining order is a misdemeanor. A person convicted under this section shall undergo

domestic violence intervention at any available domestic violence program as ordered by the court. The court additionally shall sentence a person convicted under this section as follows:

- (1) For a first conviction for violation of the temporary restraining order, the person shall serve a mandatory minimum jail sentence of forty-eight hours but not more than thirty days and be fined not less than \$150 nor more than \$500; provided that the court shall not sentence a defendant to pay a fine unless the defendant is or will be able to pay the fine; and
- (2) For the second and any subsequent conviction for violation of the temporary restraining order, the person shall serve a mandatory minimum jail sentence of thirty days and be fined not less than \$250 nor more than \$1,000; provided that the court shall not sentence a defendant to pay a fine unless the defendant is or will be able to pay the fine.

Upon conviction and sentencing of the defendant, the court shall order that the defendant immediately be incarcerated to serve the mandatory minimum sentence imposed; provided that the defendant may be admitted to bail pending appeal pursuant to chapter 804. The court may stay the imposition of the sentence if special circumstances exist.

The court may suspend any jail sentence, except for the mandatory sentences under paragraphs (1) and (2), upon condition that the defendant remain alcohol and drug-free, conviction-free, [or] and complete court-ordered assessments or intervention. Nothing in this section shall be construed as limiting the discretion of the judge to impose additional sanctions authorized in sentencing for a misdemeanor.

(d) Any fines collected pursuant to subsection (c) shall be deposited into the spouse and child abuse special account established under section 601-3.6.”

### **Section 586-5 Period of Order; Hearing**

This section deals with the period of the temporary restraining order and the hearing on the merits of the petition. As presently worded, the section:

- (1) Authorizes the granting of a temporary restraining order not to exceed ninety days;
- (2) Requires the court to hold a hearing on the merits of the petition within fifteen days of the granting of the temporary restraining order;
- (3) Permits the court to set a new hearing date, within the ninety-day limit, in the event service of the temporary restraining order has not been effected;
- (4) Requires the presence of all parties; and
- (5) Addresses the issue of specific relief that may be included in the protective order.

Several commentators maintained that, given a recent ruling by the Hawaii Intermediate Court of Appeals, the present language of section 586-5(b) must be interpreted as not permitting a continuance of a hearing date on the merits of the petition, past fifteen days of the granting of

the temporary restraining order.<sup>9</sup> Furthermore, commentators pointed out that a continuance is not automatically permitted even when service has not been effected; in such instance, the statute requires the court to calendar the case and set a new hearing date on the record. Commentators noted that this is an inefficient use of court resources and an unnecessary burden on the petitioner who must appear at court. Several commentators urged that the section be amended to permit a continuance, for good cause, past the fifteen days, but not to exceed ninety days. In addition, they suggested that, in situations when service has not been effected, the court be permitted to set a new date administratively.

Commentators also observed that section 586-5(b), in requiring the presence of both parties, precludes a default judgment if the respondent who was properly served fails to show. This is contrary to the procedure in most civil matters. In addition, a number of commentators pointed out that the phrase “requiring cause to be shown why the order should not continue” improperly shifts the burden of persuasion to the respondent; it should be up to the petitioner to show that sufficient cause exists for a protection order to issue. Finally, the last paragraph of the section, dealing with actual relief the court may order, is duplicated in section 586-5.5. This latter section, dealing with the protective order, is the more appropriate location for this provision, rather than the section dealing with the period of the order and the hearing.

### **Recommendation Summary**

Accordingly, the Bureau proposes that section 586-5(b) be amended to:

- (1) Permit a good cause continuance not to exceed ninety days;
- (2) Allow the court, if service has not been effected, to set a new date administratively, after giving notice to the petitioner and applicable police department charged with service of the order;
- (3) Delete the language requiring the presence of both parties;
- (4) Delete the phrase “requiring cause to be shown why the order should not continue”; and
- (5) Delete the last paragraph of section 586-5(b) dealing with actual relief the court may order.

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<sup>9</sup> *Ling v. Yokoyama*, No. 21891, slip op. at 6 (June 28, 1999) in which the Hawaii Intermediate Court of Appeals interpreted section 604.10.5, relating to temporary restraining orders and injunction against harassment, as requiring a hearing on the merits of the petition for an injunction within the fifteen day period. Section 586-5 contains language similar to section 604-10.5 with respect to holding a hearing on the petition within fifteen days.

### ***Legislative Reference Bureau's Recommended Amendments***

**“§586-5 Period of order; hearing.** (a) A temporary restraining order granted pursuant to this chapter shall remain in effect, at the discretion of the court, for a period not to exceed ninety days from the date the order is granted.

(b) On the earliest date that the business of the court will permit, but no later than fifteen days from the date the temporary restraining order is granted, the court, after [giving due] notice to all parties, shall hold a hearing on the application [requiring cause to be shown why the order should not continue.], unless a continuance is granted for good cause. In the event that service has not been effected, the hearing need not be held and the court administratively may set a new date for the hearing; provided that the date shall not exceed ninety days from the date the temporary restraining order was granted[. All parties shall be present at the hearing and may be represented by counsel.

The protective order may include all orders stated in the temporary restraining order and may provide further relief, as the court deems necessary to prevent domestic abuse or a recurrence of abuse, including orders establishing temporary visitation with regard to minor children of the parties and orders to either or both parties to participate in domestic violence intervention.], and the court shall notify the petitioner and the applicable police department charged with service of the order of the new hearing date.”

### **Section 586-5.5 Protective Order; Additional Orders**

Section 586-5.5(a) authorizes the court (after hearing relevant evidence and finding that the respondent has failed to show cause why the order should not continue) to issue a protective order for a period up to three years, to prevent domestic abuse or a recurrence of abuse. As with the previous section 586-5, commentators objected to the improper shift of the burden of persuasion to the respondent to show that sufficient cause exists for a protective order to issue.

Section 586-5.5(a) also states that the protective order may include all orders stated in the temporary restraining order and provide further appropriate relief, including establishing temporary visitation and custody with regard to minor children and ordering “either or both parties” to participate in domestic violence intervention services. Section 586-5.5(b) authorizes extension of a protective order for a period up to three years from the expiration of the preceding protective order.<sup>10</sup> The extended protective order may include all orders stated in the preceding order and provide further appropriate relief, including establishing temporary visitation and custody with regard to minor children and ordering “either or both parties” to participate in domestic violence intervention services.

A majority of commentators contended that the phrase “either or both parties” should be changed to “the respondent”, with respect to ordering participation in domestic violence intervention services, in recognition that the protective order should be addressed to the respondent, not the petitioner. Several commentators expressed concern that this language subjects a petitioner who fails to comply with such an order to the possibility of prosecution.

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<sup>10</sup> The issue of an extended protective order is discussed later in this chapter. See Alternatives A and B.



Moreover, they observed that this may discourage some abuse victims from seeking protective orders and thus is counter-productive to ensuring victim safety.

Several other commentators from one particular county, however, reported that, after experimenting with ordering and not ordering victim/petitioners to attend support groups or take minor children to programs designed for such children, they had reached the following conclusions:

- Victims were reluctant to participate unless ordered;
- After attending, most victims found the information obtained from such programs helpful; and
- Support exists within the county's domestic violence community for ordering such attendance by victim/petitioners or their minor children.

This group of commentators noted that there had not been any prosecution within the particular circuit for a petitioner failing to attend a support group or take a minor child to such a group because of the effort by "the whole system [to be] careful not to revictimize the victim". Finally, one commentator realistically pointed out that deleting the court's authority to order victims to victim support programs may have a negative impact on court funding of such programs.

The Bureau recognizes that there are strong considerations on both sides of this issue. On the one hand, there is concern for ensuring that abuse victims receive assistance from programs designed to help them develop safety plans and successfully leave abusive relationships and also that children in abusive relationships receive the benefit of programs designed specifically for them. On the other hand, there is concern that ordering victims to participate in programs will revictimize them by subjecting them to possible criminal prosecution and may discourage victims of abuse from seeking protective orders. The Bureau finds this latter concern persuasive, especially in view of S.C.R. No. 184's direction to consider the enhancement of protection for victims in its recommendations. Furthermore, limiting the court's order to the respondent is consistent with the Bureau's recommendation under section 586-4 that the temporary restraining order be granted only to a petitioner who meets the requirements of chapter 586. Nevertheless, the Bureau believes that there may be instances in which it may be in the best interest of minor children of the petitioner to order their attendance at domestic violence intervention programs specifically designed for them. This is somewhat analogous to the requirement that children of divorcing parents attend special programs.

Finally, several commentators suggested that in order to ensure that the protective orders are entitled to full faith and credit in foreign jurisdictions in compliance with the federal Violence Against Women Act,<sup>11</sup> the order should reflect the court's finding that the order is necessary to protect the victim and include language indicating the respondent was given reasonable notice and an opportunity to be heard.

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<sup>11</sup> 18 U.S.C. §2265.

## Recommendation Summary

The Bureau proposes the following amendments to section 586-5.5:

- (1) Delete the language relating to the respondent failing to show cause why the order should not continue;
- (2) Require the court to make findings on the record, and include these in the order, with respect to whether the respondent was given reasonable notice and an opportunity to be heard and the order is necessary to protect the victim;
- (3) Change the phrase “either or both parties” to “the respondent” with respect to ordering participation in domestic violence intervention services; and
- (4) Permit the court, based on written findings that it is in the minor child’s best interest, to order a minor child of the parties to participate in domestic violence intervention services designed specifically for minor children.

### *Legislative Reference Bureau’s Recommended Amendments*

“§586-5.5 **Protective order; additional orders.** (a) If, after hearing all relevant evidence, the court finds [that the respondent has failed to show cause why the order should not be continued and] that a protective order is necessary to prevent domestic abuse or a recurrence of abuse, the court may order that a protective order be issued for [such further] a period [as] of time the court deems appropriate, not to exceed three years from the date the protective order is granted. The court shall make findings on the record with respect to whether the respondent was given reasonable notice and an opportunity to be heard and the order is necessary to prevent domestic abuse or a recurrence of abuse. The findings shall be included in the protective order.

The protective order may include all orders stated in the temporary restraining order and may provide for further relief as the court deems necessary to prevent domestic abuse or a recurrence of abuse, including orders establishing temporary visitation and custody with regard to minor children of the parties and orders to [either or both parties] the respondent to participate in domestic violence intervention services. On the basis of written findings that it is in the best interest of the minor child, the court may order a minor child of the parties to participate in domestic violence intervention services that are designed specifically for minor children. If the court finds that the party meets the requirements under section 334-59(a)(2), the court [further] also may order that the party be taken to the nearest facility for emergency examination and treatment.

(b) A protective order may be extended for a period not to exceed three years from the expiration of the preceding protective order. Upon application by a person or agency capable of petitioning under section 586-3, the court shall hold a new hearing to determine whether the protective order should be extended. In making a determination, the court shall consider

evidence of abuse and threats of abuse that occurred prior to the initial restraining order and whether good cause exists to extend the protective order.

The extended protective order may include all orders stated in the preceding [restraining] protective order and may provide [such] any further relief [as] the court deems necessary to prevent domestic abuse or a recurrence of abuse, including orders establishing temporary visitation and custody with regard to minor children of the parties and orders to [either or both parties] the respondent to participate in domestic violence intervention services. The court may terminate the extended protective order at any time with the mutual consent of the parties.”

## **Section 586-5.6 Effective Date**

This section states the effective dates for temporary restraining orders and protective orders. It also requires the Judiciary to provide forms for the court to issue all temporary restraining orders, but not protective orders. None of the other sections under chapter 586 deal with the form of a protective order. Because this section concerns effective dates for both temporary restraining orders and protective orders, it is logical and promotes consistency to include protective orders as well as temporary restraining orders in the part of the section dealing with forms.

### **Recommendation Summary**

The Bureau proposes that section 586-5.6(c) be amended to:

- (1) Include “form of order” in the section title to accurately reflect the section’s contents; and
- (2) Require that the forms provided by the Judiciary be used to issue all protective orders as well as temporary restraining orders.

### ***Legislative Reference Bureau’s Recommended Amendments***

“**§586-5.6 Effective date[. The]; form of order.** (a) A temporary restraining order shall be effective as of the date of signing and filing; provided that if a temporary restraining order is granted orally in the presence of all the parties and the court determines that each of the parties understands the order and its conditions, if any, [then] the order shall be effective as of the date it is orally stated on the record by the court until further order of the court.

(b) Protective orders orally stated by the court on the record shall be effective as of the date of the hearing until further order of the court; provided that all oral protective orders shall be reduced to writing and issued forthwith.

(c) The judiciary shall provide forms [which will enable] that shall be used by the court to issue forthwith all temporary restraining orders [forthwith.] and all protective orders pursuant to this chapter.”

## Section 586-6 Notice of Order

This section addresses the manner of service of a protective order upon the respondent. The section allows either personal service or service by certified mail or, if the respondent is present at the hearing, the respondent is deemed to have sufficient notice of the order. The section also provides for service of an order by regular mail upon the Chief of Police of each county. This latter provision is redundant with section 586-10, which addresses service upon the Police Department.

Several commentators indicated that respondents often deny that they, in fact, are the respondent and refuse personal service of an order. These commentators expressed concern that, when this happens, the law enforcement officer attempting to serve the order has little recourse. These commentators suggested that the statute be amended to make refusal to accept personal service of an order issued under chapter 586 a petty misdemeanor. This would allow the law enforcement officer to detain or arrest the person and take the person to the appropriate police station, to verify the person's identification and effect service.

### Recommendation Summary

The Bureau recommends that section 586-6 be amended as follows:

- (1) By deleting the language relating to service by regular mail upon the Chief of Police;
- (2) By making refusal to accept personal service of an order issued under chapter 586 a petty misdemeanor; and
- (3) By changing the title of the section to reflect these changes.

### *Legislative Reference Bureau's Recommended Amendments*

**“§586-6 Service of order[.]; refusal to accept service; penalty.** Any order issued under this chapter shall either be personally served upon the respondent[,], or be served by certified mail[, unless]; provided that if the respondent was present at the hearing [in which case], the respondent shall be deemed to have notice of the order. [A filed copy of each order issued under this chapter shall be served by regular mail upon the chief of police of each county.] Refusal by a respondent to accept personal service of an order issued pursuant to this chapter is a petty misdemeanor.”

## Section 586-7 Assistance of Police in Service or Execution

Section 586-7 authorizes the court to order the police to assist the petitioner by serving an order issued under chapter 586 upon a respondent and to accompany the petitioner and assist in placing the petitioner in possession of the dwelling or residence. Several commentators observed that the section is vague as to actions a police officer may take to place the petitioner in possession of the dwelling or residence. For example, it is unclear from the face of the statute whether it permits a police officer to order the respondent to leave the premises in order to place the petitioner in possession of the dwelling or residence. In addition, one commentator noted that deputy sheriffs should be included in this section, because they sometimes act as process servers, even though this statute refers only to the police.<sup>12</sup> Other commentators were uncertain, however, whether deputy sheriffs serve protective orders under chapter 586. Furthermore, it is uncertain whether the authority of deputy sheriffs would extend to other actions authorized in this section.

### Recommendation Summary

The Bureau recommends that section 586-7 be amended to clarify that a police officer may take any lawful action necessary to place the petitioner in possession of the dwelling or residence, including ordering the respondent to leave the premises.

### *Legislative Reference Bureau's Recommended Amendments*

“**[[§586-7]] Assistance of police in service or execution.** When an order is issued under this chapter and upon request of the petitioner, the court may order the appropriate police department to [serve]:

- (1) Serve the order and related documents upon respondent [and to accompany];
- (2) Accompany the petitioner to the petitioner's dwelling or residence; and [assist in placing]
- (3) Take any lawful action necessary to place the petitioner in possession of the dwelling or residence[.], including ordering the respondent to leave the premises.”

## Section 586-8 Right to Apply for Relief

No substantive changes are recommended.

“**[[§586-8]] Right to apply for relief.** (a) A person's right to apply for relief shall not be affected by the person's leaving the residence or household to avoid abuse.

(b) The court shall not require security or bond of any party unless it deems **[[it]]** necessary in exceptional cases.”

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<sup>12</sup> Section 634-21, Hawaii Revised Statutes (permitting service of process in civil actions and proceedings).

## Section 586-9 Modification of Order

No substantive changes are recommended; proposed changes would advance uniformity and consistency by changing order for protection to protective order.

“~~[[§586-9]]~~ **Modification of order.** Upon application, notice to all parties, and hearing, the court may modify the terms of an existing protective order [for protection].”

## Section 586-10 Copy to Law Enforcement Agency

Section 586-10(a) provides that the court clerk, upon petitioner’s request, must forward a copy of any order granted pursuant to chapter 586 to the county police department. Section 586-10(b) requires the county Police Department to make information concerning an order available to other law enforcement officers in the same county.

Several commentators objected to the prerequisite that the petitioner must *request* the court to forward a copy of an order to the county police. They contend that a copy of the order should automatically be sent to the police, without predicating this upon the request of the petitioner who, more often than not, might be emotionally distressed, unfamiliar with court procedure, and without the benefit of counsel. Commentators also observed that the word “transmit” as opposed to “forward” had a broader connotation that would include facsimile and electronic mail transmissions. Finally, commentators noted that the statute should more appropriately bestow responsibility upon the “court”, not the “clerk of the court”. The Bureau notes that these amendments would reflect similar provisions added to section 604-10.5, Hawaii Revised Statutes, by Act 200, Regular Session of 1999.

## Recommendation Summary

The Bureau recommends that section 586-10 be amended as follows:

- (1) By deleting the phrases “upon request of the petitioner” and “shall be forwarded by the clerk”; and
- (2) By providing that the court “transmit” a copy of the order to the appropriate county police department.

## *Legislative Reference Bureau’s Recommended Amendments*

“~~[[§586-10]]~~ **Copy to law enforcement agency.** (a) [Upon the request of the petitioner,] Within twenty-four hours of the granting of any order for protection [granted] pursuant to this chapter [shall be forwarded by the clerk of], the court [within twenty-four hours] shall transmit a filed copy of the order to the appropriate county police department.

(b) Each county police department shall make available to other law enforcement officers in the same county, through a system for verification, information as to the existence and status of any order for protection issued pursuant to this chapter.”

### **Section 586-10.5 Reports by the Department of Human Services**

This section authorizes the employee or nonjudicial agency designated by the Family Court (see section 586-3(b)) to assist the petitioner to report cases involving allegations of domestic abuse involving a minor family or household member to the Department of Human Services. The Department is required to provide the Family Court with an oral or written report of the investigation’s progress on or before the scheduled hearing date.

Commentators pointed out that this section be should be consistent with section 586-3(b)(1) and (2), by including references to incapacitated persons and dependent adults in addition to minors. Commentators also noted that, for purposes of consistency with section 586-3(b)(2), the section should clarify that the Department of Human Services may intervene as a co-petitioner.

### **Recommendation Summary**

The Bureau recommends that section 586-10.5 be amended as follows:

- (1) Authorize reporting of cases involving an incapacitated person as defined in section 560:5-101(2) or dependent adult as defined in section 346-222; and
- (2) Clarify that the Department of Human Services may intervene as a co-petitioner pursuant to section 586-3(b)(2).

### ***Legislative Reference Bureau’s Recommended Amendments***

**“§586-10.5 Reports by the department of human services.** In cases where there are allegations of domestic abuse involving a [minor] family or household member[,] who is a minor or a person who is incapacitated as defined in section 560:5-101(2) or who is a dependent adult as defined in section 346-222, the employee or appropriate nonjudicial agency designated by the family court to assist the petitioner shall report the matter to the department of human services, as required under chapters 350 [and] or 587, and section 346-222, and shall further notify the department of the granting of the temporary restraining order and of the hearing date. The department of human services shall provide the family court with an oral or written report of the investigation's progress on or before the hearing date[.] and may intervene as a co-petitioner pursuant to section 586-3(b)(2).”

## Section 586-11 Violation of an Order for Protection

Under this section, a knowing or intentional violation of a protective order is a misdemeanor. Any convicted person is required to undergo domestic violence intervention. Imposition of other penalties are rather complicated and are dependent upon whether the violation is “in the nature of domestic abuse” or “in the nature of non-domestic abuse” and whether it is a first or second conviction for a violation of the same protective order. The penalty for a first violation:

- (1) If in the nature of non-domestic abuse, is a possible jail sentence for forty-eight hours and a fine of not more than \$150; or
- (2) If in the nature of domestic abuse, is a mandatory minimum jail sentence for forty-eight hours and a fine not less than \$150 but not more than \$500.

The penalty for a second violation of the same protective order:

- (1) That is in the nature of non-domestic abuse and occurs after a first conviction for a violation of the same order that was in the nature of non-domestic abuse, is a mandatory minimum jail sentence of not less than forty-eight hours and a fine of not more than \$250;
- (2) That is in the nature of domestic abuse and occurs after a first conviction for a violation of the same order that was in the nature of domestic abuse, is a mandatory minimum jail sentence of not less than thirty days and a fine not less than \$250 nor more than \$1,000;
- (3) That is in the nature of non-domestic abuse and occurs after a first conviction for a violation of the same order that was in the nature of domestic abuse, is a mandatory minimum jail sentence of not less than forty-eight hours and a fine of not more than \$250;
- (4) That is in the nature of domestic abuse and occurs after a first conviction for a violation of the same order that was in the nature of non-domestic abuse, is a mandatory minimum jail sentence of not less than forty-eight hours and a fine of not more than \$150.

The penalty for a subsequent violation of the same order that occurs after a second conviction for a violation of the same order (regardless of whether domestic or non-domestic in nature) is a mandatory minimum jail sentence of not less than thirty days and fine not less than \$250 nor more than \$1,000.

In all cases, the court may order a fine only if the defendant is able or will be able to pay the fine. Any fines collected are deposited into the spouse and child abuse special account established under section 601-3.6.



Upon conviction and sentencing, the defendant is to be incarcerated immediately to serve the mandatory minimum jail sentence, unless the defendant is appealing, in which case the defendant may be admitted to bail. Furthermore, the court may suspend any jail term imposed for either: a first conviction for a violation that is in the nature of non-domestic abuse; or a second conviction for a violation that is in the nature of non-domestic abuse and occurs after a first conviction for a violation of the same order that was in the nature of domestic abuse.

A few commentators supported the statute's distinction between domestic and non-domestic abuse, on the basis that violations "in the nature of domestic abuse" should be treated more harshly than those that constitute only a technical or unintentional violation and thus are "in the nature of non-domestic abuse".

However, a substantial number of commentators expressed strong concern over the statutory distinction made between domestic and non-domestic abuse violations and advocated that these distinctions be eliminated. Several commentators also noted that the statute's lack of a definition of "non-domestic abuse" is problematic and results in a number of "non-physical" actions being judged as "non-domestic abuse". Furthermore, they observed that many non-physical violations are nonetheless intentional acts committed by the respondent to "send a message" to the petitioner. For example, one commentator posited that:

- A communication by the respondent to the petitioner indicating the places where, or people with whom, the petitioner had recently been may be sending a message that the respondent "is watching" the petitioner; or
- Leaving something of the respondent's (such as slippers) outside the petitioner's residence while the petitioner is not home may be sending a message that the respondent can "get at" the petitioner anytime the respondent wants.

The majority of commentators maintained that any type of protective order violation indicates, at best, an unwillingness or inability on the part of a respondent to comply with a court order. Moreover, many commentators viewed violations in the nature of non-domestic abuse as a test or challenge to the authority of the court and, therefore, urged that such violations be treated equally seriously.

This issue between domestic abuse and non-domestic abuse violations of protective orders dates back to House Bill No. 570, enacted during the regular session of 1993 as Act 229, Session Laws of Hawaii 1993. The original purpose behind House Bill No. 570 was to:

- (1) Clarify that the state of mind required for conviction of a violation of a temporary restraining order is knowing or intentional; and
- (2) Require a mandatory minimum jail term of forty-eight hours for a first violation and a mandatory minimum jail term of thirty days for any subsequent violations

of a protective order, thus making the penalties consistent with those for violation of a temporary restraining order.<sup>13</sup>

The House Judiciary Committee observed in its Standing Committee Report, that protective orders “typically last much longer than temporary restraining orders and typically contain provisions not directly related to the protection of a party.”<sup>14</sup> In this reasoning, the House Committee appeared to rely upon testimony from the Office of the Public Defender that:

- Protective orders often contain “provisions not directly related to the protection of a party”, such as failure to attend court-ordered counseling or violations of specific dates or times for pick-up or drop-off relating to child visitation; and mandatory imprisonment for such violations “may not be appropriate”.<sup>15</sup> However, the Committee clearly considered mandatory terms appropriate for either violations in the nature of domestic abuse or repeated violations of an order.<sup>16</sup>

The House Judiciary Committee proposed the following penalty scheme in House Draft 1 to House Bill No. 570: for a first violation, forty-eight hours mandatory minimum jail only if it involved domestic abuse; for a second violation of the same order, forty-eight hours mandatory minimum jail or, if domestic violence is involved, mandatory minimum thirty days jail term; and subsequent violations, mandatory minimum thirty days jail term.<sup>17</sup>

The Senate Committee on Judiciary rejected any distinction between domestic or non-domestic abuse violations and amended the bill, reaffirming that “sanctions for violation of a temporary restraining order or a protective order should be equal”.<sup>18</sup>

The Conference Committee devised the present distinction in section 586-11 between domestic abuse violations and non-domestic abuse violations of protective orders. Noting that the term “domestic abuse” is defined in section 586-1, Hawaii Revised Statutes, to include “such actions as physical harm, bodily injury, assault, threats, etc.,” the Conference Committee stated its intent that the phrase “non-domestic abuse” cover “violations of the protective order other than those amounting to ‘domestic abuse.’”<sup>19</sup> As an example of a “non-domestic abuse” violation, the Committee gave the failure to comply with dates or times specified in a protective order for pick-up or drop-off relating to child visitation, “as long as [such violation] does not constitute ‘extreme psychological abuse’ under the definition of ‘domestic abuse.’”<sup>20</sup> Finally,

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<sup>13</sup> House Standing Committee Report No. 512 on House Bill No. 570, Journal of the House of the Seventeenth Legislature, 1993, at 1180.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> Senate Standing Committee Report No. 1121 on House Bill No. 570, Journal of the Senate of the Seventeenth Legislature, 1993, at 1182. The S.D. 1, thus provided for no mandatory minimum sentence for a first offense, but a 30-day mandatory minimum for a second or subsequent conviction.

<sup>19</sup> Conference Committee Report No. 226 on House Bill No. 570, Journal of the House of the Seventeenth Legislature, 1993, at 965.

<sup>20</sup> *Id.*

the Committee noted that it “[deemed] domestic abuse violations to be generally more serious than non-domestic abuse violations.”<sup>21</sup>

The contention that violations such as the failure to complete domestic violence intervention or comply with specific dates or times for pick-up or drop-off relating to child visitation are “not directly related to the protection of a party” may have been persuasive seven years ago. However, given today’s heightened awareness of the need to protect victims of domestic violence and the current understanding of what types of contact may leave a victim vulnerable to acts of domestic violence, it is questionable how persuasive policy makers would find such contentions today. At the very least, the Bureau believes the time is ripe for the Legislature to reconsider the policy rationale behind the distinction in section 586-11 between domestic abuse and non-domestic abuse violations.

### **Recommendation Summary**

The Bureau offers two different approaches to section 586-11. The second approach is the simplest and the one the Bureau favors. Its advantages become even more apparent, however, after a consideration of the first approach, which provides an in-depth discussion of the section and some of the difficulties with its present structure.

### **Approach No. 1**

If the Legislature determines to maintain the present distinction between domestic and non-domestic abuse violations in section 586-11, the Bureau recommends that the Legislature structure a more rational relationship between the various sanctions for violation of a protective order. One might expect a rationally structured penalty scheme to provide a graduated series of penalties that increase either with the severity of the criminal conduct or with the repetition of the criminal conduct. Under such a scheme, a conviction involving more egregious conduct should carry a greater penalty than a conviction involving less egregious conduct. Likewise, a subsequent conviction for violation of a protective order should carry a greater penalty (and certainly not a lesser one) than that imposed for a prior conviction.

Under the present sanctions there are several instances in which a person convicted of a second violation of the same protective order faces either the same penalties or (in one case) lesser penalties, as a person convicted of a first violation. For example, under section 586-11(a)(2)(C), a person convicted of a **non-domestic** abuse violation **after** a first conviction for a **domestic** abuse violation of the same order faces:

- The **same** jail sentence as a person with a **first** conviction of a **domestic** abuse violation (meaning there is no increase in jail time for the second offense); and

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<sup>21</sup> *Id.*

- A fine that is more than the minimum but **less** than the **maximum** for a **first** conviction of a **domestic** abuse violation.

Moreover, under section 586-11(a)(2)(D), a person convicted of a **domestic** abuse violation (which the legislature has determined to be “more serious”) following a **first** conviction for a **non-domestic** abuse violation of the same order (which may indicate an escalating level of violence) faces:

- The **same** jail sentence as a person with a **first** conviction of a **domestic** abuse violation (meaning there is no increase in jail time for the second offense); and
- A fine that is **equal** to that for a **first** conviction for a **non-domestic** abuse violation.

Such treatment of a second domestic abuse violation is not indicative of the Legislature’s view that domestic abuse violations are “more serious” than non-domestic abuse violations.

Finally, under section 586-11(a)(3), a person convicted of a third or subsequent violation (regardless of whether domestic abuse or non-domestic abuse) of the same order faces:

- The **same** jail sentence as a person with **two prior** convictions for a domestic abuse violation; and
- The **same** minimum and maximum range of monetary fine as a person with **two prior** convictions for a domestic abuse violation.

Another provision that appears inconsistent within the sentencing scheme, but was not raised by any of the commentators is the authority of the court to suspend *any* jail term imposed under section 586-11(a)(1)(A) and (2)(C) (thus presumably the mandatory portion also), provided the defendant remain alcohol and drug-free, conviction-free, or complete court-ordered assessments or intervention. Section 586-11(a)(1)(A) deals with a **first** conviction for a violation that is in the nature of **non-domestic** abuse. However, section 586-11(a)(2)(C) deals with a violation that is in the nature of **non-domestic** abuse after a **first** conviction for a violation that was in the nature of **domestic** abuse.<sup>22</sup>

The rationale for allowing a suspended sentence in section 586-11(a)(1)(A) may be that it is a first incident involving only non-domestic abuse. The same rationale does not apply with respect to section 586-11(a)(2)(C), in which the first conviction involves domestic abuse and the second conviction involves non-domestic abuse. While it might be argued that the conviction later in time was not as egregious because it was in the nature of non-domestic abuse, the fact remains that the person, after a first conviction involving domestic abuse, either was unable or unwilling to exert sufficient self-control to avoid violating a lawful court order or deliberately challenged the authority of the court. If the Legislature is inclined to be magnanimous to a

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<sup>22</sup> Prior to its amendment by Act 200, Session Laws of Hawaii 1999, section 586-11(a)(2)(C) specifically provided that the court could determine not to impose the mandatory forty-eight-hour jail term if the court found that the violation did not warrant a jail sentence and stated its reasons in writing.

person twice convicted of violation of a protective order, a more persuasive argument could be made for authorizing a suspended jail sentence under paragraph (2)(A) (two non-domestic abuse violations), rather than paragraph (2)(C). In fact, it appears illogical that a suspended jail sentence is permitted under paragraph (2)(C) but not (2)(A) or even (1)(B) (only one domestic abuse violation).

Furthermore, similar to section 586-4, the conditions for suspension of sentence are listed in the alternative: the defendant must remain either “alcohol and drug-free, conviction-free, or complete court-ordered assessments or intervention.”<sup>23</sup> Under the present wording, the defendant could complete court-ordered assessments or intervention, but not be conviction-free or not be alcohol and drug-free and still qualify for a suspended jail sentence. It would appear to be more logical and more consistent to require the defendant, in order to qualify for a suspended jail sentence, be alcohol and drug-free, conviction-free, *and* complete court-ordered assessments or intervention.

Accordingly, the Bureau recommends the following:

- (1) With respect to a first offense, include a maximum period of thirty days jail to preclude the possibility of a jury trial for first convictions, consistent with changes proposed to section 586-4;
- (2) With respect to a second offense:
  - (a) In the nature of non-domestic abuse after a first conviction for a non-domestic abuse violation, include a maximum period of thirty days jail to preclude the possibility of a jury trial;
  - (b) In the nature of domestic abuse after a first conviction for domestic abuse violation, change the minimum fine from “\$250” to “\$500”;
  - (c) In the nature of non-domestic abuse after a first conviction for a domestic abuse violation, changed the mandatory minimum jail sentence from not less than “forty-eight hours” to not less than “five days” and change the fine from not “more” than \$250 to not “less” than \$250 “nor more than \$500”;
  - (d) In the nature of domestic abuse after a first conviction for a non-domestic abuse violation, change the mandatory minimum jail sentence from not less than “forty-eight hours” to not less than “ten days” and change the fine from not “more” than \$150 to not “less than \$500 nor more than \$1,000”.
- (3) With respect to a third or subsequent offense, change the mandatory minimum jail sentence from not less than “thirty days” to not less than “forty-five days” and

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<sup>23</sup> Section 586-11(a), Hawaii Revised Statutes.

change the fine from “not less than \$250 nor more than \$1,000” to “not less than \$500 nor more than \$1,000”.

- (4) Permit a suspended jail sentence only with respect to section 586-11(a)(1)(A); and
- (5) Change the “or” between the phrase “conviction-free” and “complete court-ordered assessments” in section 586-11(a) to “and”.

***Proposed Amendment for Approach No. 1***

**“§586-11 Violation of [an] a protective order [for protection].** (a) Whenever [an] a protective order [for protection] is granted pursuant to this chapter, a respondent or person to be restrained who knowingly or intentionally violates the protective order [for protection] is guilty of a misdemeanor. A person convicted under this section shall undergo domestic violence intervention at any available domestic violence program as ordered by the court. The court additionally shall sentence a person convicted under this section as follows:

- (1) For a first conviction for violation of the protective order [for protection]:
  - (A) That is in the nature of non-domestic abuse, the person may be sentenced to a jail sentence of forty-eight hours but not more than thirty days and be fined not more than \$150; provided that the court shall not sentence a defendant to pay a fine unless the defendant is or will be able to pay the fine;
  - (B) That is in the nature of domestic abuse, the person shall be sentenced to a mandatory minimum jail sentence of not less than forty-eight hours but not more than thirty days and be fined not less than \$150 nor more than \$500; provided that the court shall not sentence a defendant to pay a fine unless the defendant is or will be able to pay the fine;
- (2) For a second conviction for violation of the protective order [for protection]:
  - (A) That is in the nature of non-domestic abuse, and occurs after a first conviction for violation of the same order that was in the nature of non-domestic abuse, the person shall be sentenced to a mandatory minimum jail sentence of not less than forty-eight hours but not more than thirty days and be fined not more than \$250; provided that the court shall not sentence a defendant to pay a fine unless the defendant is or will be able to pay the fine;
  - (B) That is in the nature of domestic abuse, and occurs after a first conviction for violation of the same order that was in the nature of domestic abuse, the person shall be sentenced to a mandatory minimum jail sentence of not less than thirty days and be fined not less than [\$250] \$500 nor more than \$1,000; provided that the court shall not sentence a defendant to pay a fine unless the defendant is or will be able to pay the fine;
  - (C) That is in the nature of non-domestic abuse, and occurs after a first conviction for violation of the same order that was in the nature of domestic abuse, the person shall be sentenced to a mandatory minimum jail sentence of not less than [forty-eight hours] five days and be fined not

[more] less than \$250[;] nor more than \$500; provided that the court shall not sentence a defendant to pay a fine unless the defendant is or will be able to pay the fine;

(D) That is in the nature of domestic abuse, and occurs after a first conviction for violation of the same order that is in the nature of non-domestic abuse, the person shall be sentenced to a mandatory minimum jail sentence of not less than [forty-eight hours] ten days and be fined not [more] less than [\$150;] \$500 nor more than \$1,000; provided that the court shall not sentence a defendant to pay a fine unless the defendant is or will be able to pay the fine;

(3) For any subsequent violation that occurs after a second conviction for violation of the same protective order [for protection], the person shall be sentenced to a mandatory minimum jail sentence of not less than [thirty] forty-five days and be fined not less than [\$250] \$500 nor more than \$1,000; provided that the court shall not sentence a defendant to pay a fine unless the defendant is or will be able to pay the fine.

Upon conviction and sentencing of the defendant, the court shall order that the defendant immediately be incarcerated to serve the mandatory minimum sentence imposed; provided that the defendant may be admitted to bail pending appeal pursuant to chapter 804. The court may stay the imposition of the sentence if special circumstances exist.

The court may suspend any jail sentence under [subparagraphs] paragraph (1)(A) [and (2)(C)], upon condition that the defendant remain alcohol and drug-free, conviction-free, [or] and complete any court-ordered assessments or intervention. Nothing in this section shall be construed as limiting the discretion of the judge to impose additional sanctions authorized in sentencing for a misdemeanor offense. All remedies for the enforcement of judgments shall apply to this chapter.

(b) Any fines collected pursuant to subsection (a) shall be deposited into the spouse and child abuse special account established under section 601-3.6.”

## **Approach No. 2**

Approach No. 2, which the Bureau favors over Approach No. 1, eliminates distinctions between domestic abuse and non-domestic abuse violations and treats all violations of a protective order in the same manner, similar to the penalties for a violation of a temporary restraining order. The proposed language also reflects the Bureau’s proposed amendments to section 586-4(c), particularly with respect to a maximum jail term of thirty days for a first offense.

### ***Proposed Amendment for Approach No. 2***

“§586-11 **Violation of [an] protective order [for protection].** (a) Whenever [an] a protective order [for protection] is granted pursuant to this chapter, a respondent or person to be restrained who knowingly or intentionally violates the protective order [for protection] is guilty of a misdemeanor. A person convicted under this section shall undergo domestic violence

intervention at any available domestic violence program as ordered by the court. The court additionally shall sentence a person convicted under this section as follows:

- (1) For a first conviction for violation of the order for protection:
  - (A) That is in the nature of non-domestic abuse, the person may be sentenced to a jail sentence of forty-eight hours and be fined not more than \$150; provided that the court shall not sentence a defendant to pay a fine unless the defendant is or will be able to pay the fine;
  - (B) That is in the nature of domestic abuse, the person shall be sentenced to a mandatory minimum jail sentence of not less than forty-eight hours and be fined not less than \$150 nor more than \$500; provided that the court shall not sentence a defendant to pay a fine unless the defendant is or will be able to pay the fine;
- (2) For a second conviction for violation of the order for protection:
  - (A) That is in the nature of non-domestic abuse, and occurs after a first conviction for violation of the same order that was in the nature of non-domestic abuse, the person shall be sentenced to a mandatory minimum jail sentence of not less than forty-eight hours and be fined not more than \$250; provided that the court shall not sentence a defendant to pay a fine unless the defendant is or will be able to pay the fine;
  - (B) That is in the nature of domestic abuse, and occurs after a first conviction for violation of the same order that was in the nature of domestic abuse, the person shall be sentenced to a mandatory minimum jail sentence of not less than thirty days and be fined not less than \$250 nor more than \$1,000; provided that the court shall not sentence a defendant to pay a fine unless the defendant is or will be able to pay the fine;
  - (C) That is in the nature of non-domestic abuse, and occurs after a first conviction for violation of the same order that was in the nature of domestic abuse, the person shall be sentenced to a mandatory minimum jail sentence of not less than forty-eight hours and be fined not more than \$250; provided that the court shall not sentence a defendant to pay a fine unless the defendant is or will be able to pay the fine;
  - (D) That is in the nature of domestic abuse, and occurs after a first conviction for violation of the same order that is in the nature of non-domestic abuse, the person shall be sentenced to a mandatory minimum jail sentence of not less than forty-eight hours and be fined not more than \$150; provided that the court shall not sentence a defendant to pay a fine unless the defendant is or will be able to pay the fine;
- (3) For any subsequent violation that occurs after a second conviction for violation of the same order for protection, the person shall be sentenced to a mandatory minimum jail sentence of not less than thirty days and be fined not less than \$250 nor more than \$1,000; provided that the court shall not sentence a defendant to pay a fine unless the defendant is or will be able to pay the fine.]
- (1) For a first conviction for violation of the protective order, the person shall serve a mandatory minimum jail sentence of forty-eight hours but not more than thirty days and be fined not less than \$150 nor more than \$500; provided that the court



shall not sentence a defendant to pay a fine unless the defendant is or will be able to pay the fine; and

- (2) For a second and any subsequent conviction for violation of the protective order, the person shall serve a mandatory minimum jail sentence of thirty days and be fined not less than \$250 nor more than \$1,000; provided that the court shall not sentence a defendant to pay a fine unless the defendant is or will be able to pay the fine.

Upon conviction and sentencing of the defendant, the court shall order that the defendant immediately be incarcerated to serve the mandatory minimum sentence imposed; provided that the defendant may be admitted to bail pending appeal pursuant to chapter 804. The court may stay the imposition of the sentence if special circumstances exist.

The court may suspend any jail sentence under [subparagraphs (1)(A) and (2)(C),] paragraph (1), upon condition that the defendant remain alcohol and drug-free, conviction-free, [or] and complete any court-ordered assessments or intervention. Nothing in this section shall be construed as limiting the discretion of the judge to impose additional sanctions authorized in sentencing for a misdemeanor offense. All remedies for the enforcement of judgments shall apply to this chapter.

(b) Any fines collected pursuant to subsection (a) shall be deposited into the spouse and child abuse special account established under section 601-3.6.”

## **Extended Term of Protective Order**

Presently, protective orders are effective for three years and may be extended for an additional three years under section 586-5.5. A substantial number of commentators contended that this is an insufficient time period and urged that the duration of the protective order be extended. One rationale for a longer duration period is that it is burdensome on an abuse victim to have to petition the court for an extension, serve the respondent, and return to court for a hearing every three years. Several commentators contended that having to go through this process every three years interferes with the petitioner’s ability to move on with her or his life. Other commentators pointed out that just attending a court hearing could put some abuse victims at risk and therefore advocated reducing the number of court appearances required of a petitioner. A number of commentators maintained that the law should authorize extension of protective orders for the lifetime of either the respondent or the petitioner. Others felt that this lengthy extension would unfairly restrict the movement of the respondent. Several of these commentators observed that the petitioner should bear some burden of having to show, on a periodic basis, that justifications for the protective order remain in effect.

## **Recommendation Summary**

The Bureau believes an extension period longer than three years is necessary to enhance the protection of victims. The Bureau proposes two alternative drafts to address the issue of longer protective orders. The first alternative is a brand new section to be added to chapter 586 that provides for a lifetime extension of a protective order. This lifetime extension would be available only after:

- A protective order initially has been extended for three years, as presently provided under section 586-5.5(b); and
- The court, after a hearing, makes written findings that good cause exists to extend the order.

The second alternative is an amendment to section 586-5.5(b) to change the extension of a protective order to ten years, instead of three years. This alternative also adds a new subsection (c) to clarify that there is no limit on the number of times a protective order may be extended under the section. One commentator, in reviewing the alternative drafts, observed that the person against whom the court would issue a ten-year restraining order is the same person against whom a lifetime order should be granted.

There is no logic to thinking a person may need 10 years but then will be safe. If they [sic] need that long they probably will never be safe, and the responsibility should not be on the victims to come back. [There are] cases where a lifetime order is the only thing that makes sense.

Whether this extension period should be for ten years or for a lifetime is a policy decision for the Legislature. If the Legislature chooses a period shorter than lifetime extension, the Bureau recommends the Legislature clarify that the statute authorizes unlimited extensions of a protective order.

### *Proposed Amendment for Alternative A*

“§586- Lifetime extension of protective orders. (a) Prior to the expiration of a protective order that has been extended for a period not to exceed three years from the expiration date of a preceding protective order under section 586-5.5, a person or agency capable of petitioning under section 586-3 may apply to the court for a lifetime extension of the protective order. The court shall hold a hearing to determine whether the protective order should be extended for life. In making this determination, the court shall consider evidence of abuse and threats of abuse that occurred prior to the initial restraining or protective order and whether good cause exists to extend the protective order. The court shall not grant a lifetime extension of the protective order unless the court makes written findings that good cause exists to extend the order.

(b) The lifetime extension of a protective order granted under this section may include all orders stated in any preceding protective order and may provide further relief as the court deems necessary to prevent domestic abuse or a recurrence of abuse, including orders establishing visitation and custody with regard to minor children of the parties and orders to the respondent to participate in domestic violence intervention services.

(c) The duration of the lifetime extension of the protective order shall cease upon the death of the petitioner or the respondent, whichever occurs first. The court also may terminate the lifetime extension of the protective order:

- (1) At any time upon the request of the petitioner or with the mutual consent of both parties; or

- (2) Upon a showing by the respondent by clear and convincing evidence that good cause no longer exists to support the lifetime extension of the protective order.”

### ***Proposed Amendment for Alternative B***

“§586-5.5 **Protective order; [additional] extension of orders.** (a) If, after hearing all relevant evidence, the court finds [that the respondent has failed to show cause why the order should not be continued and] that a protective order is necessary to prevent domestic abuse or a recurrence of abuse, the court may order that a protective order be issued for [such further] a period [as] of time the court deems appropriate, not to exceed three years from the date the protective order is granted.

The protective order may include all orders stated in the temporary restraining order and may provide for further relief as the court deems necessary to prevent domestic abuse or a recurrence of abuse, including orders establishing temporary visitation and custody with regard to minor children of the parties and orders to [either or both parties] the respondent to participate in domestic violence intervention services. If the court finds that the party meets the requirements under section 334-59(a)(2), the court [further] also may order that the party be taken to the nearest facility for emergency examination and treatment.

(b) A protective order may be extended for a period not to exceed [three] ten years from the expiration of the preceding protective order. Upon application for an extension under this section by a person or agency capable of petitioning under section 586-3, the court shall hold a new hearing to determine whether the protective order should be extended. In making a determination, the court shall consider evidence of abuse and threats of abuse that occurred prior to the initial restraining order and whether good cause exists to extend the protective order.

The extended protective order may include all orders stated in the preceding [restraining] protective order and may provide [such] further relief as the court deems necessary to prevent domestic abuse or a recurrence of abuse, including orders establishing temporary visitation and custody with regard to minor children of the parties and orders to [either or both parties] the respondent to participate in domestic violence intervention services. The court may terminate the extended protective order at any time with the mutual consent of the parties.

(c) There shall be no limit on the number of times a protective order may be extended under this section, provided the requirements of this section are met.”

### **Full Faith and Credit**

Title IV of the Violent Crime Control and Law Enforcement Act of 1994, otherwise known as the Violence Against Women Act (VAWA), among other things, provides legal protection to battered women and enhances prosecution of domestic violence crimes. Cited as “one of the most important provisions of VAWA” is the section that “establishes nationwide enforcement of civil and criminal protection orders in state, tribal and territorial courts.”<sup>24</sup>

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<sup>24</sup> S. Carbon, P. MacDonald, and S. Zeya, “Enforcing Domestic Violence Protection Orders Throughout the Country: New Frontiers of Protection for Victims of Domestic Violence,” Spring 1999 Juvenile and Family Court Journal 39-51, 39.

Section 2265 of VAWA requires these jurisdictions<sup>25</sup> to accord full faith and credit to valid protective orders of other jurisdictions as if they were orders of the enforcing jurisdiction.<sup>26</sup> Commentators have noted that:

“The full faith and credit provisions of VAWA raise serious problems for those involved in the enforcement of orders from other jurisdictions. VAWA is an extraordinary piece of legislation—extraordinary in its brevity and the fact that it affects the entire country. It does not, however, answer serious questions about procedures for the enforcement of orders across jurisdictional lines.”<sup>27</sup>

Concerns related to implementation of section 2265 include, but are not limited to: registration or filing and certification of foreign protective orders; procedures for service of process across state lines; and treatment of custody provisions.<sup>28</sup>

Section 2265 applies to “any injunction or other order, issued for the purpose of preventing violent or threatening acts or harassment against, or contact or communication with or physical proximity to, another person, including temporary and final protection orders issued by civil and criminal courts (other than support or child custody orders)...”.<sup>29</sup> A foreign protective order is valid if the issuing court of the foreign jurisdiction had jurisdiction over the parties and subject matter and the respondent was given reasonable notice and an opportunity to be heard before the order was issued. In the instance of ex parte orders, the respondent must have been provided with notice and opportunity to be heard within a reasonable period of time after entry of the order, consistent with due process.

Because the full faith and credit provision of VAWA does not prescribe the specific procedures a petitioner must adopt to comply with its mandate for interstate enforcement, a large majority of states have enacted legislation and established procedures for enforcement of foreign protective orders. In fact, since the passage of VAWA, only Hawaii, Georgia, Michigan, Mississippi, and South Dakota have not adopted some provision to facilitate implementation of the full faith and credit provisions. The Hawaii State Attorney General convened a statewide Full Faith and Credit Committee in September 1997 to develop a strategic plan to educate and train all members of the criminal justice system, including victim services personnel, regarding enforcement of protective orders.<sup>30</sup> The Committee has continued to meet and is considering, among other issues, whether a definitive statutory response is necessary to facilitate the implementation of the full faith and credit provisions of VAWA.<sup>31</sup> Although many of the issues associated with the full faith and credit provisions of VAWA were beyond the time constraints of this study, Bureau staff attended several of these Full Faith and Credit Committee meetings.

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<sup>25</sup> In this instance, “jurisdictions” refer to other states, the District of Columbia, an Indian tribe, or a commonwealth, territory, or possession of the United States. See 18 U.S.C. §2266.

<sup>26</sup> 18 U.S.C. §2265 (1994).

<sup>27</sup> Carbon, *supra* note, at 39.

<sup>28</sup> *Id.* at 40-41.

<sup>29</sup> 18 U.S.C. §2265 (1994).

<sup>30</sup> The committee included representatives from the court, federal, state and county criminal justice agencies, military and victim services providers.

<sup>31</sup> The composition of the Committee has changed somewhat and recently has focused more on issues facing the city and county of Honolulu, rather than statewide issues.

## Recommendation Summary

Recognizing that the Full Faith and Credit Committee has not yet reached consensus on a comprehensive approach for implementation of the full faith and credit provisions, the Bureau nevertheless believes that chapter 586 should include some minimal recognition that foreign orders are entitled to full faith and credit under Hawaii State law. It may be that the Full Faith and Credit Committee will propose more far reaching legislation to implement the full faith and credit provisions at some later date. In the meantime, however, the Bureau proposes the following sections be added to chapter 586 to facilitate the implementation of the full faith and credit provisions, pursuant to VAWA.

**“§586- Foreign protective orders.** (a) Any protective order that is related to domestic or family abuse or violence and is issued by a court or tribunal of another state, tribe, or territory of the United States shall be presumed valid when the order appears authentic on its face and shall be enforced as if it were an order of this State.

(b) Failure to provide reasonable notice and opportunity to be heard shall be an affirmative defense to any charge or process filed seeking enforcement of an out-of-state protective order.

(c) For purposes of this section, "authentic on its face" means the protective order contains the names of both parties and remains in effect.

**§586- Good faith immunity.** Any police officer acting in good faith shall be immune from civil or criminal liability in any action arising in connection with enforcement of a valid foreign protective order pursuant to section 586- .”

## Chapter 3

### DOMESTIC ABUSE PROTECTIVE ORDERS UNDER SECTION 580-10(d)

Although the primary statutory provisions relating to domestic abuse protective orders are found in chapter 586, Hawaii Revised Statutes, section 580-10(d) also provides for domestic abuse restraining orders in connection with complaints filed for an annulment, divorce, or separation under chapter 580, Hawaii Revised Statutes. However, section 580-10(d) is very limited and, except for a few provisions, does not mirror the substantive provisions of chapter 586. The court may issue a restraining order if it appears there are reasonable grounds to believe a party may inflict physical abuse upon, threaten by words or conduct, or harass the other party. Section 586-10(d) also authorizes a law enforcement officer to enforce a restraining order issued under the section, including to order the restrained party to leave for a three-hour cooling off period and to arrest the restrained party if the law enforcement officer has reasonable grounds to believe the restrained party violated the order. The Legislature amended this section during the regular session of 1999, to conform the penalties for violation of a protective order under section 580-10(d) to those of section 586-4, Hawaii Revised Statutes, relating to temporary restraining orders.<sup>32</sup> The amendment also requires any fines collected to be deposited into the spouse and child abuse special account.

A substantial number of commentators were highly critical of section 580-10(d). Several commentators contended that this section is not taken seriously by the private bar as a protective order provision. Commentators maintained that the request for a protective order is part of a check off laundry list on the predecree order and, therefore, is often checked off automatically. Furthermore, they noted that judges on the divorce calendar are focused on issues of child custody and visitation, alimony, and property division; they are not dedicated domestic violence judges. Accordingly, the issue of a protective order is secondary to these other issues and is rarely discussed, much less supported by articulated facts, by the lawyers and parties at the hearing.

Commentators also pointed out most of the protective orders issued under this section are not VAWA compliant and thus would not be entitled to full faith and credit under VAWA in foreign jurisdictions.<sup>33</sup> They noted that for a protective order granted under section 580-10(d) to provide the protection to victims intended under VAWA, it would need to: state that the respondent was given notice and an opportunity to be heard, and contain findings that the protective order was necessary to protect the victim. Several commentators also observed that the lack of a hearing on the issues is particularly troublesome given that, under state and federal laws, issuance of a protective order would preclude a respondent from carrying a firearm and thus could affect the person's livelihood. In particular, one commentator pointed out that this issue was significant in view of the divorce rate among law enforcement officers.

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<sup>32</sup> Act 200, Session Laws of Hawaii 1999.

<sup>33</sup> See discussion in chapter, *supra* notes and accompanying text.

Another major complaint with the protective order under section 580-10(d) is that the restraining order language is buried in the longer divorce decrees, which contain other issues relating to child custody and property division. Therefore, the protective orders under section 580-10(d), do not resemble the more familiar orders under chapter 586. Commentators indicated that this makes it difficult for law enforcement officers to determine, at a quick glance, whether it is a valid protective order. In addition, commentators contended that it is unclear how long protective orders issued under section 580-10(d) are valid. The statute itself provides for no expiration date, unlike section 586-5.5, which limits protective order under chapter 586 to three years and permits an extension for an additional three-year period. A number of commentators disagreed among themselves over this issue: some commentators maintained that the order expires upon the effective date of the divorce, while others thought the order would survive the divorce. Regardless of which group is correct, it is apparent that the lack of a clear expiration date poses enforcement problems for law enforcement officers. Accordingly, requiring that the protective order be stated in a separate document and providing a clear expiration date would resolve some of these issues and thereby enhance the safety of victims of domestic abuse.

In addition, commentators pointed out that section 580-10(d) lacks many of the other protections contained in chapter 586. For example it does not include provisions relating to:

- Assumed notice if the respondent was present at the hearing;
- Notice to the police;
- The assistance of the police department in effecting service of process and accompanying the petitioner to the petitioner's dwelling; and
- The neutral effect on relief of leaving a residence to avoid abuse.

Based upon the foregoing, a substantial number of commentators urged that section 580-10(d) be deleted to eliminate protective orders under this section. They maintained that those persons who might petition for a protective order under section 580-10(d) would have access to a protective order under chapter 586, Hawaii Revised Statutes, and that the provisions of chapter 586 would provide greater protection to abuse victims.

Despite considerable criticism of section 580-10(d), however, several commentators were convinced that the provision provides a necessary protection to potential victims of domestic violence, at least during the pendency of divorce proceedings. These commentators noted that the protective orders under chapter 586 are limiting in that the petitioner must show some previous history or, probable imminent threat, of domestic abuse. Moreover, they pointed out that filing for separation or divorce and requesting custody or child support often is a dangerous time for many petitioners. Although there may be no previous history of domestic abuse in the relationship, the filing may be a trigger for domestic violence in some cases.

Several commentators also noted that it often can be dangerous for petitioners just to go to court where the petitioner is in the same vicinity as the respondent. Although the Family Court tries to provide separate waiting areas for petitioners, this is not possible in all court

facilities because of space constraints. Even in those courthouses that do provide separate areas, the safety of the petitioner is not assured, especially in the public areas of the courthouse and outside the courthouse. Therefore, requiring a person already involved in a separation or divorce proceeding to return to court to obtain a protective order pursuant to chapter 586 may pose additional risks for the person. Accordingly, these commentators maintained that section 580-10(d) is critical to enhancing victim safety because it reduces the number of times a petitioner must go to court. However, several of the commentators supporting the retention of section 580-10(d) disagreed as to whether it should be amended to reflect many of the provisions in chapter 586 or whether it should be left as it presently appears.

Consideration of section 580-10(d) raised difficult, emotional policy issues. Senate Concurrent Resolution No. 184 requested the Bureau to recommend changes to Hawaii's domestic abuse laws and protective orders to enhance the protection of victims and to achieve uniformity and consistency. These are two separate goals that, in some, cases may not be achievable through the same means. This appears to be one of those instances.

### **Approach No. 1**

It would be simple to achieve uniformity and consistency in domestic abuse protective orders by merging all protective orders under chapter 586 and deleting section 580-10(d) entirely. This would require only a few conforming changes to language in chapter 586<sup>34</sup> in addition to amending section 580-10 to delete subsection (d).

On the other hand, the argument that the availability of protective orders under section 580-10(d) provides an additional layer of protection for abuse victims and potential abuse victims carries some weight. Thus, deleting section 580-10(d) may prove counterproductive to enhancing victim safety.

### **Approach No. 2**

Therefore, another alternative, which comes closer to achieving both goals and therefore is favored by the Bureau, is to retain the ability to obtain a protective order under section 580-10(d), but conform the substantive provisions with chapter 586. Thus the Bureau proposes section 580-10(d) be amended to:

- (1) Change the grounds for a petition to reasonable belief that “domestic abuse” may inflict upon the requesting party;
- (2) Require the party to petition the court in the manner provided in chapter 586;

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<sup>34</sup> For example, the phrase “notwithstanding that a complaint for annulment, divorce, or separation has not been filed” in section 586-4(a) should be changed to “regardless of whether a complaint for annulment, divorce, or separation has been filed”.



- (3) Authorize the court to issue protective orders and temporary restraining orders in compliance with chapter 586; and
- (4) Provide that protective orders under section 580-10(d) shall have the force and effect of orders issued under chapter 586 and shall be enforced pursuant to chapter 586.

***Legislative Reference Bureau's Recommended Language for Approach No. 2***

“(d) Whenever it is made to appear to the court after the filing of any complaint, that there are reasonable grounds to believe that a party [thereto] to the action may inflict [physical] domestic abuse, as defined in section 586-1, upon[, threaten by words or conduct, or harass] the other party, the other party may petition the court, in the manner provided in chapter 586, for an ex parte temporary restraining order and a protective order. The court may issue a temporary restraining order [to prevent such physical abuse, threats, or harassment, and shall enjoy in respect thereof the powers pertaining to a court of equity. Where necessary, the order may require either or both of the parties involved to leave the marital residence during the period of the order, and may also restrain the party to whom it is directed from contacting, threatening, or physically abusing the children or other relative of the spouse who may be residing with that spouse at the time of the granting of the restraining order. The order may also restrain a party's agents, servants, employees, attorneys, or other persons in active concert or participation with the respective party.

- (1) A knowing or intentional violation of a restraining order issued pursuant to this section is a misdemeanor. A person convicted under this section shall undergo domestic violence intervention at any available domestic violence program as ordered by the court. The court additionally shall sentence a person convicted under this section as follows:
  - (A) For a first conviction for violation of the restraining order, the person shall serve a mandatory minimum jail sentence of forty-eight hours and be fined not less than \$150 nor more than \$500; provided that the court shall not sentence a defendant to pay a fine unless the defendant is or will be able to pay the fine; and
  - (B) For the second and any subsequent conviction for violation of the restraining order, the person shall serve a mandatory minimum jail sentence of thirty days and be fined not less than \$250 nor more than \$1,000; provided that the court shall not sentence a defendant to pay a fine unless the defendant is or will be able to pay the fine.

Upon conviction and sentencing of the defendant, the court shall order that the defendant immediately be incarcerated to serve the mandatory minimum sentence imposed; provided that the defendant may be admitted to bail pending appeal pursuant to chapter 804. The court may stay the imposition of the sentence if special circumstances exist.

The court may suspend any jail sentence, except for the mandatory sentences under subparagraphs (A) and (B), upon condition that the defendant remain alcohol and drug-free, conviction-free or complete court-ordered

assessments or intervention. Nothing in this section shall be construed as limiting the discretion of the judge to impose additional sanctions authorized in sentencing for a misdemeanor offense. All remedies for the enforcement of judgments shall apply to this section.

- (2) Any law enforcement officer shall enforce a restraining order issued pursuant to this subsection, including lawfully ordering the restrained party to voluntarily leave for a three-hour cooling off period, or, with or without a warrant, where the law enforcement officer has reasonable grounds to believe that the restrained party has violated the restraining order, arresting the restrained party.

(e) Any fines collected pursuant to subsection (d) shall be deposited into the spouse and child abuse special account established under section 601-3.6.] or protective order in compliance with the requirements of chapter 586. These orders shall have the force and effect of orders issued under, and shall be enforced pursuant to, chapter 586.”

### **Approach No. 3**

Several commentators disliked the proposal favored by the Bureau because it changes (and, in their view, narrows) the grounds upon which a person may petition for a restraining order under section 580-10(d). They favored retaining the present language of section 580-10(d) but adding additional language to reflect many of the provisions in chapter 586. To accomplish this, and prevent section 580-10 from becoming too lengthy, the Bureau proposes a third alternative that creates a new section in chapter 580, containing the present language of section 580-10(d) and adding provisions from chapter 586 as subsections within the new section to address some of the foregoing concerns raised by commentators. Under Approach No. 3, section 580-10(d) would be deleted in its entirety. The Bureau proposes the following provisions be added to the new section:

- (1) Change terms to protective order, petitioner, and respondent;
- (2) Require findings in the protective order that the respondent was given reasonable notice and opportunity to be heard and that the order was necessary for the protection of the petitioner;
- (3) Add thirty-day maximum jail sentence for first offense;
- (4) Change “or” between the phrase “conviction free” and “complete court-ordered assessments” to the conjunctive “and”;
- (5) Require that the Judiciary provide separate forms to be used to issue protective orders;
- (6) Clarify effective date of oral protection orders;
- (7) Expand authorized action of police officer in enforcing orders to mirror those of chapter 586; and

- (8) Mirror provisions in chapter 586, relating to service of process, notice to police, modification of order, neutral effect of leaving residence, and security or bond requirements.

***Legislative Reference Bureau's Recommended Language for Approach No. 3***

“§580- Protective orders. (a) After the filing of any complaint under this chapter, either party may petition the court for a protective order. A petition for relief shall be in writing and upon separate forms provided by the court and shall allege, under penalty of perjury, relevant facts. If, after notice and a hearing, the court finds that there are reasonable grounds to believe that the other party may inflict physical abuse upon, threaten by words or conduct, or harass the petitioner, the court may issue a restraining order to prevent the physical abuse, threats, or harassment. The court shall make findings on the record with respect to whether: the respondent was given reasonable notice and an opportunity to be heard; and the order is necessary to prevent domestic abuse or a recurrence of abuse. The findings shall be included in the protective order. In issuing the order, the court shall enjoy the powers pertaining to a court of equity. If necessary, the order may require the respondent to leave the marital residence during the period of the order and also may restrain the respondent from contacting, threatening, or physically abusing the children or other relative of the petitioner, who may be residing with the petitioner at the time of the granting of the protective order. The order also may restrain a respondent's agents, servants, employees, attorneys, or other persons in active concert or participation with the respondent.

(b) A knowing or intentional violation of a protective order issued pursuant to this section is a misdemeanor. A person convicted under this section shall undergo domestic violence intervention at any available domestic violence program as ordered by the court. The court additionally shall sentence a person convicted under this section as follows:

- (1) For a first conviction for violation of the protective order, the person shall serve a mandatory minimum jail sentence of forty-eight hours, but not more than thirty days, and be fined not less than \$150 nor more than \$500; provided that the court shall not sentence a defendant to pay a fine unless the defendant is or will be able to pay the fine; and
- (2) For the second and any subsequent conviction for violation of the protective order, the person shall serve a mandatory minimum jail sentence of thirty days and be fined not less than \$250 nor more than \$1,000; provided that the court shall not sentence a defendant to pay a fine unless the defendant is or will be able to pay the fine.

Upon conviction and sentencing of the defendant, the court shall order that the defendant immediately be incarcerated to serve the mandatory minimum sentence imposed; provided that the defendant may be admitted to bail pending appeal pursuant to chapter 804. The court may stay the imposition of the sentence if special circumstances exist.

The court may suspend any jail sentence, except for the mandatory sentences under paragraphs (1) and (2), upon condition that the defendant remain alcohol and drug-free, conviction-free and complete court-ordered assessments or intervention. Nothing in this section shall be construed as limiting the discretion of the judge to impose additional sanctions

authorized in sentencing for a misdemeanor offense. All remedies for the enforcement of judgments shall apply to this section.

(c) Protective orders orally stated by the court on the record shall be effective as of the date of the hearing for a period of time specified by the court; provided that all protective orders shall be reduced to writing, include the expiration date specified by the court, and be issued immediately. The judiciary shall provide separate forms that shall be used by the court to issue all protective orders pursuant to this section.

(d) Any police officer shall enforce a protective order issued pursuant to this section, including:

- (1) Accompany the petitioner to the petitioner's dwelling or residence; and
- (2) Take action necessary to place the petitioner in possession of the dwelling or residence, including ordering the respondent to leave the premises for a twenty-four-hour cooling off period;
- (3) Arresting the respondent, with or without a warrant, provided the law enforcement officer has reasonable grounds to believe that the respondent has violated the restraining order.

(e) Any order issued under this chapter shall be either personally served upon the respondent or served by certified mail; provided that if the respondent was present at the hearing, the respondent shall be deemed to have notice of the order. Upon request of the petitioning party, the court may order the appropriate police department or other appropriate law enforcement officer to serve the order and related documents upon respondent.

(f) Refusal by a respondent to accept personal service of an order is a petty misdemeanor.

(g) Within twenty-four hours of the granting of any protective order pursuant to this section, the court shall transmit a copy of the order to the appropriate county police department. Each county police department shall make available to other law enforcement officers in the same county, through a system for verification, information as to the existence and status of any protective order issued pursuant to this section.

(h) Upon application, notice to all parties, and hearing, the court may modify the terms of an existing protective order.

(i) A person's right to apply for relief shall not be affected by the person's leaving the residence or household to avoid abuse.

(j) The court shall not require security or bond of any party unless it deems it necessary in exceptional cases.

(k) Any fines collected pursuant to subsection (b) shall be deposited into the spouse and child abuse special account established under section 601-3.6.”

### ***Legislative Reference Bureau’s Proposed Amendment for Approach No. 3***

**“§580-10 Restraining orders; appointment of master.** (a) When a complaint for annulment, divorce, or separation, is filed in this State, the court, on an application by either party, supported by affidavit or a statement made under penalty of perjury, without a hearing, may enjoin and restrain each of the parties to that action from transferring, encumbering, wasting, or otherwise disposing of any of their property, whether real, personal, or mixed, over and above current income, except as necessary for the ordinary course of a business or for usual

current living expenses, without the consent and concurrence of the other party to such action for divorce, or further specific order of the court. Where such restraining orders are issued against the other party to the action, such person shall be served promptly with the order and shall be entitled to a prompt hearing to show cause why such order should not be enforced.

(b) In all actions for annulment, divorce, or separation, the court shall have the power to issue such restraining orders against a person or persons not a party to the action, as shall be reasonably required during the pendency of such action, to preserve the estates of the parties. Where such restraining orders are issued against a person or persons not a party to the action, such persons shall be promptly served with the order and shall be entitled to a prompt hearing within a reasonable time to show cause why such order should not be enforced.

(c) In all actions for annulment, divorce, or separation, the court shall have the power to appoint a master, or masters, to make preliminary findings and to report to the court on any issue. The written reports of a master shall be available to interested parties and may be received in evidence if no objection is made; or if objection is made, may be received in evidence provided the person or persons responsible for the reports are available for cross-examination as to any matter contained therein. When a report is received in evidence, any party may introduce other evidence supplementing, supporting, modifying, or rebutting the whole or any part of the report.

[(d) Whenever it is made to appear to the court after the filing of any complaint, that there are reasonable grounds to believe that a party thereto may inflict physical abuse upon, threaten by words or conduct, or harass the other party, the court may issue a restraining order to prevent such physical abuse, threats, or harassment, and shall enjoy in respect thereof the powers pertaining to a court of equity. Where necessary, the order may require either or both of the parties involved to leave the marital residence during the period of the order, and may also restrain the party to whom it is directed from contacting, threatening, or physically abusing the children or other relative of the spouse who may be residing with that spouse at the time of the granting of the restraining order. The order may also restrain a party's agents, servants, employees, attorneys, or other persons in active concert or participation with the respective party.

(1) A knowing or intentional violation of a restraining order issued pursuant to this section is a misdemeanor. A person convicted under this section shall undergo domestic violence intervention at any available domestic violence program as ordered by the court. The court additionally shall sentence a person convicted under this section as follows:

(A) For a first conviction for violation of the restraining order, the person shall serve a mandatory minimum jail sentence of forty-eight hours and be fined not less than \$150 nor more than \$500; provided that the court shall not sentence a defendant to pay a fine unless the defendant is or will be able to pay the fine; and

(B) For the second and any subsequent conviction for violation of the restraining order, the person shall serve a mandatory minimum jail sentence of thirty days and be fined not less than \$250 nor more than \$1,000; provided that the court shall not sentence a defendant to pay a fine unless the defendant is or will be able to pay the fine.

Upon conviction and sentencing of the defendant, the court shall order that the defendant immediately be incarcerated to serve the mandatory minimum sentence imposed; provided that the defendant may be admitted to bail pending

appeal pursuant to chapter 804. The court may stay the imposition of the sentence if special circumstances exist.

The court may suspend any jail sentence, except for the mandatory sentences under subparagraphs (A) and (B), upon condition that the defendant remain alcohol and drug-free, conviction-free or complete court-ordered assessments or intervention. Nothing in this section shall be construed as limiting the discretion of the judge to impose additional sanctions authorized in sentencing for a misdemeanor offense. All remedies for the enforcement of judgments shall apply to this section.

- (2) Any law enforcement officer shall enforce a restraining order issued pursuant to this subsection, including lawfully ordering the restrained party to voluntarily leave for a three-hour cooling off period, or, with or without a warrant, where the law enforcement officer has reasonable grounds to believe that the restrained party has violated the restraining order, arresting the restrained party.
- (e) Any fines collected pursuant to subsection (d) shall be deposited into the spouse and child abuse special account established under section 601-3.6.]”

## Chapter 4

### THE OFFENSE OF ABUSE OF FAMILY OR HOUSEHOLD MEMBER

This chapter focuses on the offense of abuse of family or household member, which is stated in section 709-906 of the Hawaii Revised Statutes. Under section 709-906(1)(a), it is a misdemeanor offense for a person to “physically abuse a family or household member or to refuse compliance with the lawful order of a police officer under subsection (4).” The definition of the term “family or household member” in section 709-906 is identical to that in section 586-1, Hawaii Revised Statutes. Under section 709-906(4), a police officer who has “reasonable grounds to believe there is probable danger of *further physical abuse or harm* being inflicted by one person upon a family or household member”<sup>35</sup> may order a person to leave the premises for a twenty-four-hour period of separation; provided the officer reasonably believes physical abuse or harm has already been inflicted.<sup>36</sup> A person refusing to comply with such order may be convicted of the offense of abuse of family or household member. Because of the wording of the statute, however, in situations in which it does not appear that physical abuse or harm *has already occurred*, a police officer has no authority to order the period of separation. This appears to be true even if the officer has reasonable grounds to believe that the infliction of physical abuse may be imminent.

The concept of abuse under section 709-906 is more restrictive than under chapter 586, Hawaii Revised Statutes, relating to protective orders.<sup>37</sup> Although the term physical abuse is not defined in section 709-906, it has been defined in Hawaii case law. In *State v. Nomura*,<sup>38</sup> the Hawaii Intermediate Court of Appeals upheld jury instructions stating that “physical abuse meant causing bodily injury to another person” and that “bodily injury [meant] physical pain, illness or any impairment of physical conditions.”<sup>39</sup> The court concluded that “it is evident that to ‘physically abuse’ someone means to maltreat in such manner as to cause injury, hurt, or damage to that person’s body”.<sup>40</sup> The word “harm” used in section 709-906(4) is not defined in the statute or by case law.

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<sup>35</sup> Section 709-906(4)(b), Hawaii Revised Statutes (emphasis added).

<sup>36</sup> *Id.* at section 709-906(4), Hawaii Revised Statutes (emphasis added).

<sup>37</sup> In addition to encompassing physical harm, injury, or assault, “domestic abuse” as defined in section 586-1, Hawaii Revised Statutes, includes:

- The threat of imminent physical harm, bodily injury, or assault;
- Psychological abuse; or
- Malicious property damage.

<sup>38</sup> 79 Haw. 413 (App. 1995).

<sup>39</sup> *Id.* at 416. In its ruling the court relied upon *State v. Kameenui*, 69 Haw. 620 (1988) in which the Hawaii Supreme Court had established the “definitional parameters of ‘physical abuse’ as ‘treatment’ [which] will injure, hurt, or damage a person”. 69 Haw. at 623.

<sup>40</sup> *Nomura*, 79 Haw. at 416. The court noted that a “more precise definition would ‘require the legislature to list every type of conduct covered under the statute [which] would be counterproductive.’” *Id.*, quoting *Kameenui*, 69 Haw. at 623.

A person convicted of a misdemeanor under section 709-906 must be sentenced to attend domestic violence intervention programs and a minimum of forty-eight hours jail term for a first offense or a minimum of thirty days jail for a second or subsequent offense that occurs within one year of the previous offense.<sup>41</sup> In addition, a person convicted of a misdemeanor may be sentenced to one or more of the following: up to a maximum of one year imprisonment;<sup>42</sup> a fine up to \$2,000;<sup>43</sup> or probation for one year.<sup>44</sup> As a condition of probation, the court may sentence a misdemeanor offender to a term of imprisonment not exceeding six months.<sup>45</sup> Furthermore, in domestic abuse cases, the law permits the court to impose up to two years of probation, rather than the one-year period generally permitted for misdemeanors.<sup>46</sup>

A person also may be charged with a class C felony abuse of family or household member offense under section 709-906(7) for any subsequent offense occurring within two years after a second misdemeanor offense. However, there are no mandatory penalties provided for the class C felony abuse offense. As a general rule, the court may sentence a person convicted of a class C felony to one or more of the following: up to a maximum of five years imprisonment;<sup>47</sup> a fine up to \$10,000;<sup>48</sup> or probation for up to five years.<sup>49</sup> As a condition of probation for a class C felony, the court may sentence a person to a term of imprisonment not exceeding one year.<sup>50</sup> Thus a person convicted of a class C felony under section 709-906(7) may not be required to attend intervention programs or serve mandatory jail terms.

Once a person is arrested for abuse of family or household member, the prosecutor's office reviews the case to determine whether the evidence supports the charge. The prosecutor may reclassify a case, if the prosecutor determines that another charge is more appropriate, given the evidence against a suspect and the need to prove each element of the offense beyond a reasonable doubt. Depending upon the circumstances of the case, it is possible that the prosecutor may reclassify the case to a higher-grade offense, such as assault in the second degree, or to another misdemeanor offense, such as assault in the third degree, or a petty misdemeanor offense such as harassment.

Anecdotal evidence suggests, not surprisingly, that abuse of family or household member cases in which the prosecutor's evidence of physical abuse is strong generally plead out. Concomitantly, those cases in which such evidence is weak usually go to a jury trial<sup>51</sup> or, in

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<sup>41</sup> Section 709-906(5)(a) and (b), Hawaii Revised Statutes.

<sup>42</sup> *Id.* at section 706-663.

<sup>43</sup> *Id.* at section 706-640(1)(d).

<sup>44</sup> *Id.* at section 706-623(1)(c).

<sup>45</sup> *Id.* at section 706-624(2)(a).

<sup>46</sup> *Id.* at section 706-623(1)(c) (includes violations of protective orders under sections 586-4 and 586-11, as well as violations of section 709-906).

<sup>47</sup> Section 706-660(2), Hawaii Revised Statutes.

<sup>48</sup> *Id.* at section 706-640(1)(c).

<sup>49</sup> *Id.* at section 706-623(1)(b). The court also may impose other penalties, including community service, and restitution. See *id.* at section 706-605.

<sup>50</sup> *Id.* at section 706-624(2)(a).

<sup>51</sup> Defendants in abuse of family or household member cases are entitled to a jury trial because the maximum jail term under section 709-906 is one year.



some cases, may be reclassified to another charge.<sup>52</sup> Commentators suggested that most of these defendants going to trial request a jury trial because they feel they have a greater chance of acquittal with a jury when the prosecutor's case is weak. A frequent difficulty with proving abuse of family or household member cases is that the evidence of physical injury is weak or the victim may have recanted her or his testimony. The public has developed a better awareness and appreciation of threat of domestic violence in recent years, due in large part to well-organized public education campaigns. Several commentators observed that, as a result, jurors in abuse cases expect to see and hear vivid evidence of pronounced physical injury. If the evidence does not satisfy the expectation of the jury, the jury may acquit the defendant, even though a judge may have found the prosecutor's evidence sufficient to prove the element of "physical injury". A few commentators pointed out that this may be especially true because the jury's only choices are to convict or acquit, as there is no lesser included offense under which to convict the defendant. Indeed, several commentators estimated that only about one in five cases, if that, results in a jury conviction for abuse of family or household member. Numbers are higher, of course, for overall convictions, but even these numbers are sketchy. Senate Concurrent Resolution No. 184 assumed an approximate overall conviction rate of thirty percent. Statistics from the Honolulu Department of the Prosecuting Attorney appear to indicate that less than fifty percent of the defendants are either found guilty of or enter a plea to the original charge. (See Appendix E) A number of commentators expressed concern that the weaker evidentiary abuse cases, combined with the resulting failure to convict in a large percentage of jury trial cases, are sending the wrong message about domestic violence to jurors in particular and to the public in general. They warned that the effect of this might be to trivialize domestic violence. Therefore, they urged that a lesser degree of abuse offense be created for abusive situations that may not involve actual physical *injury* and for which a defendant would not be entitled to a jury trial.

As mentioned previously, a number of cases originally charged as abuse of family or household member also may be reclassified to other misdemeanor or petty misdemeanor offenses, such as assault in the third degree (a misdemeanor) or harassment (a petty misdemeanor). Commentators indicated that, as a practical matter, the reclassification of abuse of family or household member cases to other misdemeanor or petty misdemeanor offenses has resulted in a higher conviction or guilty plea rate. One reason for this may be that the prosecution is more successful in proving the elements of the particular reclassified offense beyond a reasonable doubt. Another may be that, because defendants do not face a mandatory jail term under the reclassified offenses as they do under abuse of family or household member offenses, more defendants may be willing to plead guilty to the reclassified offense. Many of the commentators viewed the higher conviction or guilty plea rate as resulting in more abusers being held accountable.

On the other hand, however, a number of commentators contended that the reclassification has a negative effect on ensuring safety for the abuse victim by failing to reflect or account for the dynamics of domestic abuse involved in the offense. This viewpoint recognizes that domestic abuse is rarely an isolated event. Instead, it is a continuum that often begins in an elusive and insidious manner, as manipulation, humiliation, harassment, or

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<sup>52</sup> Although a number of factors are involved in a prosecutor's decision to reclassify a case, insufficient evidence to prove an element of the charge may be one reason for reclassification, particularly if the case is reclassified to a lesser degree offense.

intimidation before escalating to serious physical violence. This view also is consistent with the defined scope of domestic abuse in chapter 586, Hawaii Revised Statutes (relating to protective orders), which includes verbal, emotional, and psychological abuse, as well as physical abuse.<sup>53</sup>

As previously noted, a person convicted under a reclassified charge does not face mandatory sentencing provisions,<sup>54</sup> whereas conviction of a misdemeanor offense of abuse of family or household member requires sentencing to a mandatory jail term and mandatory domestic violence intervention programs. Thus, many commentators maintained that reclassification of an abuse offense precludes an opportunity to provide meaningful protection to the victim and appropriate intervention and sanctions for the abuser, especially at an early stage when such intervention and sanctions may be most effective in changing behavioral patterns preventing further abuse.

Furthermore, when an abuser is convicted of or pleads guilty to a reclassified charge, the abuser's criminal history record obviously will not reflect a conviction for an offense of abuse of family or household member. By way of illustration, an abuser's record, instead of showing three convictions for abuse of family or household member, may show convictions for assault third, harassment, and abuse of family or household member. This has several important ramifications. For certain repeat offenses under specified circumstances, section 709-906, Hawaii Revised Statutes, provides for increased penalties for the misdemeanor abuse offense<sup>55</sup> and, under even more limited circumstances, reclassification to a class C felony charge.<sup>56</sup> Obviously these repeat offender provisions are not applicable if the charge is reclassified.

Based upon the foregoing concerns, a large number of commentators suggested that the offense of abuse of family or household member be reexamined to determine whether it should be divided into several degrees of offenses, such as:

- A class C felony offense for more aggravated criminal conduct than what is presently included under section 709-906;
- A misdemeanor offense; and
- A petty misdemeanor offense to cover instances in which conduct may not result in actual physical injury.

One intent of such a statutory scheme is to ensure that abusers are held accountable for their conduct, by recognizing that domestic abuse often begins with a broad array of conduct other than physical injury, including harassment, emotional abuse, threats, intimidation, coercion, isolation, and economic abuse. This allows for critical early identification of the patterns of abusive behavior and imposition of strong and consistent consequences, including mandated appropriate intervention.

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<sup>53</sup> See discussion in chapter 2.

<sup>54</sup> Upon conviction under reclassified offenses, jail is not mandated, but the court has discretion to impose any appropriate jail term authorized by statute.

<sup>55</sup> Section 709-906(5)(b), Hawaii Revised Statutes.

<sup>56</sup> Section 709-906(7), Hawaii Revised Statutes.

Another intent is to recognize that there are different degrees of abuse involving family members just as there are different degrees of harm or abuse (such as with assault or terroristic threatening offenses) involving non-family members and strangers. Although offenses such as assault or terroristic threatening offenses apply to family or household members, as well as to acquaintances or strangers, the issue of relationship between the offender and the victim is not an element of these offenses. Including the relationship of family or household member as an element of the offense would recognize the dynamics involved in an abusive relationship and justify imposition of mandatory domestic violence intervention services and stiffer penalties.<sup>57</sup> Several other states recognize that domestic abuse may encompass a broad array of criminal conduct if committed against a family or household member.<sup>58</sup> Although the Bureau is not suggesting that the offense of abuse of family or household member be changed to include a laundry list of other crimes, the Bureau believes a broader definition of abuse of family or household member would be eminently appropriate. The Legislature has already recognized the seriousness of repeated cases of abuse of family or household member by creating a class C felony offense under section 709-906(7). The Bureau agrees with a substantial number of commentators who urged creation of a statutory scheme that would broaden the class C offense to include more serious or aggravated offenses.

A third intent behind such a scheme, and one particularly noted by several commentators, is that it would enable the same level of criminal conduct to be treated similarly (for example a class C assault against a family or household member would be a class C abuse offense),<sup>59</sup> while permitting cases that involve domestic abuse to remain in Family Court, where judges have consistent experience in identifying the patterns of domestic abuse and dealing with its complex dynamics.

To effect this recommendation, the Bureau drafted a proposed statutory scheme as a new part to chapter 709, Hawaii Revised Statutes, establishing three degrees for the offense of abuse of family or household member. This would replace the existing section 709-906. A brief description of the proposed scheme is as follows:

- The offense of abuse of family or household member in the first degree is a class C felony offense. The elements are essentially the same as those of terroristic threatening in the first degree or assault in the second degree<sup>60</sup> directed against a family or household member, or a third or subsequent felony or misdemeanor abuse of family or household member offense.

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<sup>57</sup> Court may have the authority to sentence defendants to such programs under present law, but are not required to do so.

<sup>58</sup> See e.g., Ala. Code, §30-5-2(a)(1).

<sup>59</sup> In structuring the degrees of abuse of family or household member offenses, the grade of offense should parallel the grade of offense of similar criminal conduct, regardless of the relationship of the parties involved. For example, terroristic threatening in the first degree is a class C felony. Therefore, conduct that would constitute terroristic threatening in the first degree but is committed by a family or household member should be a class C felony. This would seem self-evident, but a number of commentators expressed concern that criminal conduct involving family or household member not be treated less seriously than similar conduct involving non-family or household member.

<sup>60</sup> Terroristic threatening in the first degree and assault in the second degree are class C felonies.

- Abuse of family or household member in the second degree is a misdemeanor offense. The elements are essentially the same as those of terroristic threatening in the second degree, assault in the third degree,<sup>61</sup> or the misdemeanor offense of harassment by stalking directed against a family or household member.
- Abuse of family or household member in the third degree is a petty misdemeanor offense. The elements are essentially the same as those of harassment, the petty misdemeanor offense of harassment by stalking, or disorderly conduct involving fighting, threatening, violent, or tumultuous behavior directed against a family or household member.

Each degree of the abuse offense is set out in a separate statutory section. Most of the present subsections of section 709-906 also are set out as separate statutory sections; and many contain little or no other changes from their present language. The Bureau's proposal also contains:

- A new statutory section to chapter 706 providing for enhanced sentencing of any other felony under chapter 707 or section 708-820 or 708-821, Hawaii Revised Statutes, involving a family or household member to provide for at least the same mandatory minimum jail term as for the class C abuse offense; and
- An amendment to section 706-606.5, Hawaii Revised Statutes, to add the new class C felony abuse of family or household member to the repeat offender law.

The Bureau submitted this proposal, hereafter referred to as the Bureau's proposal, to numerous individuals, agencies, and committees for their input and comment. A substantial majority of those reviewing the Bureau's proposal indicated overall approval, with some minor suggestions or modifications. The State Public Defender objected strenuously to the Bureau's proposal in concept, without commenting on any of the particulars. Members of the Honolulu Department of the Prosecuting Attorney seemed to be strongly divided. Although, the initial response to the Bureau's proposal was favorable, other members of the department later expressed a decided preference for:

- Referring to the underlying statutory offenses rather than setting out the individual elements of the underlying offenses; and
- Providing for enhanced sentencing for terroristic threatening in the first degree and assault in the second degree involving family or household members instead of including the elements of those offenses in the class C felony abuse offense. The effect of this would be to restrict the class C felony abuse offense to a repeat offender provision, similar to present law.

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<sup>61</sup> Terroristic threatening in the second degree and assault in the third degree are misdemeanors.

The following discussion includes a description of the individual statutory sections of the Bureau's proposal and a comparison with the existing statute, followed by the proposed statutory language. In addition, where applicable, the Bureau has drafted alternative proposed sections, based upon the contrasting views of the Honolulu Department of the Prosecuting Attorney, for discussion purposes. However, because the Bureau's proposal identifies the exact elements of each offense and therefore is both more precise and more consistent with the drafting style of the Penal Code, the Bureau recommends its own proposal over these alternatives.

## **Section 709-A Definitions**

The section reiterates the definition of "family or household member" contained in section 709-906(a) and adds the definitions of "dangerous instrument", "serious bodily injury", and "substantial bodily injury" as they appear in section 707-700, Hawaii Revised Statutes, and "terroristic threatening" as it appears in section 707-715(1).

### ***Legislative Reference Bureau's Recommended Statutory Language***

#### **"PART . ABUSE OF FAMILY OR HOUSEHOLD MEMBERS**

**§709-A Definition.** For the purposes of this part:

"Dangerous instrument" has the same meaning as provided in section 707-700.

"Family or household member" means spouses or reciprocal beneficiaries, former spouses or reciprocal beneficiaries, persons who have a child in common, parents, children, persons related by consanguinity, and persons jointly residing or formerly residing in the same dwelling unit.

"Serious bodily injury" and "substantial bodily injury" have the same meanings as provided in section 707-700.

"Terroristic threatening" has the same meaning as provided in section 707-715(1)."

## **Section 709-B Abuse of Family or Household Member in the First Degree**

The first degree offense would be a class C felony. Presently section 709-906(7) provides for charging an abuse offense as a class C felony if a third misdemeanor abuse offense is committed within a limited time period.

Under the Bureau's proposal, the offense of abuse of family or household member in the first degree can be committed one of three ways:

- (1) Commission of essentially the same elements as those of terroristic threatening in the first degree (class C felony offense) directed at a family or household member;

- (2) Essentially the same elements as those of assault in the second degree (class C felony offense) directed against a family or household member; or
- (3) Commission of a third or subsequent felony or misdemeanor abuse of family or household member offense.

The class C felony offense in section 709-906(7) is limited to “any subsequent offense occurring within two years after a second misdemeanor conviction.” Under the Bureau’s proposal, a person could be charged with a class C felony if the person committed abuse of family or household member in the second degree subsequent to having *any combination* of two or more prior convictions for abuse of family or household member in the first degree (class C) or abuse of family or household member in the second degree (misdemeanor) or abuse of family or household member under section 709-906 (old law).

The inclusion of the phrase “*any combination*” with respect to the two prior misdemeanor or class C felony convictions is intended to prevent the incongruous situation where a misdemeanor charge could be bumped up to a class C felony for a person with two prior misdemeanor abuse convictions, but would remain a misdemeanor charge for the person with two prior felony convictions or one prior felony conviction and one prior misdemeanor conviction.

Of prime importance, the Bureau’s proposal avoids a conflict that presently exists between section 709-906(7) and section 709-906(5)(b) that, according to commentators, has made it difficult to charge class C felonies under section 709-906(7). Section 709-906(5)(b) states that “[for] a second offense and any other subsequent offense that occurs within one year of the previous offense, the person shall be termed a ‘repeat offender’ and serve a minimum jail sentence of thirty days.”<sup>62</sup> When read together, these two provisions conflict with what is known as a “*Modica*” rule.<sup>63</sup> Under the *Modica* rule: if the same act committed under the same circumstances is punishable under either of two statutory provisions that differ in grade or class of offense, and the elements of proof essential to either are exactly the same, conviction under the higher grade or class of offense would violate the defendant’s due process and equal protection rights.<sup>64</sup>

The *Modica* problem with respect to section 709-906(7) and section 709-906(5)(b) arises because of the reference to “subsequent” offense and the overlapping time frames in which the prior offenses must occur. The following scenario illustrates the conflict between the subsections:

X commits a second abuse of family or household member offense nine months after having committed a first offense. Under section 709-906(5)(b), X would be a repeat offender and be sentenced to a mandatory minimum thirty days in jail. X then commits a third abuse of family or household member offense eleven months after having

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<sup>62</sup> Compare with section 709-906(7), which provides that a person shall be charged with a class C felony for “any subsequent offense occurring within two years after a second misdemeanor conviction”.

<sup>63</sup> See *State v. Modica*, 58 Haw. 249 (1977).

<sup>64</sup> *Id.* at pp 250-51 (act punishable either as a felony or misdemeanor); accord *State v. Kuuke*, 61 Haw. 79, 80-81 (1979) (“*Modica* rule” applies equally to prosecution and conviction under two differently classed felonies).

committed the second offense. Reading section 709-906(7) at face value, it would seem that X could be charged with a class C felony because the third offense was a “subsequent offense occurring within two years after a second misdemeanor conviction ....” But X can also be charged under section 709-906(5)(b), because X’s third offense qualifies as “any other subsequent offense that occurs within *one year* of the *previous offense*” (emphasis added). Accordingly, because the *Modica* rule holds that convicting X of a class C felony under 709-906(7) would violate due process, X would have to be charged with a misdemeanor under section 709-906(5)(b).

The Bureau’s proposal also differs from the present language in section 709-906(7) in that it:

- (1) Makes accommodation for previous convictions of a similar nature in other jurisdictions; and
- (2) Eliminates the requirement that the subsequent offense occur within two years of the previous conviction.

In fact, to avoid falling back into a *Modica* issue, the Bureau’s proposal contains no time limit. However, if the Legislature deems a time limit advisable, the Bureau would recommend that the limit be not less than five years, similar to that provided in section 291-4, Hawaii Revised Statutes (relating to driving under the influence of intoxicating liquor), which has enhanced penalties based upon repeat offenses although there are no differing grades of offenses. Care must be taken in the drafting of such a time limit, however, to ensure a *Modica* problem is not recreated.

Section 709-B(3) of the Bureau’s proposal requires a mandatory minimum jail sentence of ninety days for the class C felony abuse offense. Section 709-906(7) contains no similar requirement. Although there is a general preference under the Penal Code for judicial discretion in sentencing, the Bureau believes that a mandatory minimum jail term for a class C felony abuse offense fits in logically with section 709-906(7), Hawaii Revised Statutes, as it presently appears, as well as with the three grades of offenses proposed by the Bureau. Senate Concurrent Resolution No. 184 charged the Bureau with recommending revisions to the domestic abuse laws as necessary to enhance the protection of victims and provide for uniformity and consistency. Given that section 709-906(5)(a) and (b) (misdemeanor offenses) provide for mandatory jail terms for a first or second offense, it is incongruous that the commission of a third offense that is charged as a class C felony may result in a less harsh jail term than that imposed for a first or second misdemeanor offense of abuse of family or household member.

Section 709-B(4) reiterates the present language in section 709-906(5) concerning immediate incarceration of the defendant, admission to bail pending appeal, and stay of sentence under special circumstances.

***Legislative Reference Bureau's Recommended Statutory Language***

**“§709-B Abuse of family or household member in the first degree. (1) A person commits the offense of abuse of family or household member in the first degree if:**

- (a) The person:
  - (i) Intentionally or knowingly causes substantial bodily injury;
  - (ii) Recklessly causes serious bodily injury; or
  - (iii) Intentionally or knowingly causes bodily injury, with a dangerous instrument,  
to a family or household member;
- (b) The person commits terroristic threatening by threatening a family or household member:
  - (i) By word or conduct on more than one occasion for the same or a similar purpose; or
  - (ii) Using a dangerous instrument; or
- (c) The person commits an offense of abuse of family or household member in the second degree subsequent to having any combination of two or more prior convictions, in this State or any other state or federal jurisdiction, that are comparable to:
  - (i) An offense of abuse of family or household member in the first degree under this section;
  - (ii) An offense of abuse of family or household member in the second degree under section 709-C; or
  - (iii) An offense of abuse of family or household member under section 709-906.

(2) Abuse of family or household member in the first degree is a class C felony.

(3) Any person violating this section shall be sentenced to a mandatory minimum jail term of ninety days.

(4) Upon conviction and sentencing of the defendant, the court shall order that the defendant immediately be incarcerated to serve the mandatory minimum sentence imposed; provided that the defendant may be admitted to bail pending appeal pursuant to chapter 804. The court may stay the imposition of the sentence if special circumstances exist.”

**Alternative No. 1**

Alternative No. 1 reflects the view of those members of the Honolulu Department of the Prosecuting Attorney who felt the elements of the class C felony abuse offense should be restricted to the repeat offender provision (as similar to that provided for in section 709-906(7) but without language giving rise to the *Modica* problem). This alternative provides for a mandatory minimum term of imprisonment for ninety days under the enhanced sentencing provision rather than in section 709-B(3) under the Bureau's proposal.



*Alternative No. 1 Proposed Language*

**“§709-B Abuse of family or household member in the first degree.** (1) A person commits the offense of abuse of family or household member in the first degree if the person commits an offense of abuse of family or household member in the second degree subsequent to having any combination of two prior convictions for abuse of family or household member, in this State or any other state or federal jurisdiction, that are comparable to either:

- (a) An offense of abuse of family or household member in the first degree; or
- (b) An offense of abuse of family or household member in the second degree.
- (2) Abuse of family or household member in the first degree is a class C felony.”

**Section 709-C Abuse of Family or Household Member in the Second Degree**

Under the Bureau’s proposal, the offense of abuse of family or household member in the second degree would be a misdemeanor, except when it is charged as a class C felony under section 709-B.

The offense could be committed in one of three ways:

- (1) Commission of essentially the same elements as those of terroristic threatening in the second degree (a misdemeanor offense) directed against a family or household member;
- (2) Commission of assault in the third degree (a misdemeanor offense) directed against a family or household member; or
- (3) Commission of the misdemeanor offense of harassment by stalking<sup>65</sup> directed against a family or household member.

As noted previously, adding the offenses of terroristic threatening in the second degree, assault in the third degree, and the misdemeanor offense of harassment by stalking, when directed at a family or household member, under the umbrella of abuse of family or household member would enhance the protection of victims of domestic violence by: enabling the criminal justice system to reflect the true dynamics of domestic abuse; requiring domestic violence intervention programs and mandatory jail for abusers; and authorizing longer probationary periods.

Section 709-C(3) of the Bureau’s proposal retains the present mandatory minimum jail terms of forty-eight hours for a first offense and thirty days jail for a second offense found in section 709-906(5)(a) and (b).

However, the proposed language deletes the troublesome phrase “and any other subsequent offense that occurs within one year of the previous offense” found in section 709-

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<sup>65</sup> Harrassment by stalking is a misdemeanor, if it occurs on more than one occasion for the same or similar purpose. Section 711-1106.5(2), Hawaii Revised Statutes.

906(5)(b). As previously discussed, this language conflicts with section 709-906(7),<sup>66</sup> running afoul of the so-called “*Modica* rule”, which has rendered the present class C felony provision of section 709-906(7) difficult to use.<sup>67</sup> By deleting reference to “subsequent offense” and the over-lapping time frames, the Bureau believes the proposed statutory language does not raise a *Modica* issue.

Section 709-C(4) reiterates in the present language in section 709-906(5) concerning immediate incarceration of the defendant, admission to bail pending appeal, and stay of sentence under special circumstances.

### ***Legislative Reference Bureau’s Recommended Statutory Language***

**“§709-C Abuse of family or household member in the second degree. (1) A person commits the offense of abuse of family or household member in the second degree if:**

- (a) The person:**
  - (i) Intentionally, knowingly, or recklessly causes bodily injury to a family or household member; or**
  - (ii) Negligently causes bodily injury, with a dangerous instrument, to a family or household member; or**
- (b) The person commits terroristic threatening by threatening a family or household member other than as provided under section 709-B(1)(b); or**
- (c) The person, with intent to harass, annoy, or alarm a family or household member, or in reckless disregard of the risk thereof, pursues or conducts surveillance upon the family or household member:**
  - (i) Without legitimate purpose;**
  - (ii) On more than one occasion for the same or a similar purpose; and**
  - (iii) Under circumstances that would cause the family or household member to reasonably believe the actor intends to cause bodily injury to the family or household member or another, or damage to the property of the family or household member or another.**

**(2) Except as provided in section 709-B(1)(c), abuse of family or household member in the second degree is a misdemeanor.**

**(3) Any person violating this section shall be sentenced as follows:**

- (a) For the first offense the person shall serve a minimum jail term of forty-eight hours; and**
- (b) For a second offense, the person shall serve a minimum jail term of thirty days.**

**(4) Upon conviction and sentencing of the defendant, the court shall order that the defendant immediately be incarcerated to serve the mandatory minimum sentence imposed; provided that the defendant may be admitted to bail pending appeal pursuant to chapter 804. The court may stay the imposition of the sentence if special circumstances exist.”**

<sup>66</sup> Section 709-906(7) states that “any subsequent offense occurring within two years after a second misdemeanor conviction” shall be charged as a class C felony offense.

<sup>67</sup> See discussion *supra* at nn. 30-31 and accompanying text.

## Alternative No. 2

Alternative No. 2 reflects the view of those members of the Honolulu Department of the Prosecuting Attorney who felt it was “cleaner” to refer to the underlying offenses rather than set out the specific elements of the underlying offense as in the Bureau’s proposal.

### *Alternative No. 2 Proposed Language*

**“§709-C Abuse of family or household member in the second degree.** (1) A person commits the offense of abuse of family or household member in the second degree if:

- (a) The person commits a misdemeanor offense of assault in the third degree under section 707-712 against a family or household member;
  - (b) The person commits an offense of terroristic threatening in the second degree under section 707-717 against a family or household member; or
  - (c) Commits a misdemeanor offense of harassment by stalking under section 711-1106.5 against a family or household member.
- (2) Except as provided in 709-B(1)(c), abuse of family or household member in the second degree is a misdemeanor.
- (3) Any person violating this section shall be sentenced as follows:
- (a) For the first offense the person shall serve a minimum jail term of forty-eight hours; and
  - (b) For a second offense, the person shall serve a minimum jail term of thirty days.
- (4) Upon conviction and sentencing of the defendant, the court shall order that the defendant immediately be incarcerated to serve the mandatory minimum sentence imposed; provided that the defendant may be admitted to bail pending appeal pursuant to chapter 804. The court may stay the imposition of the sentence if special circumstances exist.”

## **Section 709-D Abuse of Family or Household Member in the Third Degree**

Under the Bureau’s proposal, the offense of abuse of family or household member in the third degree could be committed in one of three ways:

- (1) Commission of essentially the same elements as those of harassment (a petty misdemeanor offense) directed against a family or household member;
- (2) Commission of the petty misdemeanor offense of harassment by stalking directed against a family or household member; or
- (3) Commission of disorderly conduct (a petty misdemeanor offense) involving fighting, threatening, violent, or tumultuous behavior directed against a family or household member.

The petty misdemeanor abuse offense differs from section 709-906 in that it would not necessarily involve physical pain. As previously discussed, this recognizes that domestic abuse

often begins with a broad array of conduct including harassment, manipulation, intimidation, and emotional and psychological control. In particular, a number of commentators strongly urged that the petty misdemeanor abuse offense include elements of harassment directed at a family or household member that include abusive or illegitimate communications that cause the recipient to reasonably believe the actor intends to cause bodily injury or property damage or repeated, unwelcomed communication that continues after notice is given that it is unwanted.<sup>68</sup>

The Bureau's proposal provides for a maximum jail term of thirty days for abuse of family or household member in the third degree to ensure that an accused under such offense is not entitled to a jury trial. Sentencing options under Hawaii law for a petty misdemeanor include: a maximum term of thirty days imprisonment;<sup>69</sup> a maximum period of six months probation;<sup>70</sup> and a maximum fine of \$1,000.<sup>71</sup> However, the law does not allow the court to sentence a person convicted of a petty misdemeanor as opposed to any class of felonies or a misdemeanor to both a term of imprisonment and probation; it must be either one or the other.<sup>72</sup> Thus, imposition of a mandatory jail term for a petty misdemeanor abuse offense would prevent the court from ever imposing probation and effectively eliminate any real judicial discretion in the sentencing for petty misdemeanor abuse offenses.<sup>73</sup> Accordingly, because it is entirely conceivable that there may be instances in which a longer period of court supervision through probation would be preferable to a forty-eight hour jail sentence, the Bureau recommends that the petty misdemeanor offense not carry a mandatory minimum jail term.

### *Legislative Reference Bureau's Recommended Statutory Language*

**“§709-D Abuse of family or household member in the third degree.** (1) A person commits the offense of abuse of family or household member in the third degree if the person:

- (a) With intent to harass, annoy, or alarm a family or household member:
  - (i) Strikes, shoves, kicks, or otherwise touches the family or household member in an offensive manner or subjects the family or household member to offensive physical contact;
  - (ii) Insults, taunts, or challenges a family or household member in a manner likely to provoke an immediate violent response or that would cause the family or household member to reasonably believe that the actor intends to cause bodily injury to the family or household member or another or damage to the property of the family or household member or another;

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<sup>68</sup> Section 711-1106, Hawaii Revised Statutes.

<sup>69</sup> *Id.* at section 706-663.

<sup>70</sup> *Id.* at section 706-623(1)(d).

<sup>71</sup> *Id.* at section 706-640(1)(e). Other dispositions for a petty misdemeanor offense include restitution, community service, and a suspended sentence. *Id.* at section 706-605.

<sup>72</sup> Section 706-605(2), Hawaii Revised Statutes (court cannot sentence a defendant to probation and imprisonment except as authorized by part II of chapter 706); section 706-624(2)(a), Hawaii Revised Statutes (provides for terms of imprisonment as discretionary conditions of probation for felonies and misdemeanors, but not for petty misdemeanors).

<sup>73</sup> Moreover, because the mandatory minimum jail term for a first misdemeanor offense is a forty-eight hours, it would be illogical to set a mandatory minimum jail term for a petty misdemeanor offense greater than forty-eight hours.

- (iii) Repeatedly makes telephone calls, facsimile, or electronic mail transmissions to a family or household member without purpose of legitimate communication;
- (iv) Repeatedly makes a communication to a family or household member anonymously or at an extremely inconvenient hour;
- (v) Repeatedly makes communications, after being advised by the family or household member to whom the communication is directed that further communication is unwelcome; or
- (vi) Makes a communication to a family or household member using offensively coarse language that would cause the family or household member to reasonably believe that the actor intends to cause bodily injury to the family or household member or another or damage to the property of the family or household member or another; or
- (b) With the intent to cause substantial harm or serious inconvenience to a family or household member or in reckless disregard of the risk of substantial harm or serious inconvenience, engages in fighting or in threatening, violent, or tumultuous behavior toward a family or household member; or
- (c) The person, with intent to harass, annoy, or alarm a family or household member, or in reckless disregard of the risk thereof, pursues or conducts surveillance upon the family or household member:
  - (i) Without legitimate purpose; and
  - (ii) Under circumstances that would cause the family or household member to reasonably believe the actor intends to cause bodily injury to the family or household member or another, or damage to the property of the family or household member or another
- (2) Abuse of family or household member in the third degree is a petty misdemeanor.”

### Alternative No. 3

Alternative No. 3 reflects the view of those members of the Honolulu Department of the Prosecuting Attorney who felt it was “cleaner” to refer to the underlying offenses rather than set out the specific elements of the underlying offense as in the Bureau’s proposal. Moreover, they expressed the view that the elements of harassment be limited to those under section 711-1106(1) (a) or (b). Accordingly, a person could commit the petty misdemeanor abuse offense by committing:

- (1) The offense of harassment under section 711-1106(1)(a) or (b);<sup>74</sup>

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<sup>74</sup> Thus, the harassment offense would be limited to conduct involving:

- (1) Striking, shoving, kicking, or otherwise touching a family or household member in an offensive manner or subjecting the person to offensive physical contact; or
- (2) Insulting, taunting, or challenging a family or household member in a manner likely to provoke an immediate violent response or threat would cause the person to reasonably believe that the actor intends to cause bodily injury to the person or another or damage to the person's property or another.

- (2) The offense of disorderly conduct under section 711-1101(1)(a);<sup>75</sup> or
- (3) A petty misdemeanor offense of harassment by stalking;<sup>76</sup>

with the added element, in each case, that the conduct be directed toward a family or household member.

### *Alternative No. 3 Proposed Language*

**“§709-D Abuse of family or household member in the third degree.** (1) A person commits the offense of abuse of family or household member in the third degree if the person:

- (a) Commits the offense of harassment under section 711-1106(1) (a) or (b) against a family or household member;
- (b) Commits a petty misdemeanor offense of harassment by stalking under section 711-1106.5 against a family or household member; or
- (c) Commits the offense of disorderly conduct under section 711-1101(1)(a) against a family or household member.

(2) Abuse of family or household member in the third degree is a petty misdemeanor.”

### **Section 709-E Authorized Actions of a Police Officer**

Section 709-E groups together those activities of police officers presently authorized under section 709-906, with a few changes. The section basically restates an officer’s authority under:

- (1) Section 709-906 (2) to arrest a suspected abuser;
- (2) Section 709-906 (1) to transport a victim to a hospital or safe shelter; and
- (3) Section 709-906 (4) to take certain actions, including ordering a person to leave the premises for a twenty-four-hour period of separation.

The most significant change under proposed section 709-E relates to a police officer's authority under section 709-906(4). Under the proposed language, a police officer would be permitted to take the actions presently authorized under section 709-906(4), if the officer has reasonable grounds to believe that “abuse *may be imminent*” (emphasis added).<sup>77</sup> In contrast, present law requires that the officer have “reasonable grounds to believe that there *was* physical

<sup>75</sup> Disorderly conduct would be limited to that involving fighting, threatening, violent or tumultuous behavior directed at a family or household member.

<sup>76</sup> Harassment by stalking is a petty misdemeanor, if it does not meet the criteria for a misdemeanor as provided in section 711-1106.5(2), Hawaii Revised Statutes (misdemeanor, if it occurs on more than one occasion for the same or similar purpose).

<sup>77</sup> Compare proposed section 709-E(3) and (3)(c) with section 709-906(4) and (4)(b), Hawaii Revised Statutes.

abuse or harm inflicted” on a family or household member *before* the officer may take the specified actions.<sup>78</sup> Furthermore, the authority to order the period of separation is predicated on the reasonable belief that there is “probable danger of *further* physical abuse or harm” occurring to a family or household member.<sup>79</sup>

The change proposed by the Bureau was requested by a substantial number of commentators, who maintained that this would increase the effectiveness of the section in protecting potential victims. Evidently, there are many instances in which an officer, although uncertain as to whether physical abuse *has actually occurred*, reasonably believes there is probable danger of imminent abuse being inflicted upon a family or household member. The present law does not appear to authorize an officer to order a period of separation in such instances. This appears to be a major loophole in the protection of victims and potential victims of domestic abuse. The proposed language in section 709-E(3) and (3)(e) attempts to close this loophole by focusing on probable danger of imminent abuse, rather than whether actual physical harm has occurred. The proposed language also deletes present references to the terms “physical” and “harm”, to conform to the proposed three degrees of the offense abuse of family or household members. Moreover, the term “harm” lacks definition in the present law, proving troublesome for some members of the law enforcement community. The ambiguity of this term has resulted in uncertainty as to whether sufficient grounds exist for ordering a period of separation. Such results dilute the effectiveness of this provision in providing protection to victims and potential victims of abuse.

One other significant change from the present law is the deletion of the requirement, under section 709-906(3), that an officer who has reasonable grounds to believe abuse has occurred prepare a written report. Several commentators contended that this provision is unnecessary because police procedures require that written reports be filed in all domestic abuse cases. Furthermore, commentators noted that there is no such similar statutory requirement for any other criminal offense.

### *Legislative Reference Bureau’s Recommended Statutory Language*

**“§709-E Authorized actions of law enforcement officers with respect to abuse of family or household member.** (1) Any police officer, with or without a warrant, may arrest a person if the officer has reasonable grounds to believe that the person is abusing, or has abused, a family or household member and that the person arrested is guilty of an offense of abuse of a family or household member under this part.

(2) The police, in investigating any complaint of abuse of a family or household member, upon request, may transport the abused person to a hospital or safe shelter.

(3) Any police officer who has reasonable grounds to believe either that abuse has been inflicted by one person upon a family or household member, regardless of whether the abuse occurred in the officer’s presence, or that abuse may be imminent may take the following course of action, with or without a warrant:

<sup>78</sup> Section 709-906(4)(b), Hawaii Revised Statutes (emphasis added).

<sup>79</sup> *Id.* at section 709-906(4)(b), Hawaii Revised Statutes (emphasis added). Also see discussion, *supra* at nn. 1-2 and accompanying text.

- (a) The police officer may make reasonable inquiry of the family or household member upon whom the officer believes abuse has been inflicted or may be imminent;
- (b) The police officer may make reasonable inquiry of any other witnesses that may be present;
- (c) Where the police officer has reasonable grounds to believe that there is probable danger of imminent abuse being inflicted by one person upon a family or household member, the police officer lawfully may order the person to leave the premises for a period of separation of twenty-four hours, during which time the person shall not initiate any contact, either by telephone or in person, with the family or household member; provided that the person is allowed to enter the premises with police escort to collect any necessary personal effects;
- (d) Where the police officer makes the finding referred to in paragraph (b) and the incident occurs after 12:00 p.m. on any Friday or on any Saturday, Sunday, or legal holiday, the order to leave the premises and to initiate no further contact shall commence immediately and be in full force, but the twenty-four hour period shall be enlarged and extended until 4:30 p.m. on the first day following the weekend or legal holiday;
- (e) The police officer shall give a written warning citation to any person ordered to leave premises pursuant to this section. The written warning citation shall state the date, time, and location of the warning and the penalties for violating the warning. The police officer shall retain a copy of the warning citation and attach it to the written report required to be submitted in all cases. The police officer shall give a third copy of the warning citation to the remaining family or household member;
- (f) If the person ordered to leave the premises refuses to comply with the order or returns to the premises before the expiration of the period of separation, or if the person so ordered initiates any contact with the remaining family or household member, the person shall be placed under arrest for the purpose of preventing abuse to the family or household member; and
- (g) The police officer may seize all firearms and ammunition that the police officer has reasonable grounds to believe were used or threatened to be used in the commission of an offense under this part.”

## **Section 709-F Violation of Order to Leave Premises**

Section 709-F under the Bureau's proposal restates, in a separate statutory section, the misdemeanor offense of refusal to comply with a lawful order to leave the premises for a period of separation, which presently is found in section 709-906(5). The Bureau also proposes extending the time limit for qualifying as a “repeat offender” from the current one-year to three years. Given the nature of domestic abuse cases and concern with enhancing victim safety, the Bureau believes this may be a more effective sanction.<sup>80</sup>

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<sup>80</sup> See proposed section 709F-(2)(b).



*Legislative Reference Bureau's Recommended Statutory Language*

“§709-F Violation of a lawful order to leave the premises, penalty. (1) Any violation of or refusal to comply with the lawful order of a police officer to leave the premises under section 709-E(3) is a misdemeanor.

(2) Any person violating this section shall be sentenced as follows:

(a) For the first offense the person shall serve a minimum jail sentence of forty-eight hours; and

(b) For a second offense and any other subsequent offense that occurs within three years of the previous offense, the person shall be termed a “repeat offender” and serve a minimum jail sentence of thirty days.

(3) Upon conviction and sentencing of the defendant, the court shall order that the defendant immediately be incarcerated to serve the mandatory minimum sentence imposed; provided that the defendant may be admitted to bail pending appeal pursuant to chapter 804. The court may stay the imposition of the sentence if special circumstances exist.”

**Section 709-G Mandatory Domestic Violence Intervention Programs**

Section 709-G under the Bureau's proposal restates the present language of subsections (6) and (14) of section 709-906. Section 709-G(1) contains the requirement in section 709-906(6) that any convicted abuser be sentenced to undergo any available domestic violence intervention programs as ordered by the court. This section also permits the court to suspend any jail sentence, except for those mandatory portions, upon certain conditions. However, similar to language in chapter 586, the conditions of the suspension are listed in the alternative: the defendant must remain either “alcohol and drug-free, conviction-free, **or** complete court-ordered assessments or intervention”. Under present wording, the defendant could complete court-ordered assessments or intervention, but not be conviction-free or not be alcohol and drug-free and still qualify for a suspended jail sentence. It would seem more logical and consistent to require the defendant to be alcohol and drug-free, conviction-free, **and** complete court-ordered assessments or intervention, in order to qualify for a suspended jail sentence. Therefore, the Bureau also recommends that the “or” between the phrase “conviction-free” and “complete court-ordered assessments” be changed to “and”.

Section 709-G(2) restates the requirement in section 709-906(14) that the offender show proof of compliance with court’s order to undergo domestic violence intervention at a subsequent hearing. The hearing may be waived, if a court officer establishes the offender completed the court-ordered program.

*Legislative Reference Bureau's Recommended Statutory Language*

“§709-G Mandatory domestic violence intervention programs. (1) Whenever a court sentences a person pursuant to this part, it also shall require that the offender undergo any available domestic violence intervention programs ordered by the court. However, the court may suspend any portion of a jail sentence, except for any mandatory sentences, upon the condition

that the defendant remains arrest-free and conviction-free and complete court-ordered intervention.

(2) When a person is ordered by the court to undergo any domestic violence intervention, that person shall provide adequate proof of compliance with the court's order. The court shall order a subsequent hearing at which the person is required to make an appearance, on a date certain, to determine whether the person has completed the ordered domestic violence intervention; provided that the court may waive the subsequent hearing and appearance if a court officer has established that the person has completed the intervention ordered by the court."

## **Section 709-H Rights of Victim**

Section 709-H under the Bureau's proposal groups together several provisions dealing with the rights of an abuse victim under section 709-906. Section 709-H(1) restates the rights of an abuse victim under section 709-906(9) to pursue a penal summons or arrest warrant or file a criminal complaint. Section 709-H(2) restates the duty of the prosecuting attorney under section 709-906(12) to assist any abuse victim in such endeavor. Section 709-H(3) restates the requirement under section 709-906(10) that the respondent of a penal summons, warrant, or complaint be taken into custody and brought before the Family Court for a hearing. Section 709-H(4) restates section 709-906(13), by clarifying that the provisions do not preclude a victim from pursuing any other remedy under law or equity.

### *Legislative Reference Bureau's Recommended Statutory Language*

**"§709-H Right of victim of abuse of family or household member; assistance of prosecuting attorney.** (1) A family or household member who has been abused by another person may petition the family court, with the assistance of the prosecuting attorney of the applicable county, for a penal summons or arrest warrant to issue forthwith or may file a criminal complaint through the prosecuting attorney of the applicable county. In such instance, the respondent shall be taken into custody and brought before the family court at the first possible opportunity. The court may dismiss the petition or hold the respondent in custody, subject to bail. If the petition is not dismissed, a hearing shall be set.

(2) It shall be the duty of the prosecuting attorney of the applicable county to assist any victim under this part in the preparation of the penal summons or arrest warrant.

(3) This part shall not preclude the abused family or household member from pursuing any other remedy under law or in equity."

## **Section 709-I Good Faith Immunity**

Section 709-I under the Bureau's proposal restates the good faith immunity provided to police officers in section 709-906(8).

*Legislative Reference Bureau's Recommended Statutory Language*

“§709-I Good faith immunity. Any police officer that arrests a person pursuant to this part shall not be subject to any civil or criminal liability; provided that the police officer acts in good faith, upon reasonable belief, and does not exercise unreasonable force in effecting the arrest.”

**Section 709-J Interpretation**

Section 709-J restates section 709-906(11), which clarifies that the prosecution is not barred from bringing an action under another section of the Penal Code in lieu of prosecution for abuse of family or household member.

*Legislative Reference Bureau's Recommended Statutory Language*

“§709-J Interpretation. This part shall not operate as a bar against prosecution under any other section of this Code in lieu of prosecution for abuse of a family or household member under this part.”

**Enhanced Sentencing for Felony Offenses Against a Family or Household Member**

Although the proposed class C felony offense of abuse of family or household member has been broadened to include terroristic threatening in the first degree and assault in the second degree, it is recognized that violence against a family or household member might be prosecuted under other sections of the Penal Code. This is particularly true in situations where the conduct is more egregious and thus can be prosecuted as a higher felony than the class C felony offense. A number of commentators urged that other felonies that “are in the nature of domestic abuse”, but charged under another penal code section, should receive at least the minimum jail term provided for under the proposed class C felony offense of abuse of family or household member, i.e. ninety days. For example, it makes little sense that a person who assaults a family or household member and is charged with assault in the first degree, which is a class B felony, may receive a lighter sentence than a person charged with an offense of abuse of family or household member in the third degree. Accordingly, under the Bureau's proposal, whenever a person is convicted of a felony offense under chapter 707 (offenses against the person) or under section 708-820 (criminal property damage in the first degree) or 708-821 (criminal property damage in the second degree), and the trier of fact has made a determination that the offense involves a family or household member,<sup>81</sup> the person must be sentenced to a mandatory minimum term of imprisonment of ninety days and be required to undergo domestic violence intervention programs.

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<sup>81</sup> See *State v. Tafoya*, No. 21766, slip op. 14 (Haw. S. Ct. Aug. 27, 1999) (determination of intrinsic fact that is predicate to imposition of enhanced penalty must be made by trier of fact).

*Legislative Reference Bureau's Recommended Statutory Language*

**“§706- Enhanced sentencing for felony offenses against a family or household member.** (1) Whenever a person is convicted of a felony offense under chapter 707 or section 708-820, 708-821, or 709-B and the trier of fact has made a determination that the offense involves family or household members as defined in section 709-A, the court shall sentence the person to a mandatory minimum term of imprisonment of ninety days. Nothing in this section shall be construed to prevent a court from imposing a longer term of imprisonment otherwise authorized by law.

(2) Whenever a court sentences a person pursuant to this section, it also shall require that the person undergo any available domestic violence intervention programs ordered by the court. However, the court may suspend any portion of a jail sentence, except for any mandatory sentences, upon the condition that the person remains arrest-free and conviction-free and complete court-ordered intervention.

(3) When a person is ordered by the court to undergo any domestic violence intervention, that person shall provide adequate proof of compliance with the court's order. The court shall order a subsequent hearing at which the person is required to make an appearance, on a date certain, to determine whether the person has completed the ordered domestic violence intervention; provided that the court may waive the subsequent hearing and appearance if a court officer has established that the person has completed the intervention ordered by the court.”

**Alternative No. 4**

Alternative No. 4 reflects the view of those members of the Honolulu Department of the Prosecuting Attorney who urged that the class C felony abuse offense be restricted to its present scope of repeat offender (but without the *Modica* problem) and that increased penalties for all class C felony offenses involving a family or household member be imposed as an enhanced sentencing provision.

*Alternative No. 4 Proposed Language*

**“§706- Enhanced sentencing for felony offenses against a family or household member.** Whenever a person is convicted of a felony offense under chapter 707 or section 708-820 or 708-821 and the trier of fact has made a determination that the offense involves family or household members as defined in section 709-A, the court shall sentence the person to a mandatory minimum term of imprisonment of ninety days. Nothing in this section shall be construed to prevent a court from imposing a longer term of imprisonment otherwise authorized by law.”

## Repeat Offender

To provide uniformity and consistency with other parts of the Penal Code, the Bureau's proposal includes the class C felony abuse of family or household member in the enumerated class C felony offenses under section 706-606.5, Hawaii Revised Statutes, relating to sentencing of repeat offenders.

### Section 706-606.5(1) Sentencing of Repeat Offenders

“(1) Notwithstanding section 706-669 and any other law to the contrary, any person convicted of murder in the second degree, any class A felony, any class B felony, or any of the following class C felonies: section 707-703 relating to negligent homicide in the first degree; section 707-711 relating to assault in the second degree; section 707-713 relating to reckless endangering in the first degree; section 707-716 relating to terroristic threatening in the first degree; section 707-721 relating to unlawful imprisonment in the first degree; section 707-732 relating to sexual assault or rape in the third degree; section 707-735 relating to sodomy in the third degree; section 707-736 relating to sexual abuse in the first degree; section 707-751 relating to promoting child abuse in the second degree; section 707-766 relating to extortion in the second degree; section 708-811 relating to burglary in the second degree; section 708-821 relating to criminal property damage in the second degree; section 708-831 relating to theft in the first degree as amended by Act 68, Session Laws of Hawaii 1981; section 708-831 relating to theft in the second degree; section 708-835.5 relating to theft of livestock; section 708-836 relating to unauthorized control of propelled vehicle; section 708-852 relating to forgery in the second degree; section 708-854 relating to criminal possession of a forgery device; section 708-875 relating to trademark counterfeiting; section 709-B relating to abuse of family or household member in the first degree; section 710-1031 relating to intimidation of a correctional worker; section 710-1071 relating to intimidating a witness; section 711-1103 relating to riot; section 712-1203 relating to promoting prostitution in the second degree; section 712-1221 relating to gambling in the first degree; section 712-1224 relating to possession of gambling records in the first degree; section 712-1243 relating to promoting a dangerous drug in the third degree; section 712-1247 relating to promoting a detrimental drug in the first degree; section 134-7 relating to ownership or possession of firearms or ammunition by persons convicted of certain crimes; section 134-8 relating to ownership, etc., of prohibited weapons; section 134-9 relating to permits to carry, or who is convicted of attempting to commit murder in the second degree, any class A felony, any class B felony, or any of the class C felony offenses enumerated above and who has a prior conviction or prior convictions for the following felonies, including an attempt to commit the same: murder, murder in the first or second degree, a class A felony, a class B felony, any of the class C felony offenses enumerated above, or any felony conviction of another jurisdiction shall be sentenced to a mandatory minimum period of imprisonment without possibility of parole during such period as follows:

- (a) One prior felony conviction:
  - (i) Where the instant conviction is for murder in the second degree or attempted murder in the second degree--ten years;
  - (ii) Where the instant conviction is for a class A felony--six years, eight months;

- (iii) Where the instant conviction is for a class B felony--three years, four months;
- (iv) Where the instant conviction is for a class C felony offense enumerated above--one year, eight months;
- (b) Two prior felony convictions:
  - (i) Where the instant conviction is for murder in the second degree or attempted murder in the second degree--twenty years;
  - (ii) Where the instant conviction is for a class A felony--thirteen years, four months;
  - (iii) Where the instant conviction is for a class B felony--six years, eight months;
  - (iv) Where the instant conviction is for a class C felony offense enumerated above--three years, four months;
- (c) Three or more prior felony convictions:
  - (i) Where the instant conviction is for murder in the second degree or attempted murder in the second degree--thirty years;
  - (ii) Where the instant conviction is for a class A felony--twenty years;
  - (iii) Where the instant conviction is for a class B felony--ten years;
  - (iv) Where the instant conviction is for a class C felony offense enumerated above--five years.”

## Chapter 5

### OTHER ISSUES

The Bureau also reviewed several other statutory sections pertaining either to domestic violence or to bail, which S.C.R. No. 184 specifically requested the Bureau to consider. This chapter contains discussions of these statutory sections.

#### **District Court Power to Restrain Harassment**

In addition to protective orders available from Family Court under chapter 586 and section 580-10(d), Hawaii Revised Statutes, a person may obtain a protective order from the District Court under section 604-10.5, Hawaii Revised Statutes.

Most family or household members who seek to obtain a restraining order in District Court will be directed to file a petition in Family Court. Thus, the section is not a significant factor in domestic abuse issues in the traditional sense. However, as previously discussed in Chapter 2, an increasing number of teenagers and young adults are encountering abusive situations within non live-in dating relationships. Although these teenagers and young adults may obtain protective orders under section 604-10.5, a substantial number of commentators urged that those in dating relationships be included under the jurisdiction of the Family Court for protective orders because of the Family Court judges' extensive experience in recognizing the patterns of domestic abuse and responding appropriately to the dynamics of domestic abuse in imposing appropriate sanctions, including attending mandatory domestic violence intervention programs. Many commentators believe that this early intervention may contribute to changing abusive patterns of behavior.

During the regular session of 1999, the Legislature enacted Act 143 to conform several aspects of section 604-10.5 to chapter 586.<sup>82</sup> However, the scope of section 604-10.5 differs from chapter 586 in several respects. The petitioner may be any person, not just limited to family or household members. Furthermore, section 604-10.5 restrains harassment and chapter 586 restrains domestic abuse. Under section 604-10.5, harassment is defined as:

- (1) Physical harm, bodily injury, assault, or the threat of imminent physical harm, bodily injury, or assault; or
- (2) An intentional or knowing course of conduct directed at an individual that seriously alarms or disturbs consistently or continually bothers the individual, and that serves no legitimate purpose; provided that such course of conduct would cause a reasonable person to suffer emotional distress.

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<sup>82</sup> Act 143, Session Laws of Hawaii 1999.

Despite the difference in terms, however, the definitions are similar except that harassment requires the course of conduct to be such that a reasonable person suffer only “emotional distress”, whereas “domestic abuse” under section 586-1 requires the person to suffer “*extreme* emotional distress”. Domestic abuse also includes malicious property damage between family or household members, whereas harassment does not.

Another difference between section 604-10.5 and chapter 586 is that the burden of proof under the former section requires clear and convincing evidence. This is a higher standard than under chapter 586 or section 580-10(d), which only requires a showing by a preponderance of the evidence. Commentators noted that it is more difficult for those in an abusive dating relationship to obtain a protective order under section 604-10.5 because of this difference in the standard of proof. Thus, young, inexperienced teenagers and adults, who may be most vulnerable to abuse and most in need of protection, may find more barriers to obtaining a protective order under section 604-10.5 than under chapter 586. For this reason and the extensive experience of Family Court judges in dealing with the diagnosis of domestic abuse, the Bureau recommended in Chapter 2 that dating relationships be included under chapter 586.

Including dating relationships within chapter 586 would effectively take section 604-10.5 protective orders out of the realm of this study on “domestic violence” under S.C.R. No. 184. If the Legislature accepts this recommendation, the Bureau has no further recommendations to make with respect to section 604-10.5. However, if the Legislature decides not to add “dating relationships” to chapter 586, then the Bureau recommends that the Legislature make several changes to section 604-10.5 to further conform its provisions with those in chapter 586. These include:

- (1) Following the language in section 586-3 concerning the form and manner in which one petitions for relief;
- (2) Following the language in section 586-3 concerning requiring the District Court to appoint an employee to assist the petitioner in completing the petition;
- (3) Following the language in section 586-5.6 concerning the effective date of orders under section 604-10.5;
- (4) Following the language in section 586-5 concerning the granting of a continuance for good cause and allowing the court to continue the matter administratively if service has not been effected;
- (5) Following the language in section 586-4 and the Bureau’s recommended language in section 586-11 concerning imposition of monetary fines for violations of protective orders; and
- (6) Following the language in the Bureau’s recommended new sections relating to full faith and credit of foreign protective orders.



***Legislative Reference Bureau's Recommended Amendments***

**“§604-10.5 Power to enjoin and temporarily restrain harassment.** (a) For the purposes of this section:

"Course of conduct" means a pattern of conduct composed of a series of acts over any period of time evidencing a continuity of purpose.

"Harassment" means:

- (1) Physical harm, bodily injury, assault, or the threat of imminent physical harm, bodily injury, or assault; or
- (2) An intentional or knowing course of conduct directed at an individual that seriously alarms or disturbs consistently or continually bothers the individual, and that serves no legitimate purpose; provided that such course of conduct would cause a reasonable person to suffer emotional distress.

(b) The district courts shall have power to enjoin or prohibit or temporarily restrain harassment.

(c) Any person who has been subjected to harassment may petition the district court of the district in which the petitioner resides for a temporary restraining order and an injunction from further harassment.

(d) A petition for relief from harassment shall: be in writing [and shall] and upon forms provided by the court; allege, under penalty of perjury, that a past act or acts of harassment may have occurred, or that threats of harassment make it probable that acts of harassment may be imminent[;and shall be accompanied by an affidavit made under oath or statement made under penalty or perjury stating the specific facts and circumstances from which relief is sought]. The district court shall designate an employee or appropriate non judicial agency to assist the person in completing the petition.

(e) Upon petition to a district court under this section, the court may temporarily restrain the person or persons named in the petition from harassing the petitioner upon a determination that there is probable cause to believe that a past act or acts of harassment have occurred or that a threat or threats of harassment may be imminent. The court may issue an ex parte temporary restraining order either in writing or orally; provided that oral orders shall be reduced to writing by the close of the next court day following oral issuance.

(f) A temporary restraining order that is granted under this section shall be effective as of the date of signing and filing; provided that, if a temporary restraining order is granted orally in the presence of all the parties and the court determines that each of the parties understands the order and its conditions, if any, the order shall be effective as of the date it is orally stated on the record by the court. The temporary restraining order shall remain in effect at the discretion of the court for a period not to exceed ninety days from the date the order is granted. A hearing on the petition to enjoin harassment shall be held within fifteen days after the temporary restraining order is granted[.] unless a continuance is granted for good cause. In the event that service of the temporary restraining order has not been effected before the date of the hearing on the petition to enjoin, the court administratively may set a new date for the hearing; provided that the new date shall not exceed ninety days from the date temporary restraining order was granted[.] and the court shall notify the petitioner and the applicable police department of the new hearing date.

The parties named in the petition may file or give oral responses explaining, excusing, justifying, or denying the alleged act or acts of harassment. The court shall receive all evidence that is relevant at the hearing, and may make independent inquiry.

If the court finds by clear and convincing evidence that harassment as defined in paragraph (1) of that definition exists, it may enjoin for no more than three years further harassment of the petitioner, or that harassment as defined in paragraph (2) of that definition exists, it shall enjoin for no more than three years further harassment of the petitioner; provided that this paragraph shall not prohibit the court from issuing other injunctions against the named parties even if the time to which the injunction applies exceeds a total of three years.

Orders stated orally on the record by the court shall be effective as of the date of the hearing until further order of the court; provided that all oral restraining orders shall be reduced to writing and issued immediately.

Any order issued under this section shall be served upon the respondent. For the purposes of this section, “served” shall mean actual personal service, service by certified mail, or proof that the respondent was present at the hearing in which the court orally issued the injunction.

Where service of a restraining order or injunction has been made or where the respondent is deemed to have received notice of a restraining order or injunction order, any knowing or intentional violation of the restraining order or injunction order shall subject the respondent to [the provisions in] subsection (h).

Any order issued shall be transmitted to the chief of police of the county in which the order is issued by way of regular mail, facsimile transmission, or other similar means of transmission.

(g) The court may grant costs and fees to the prevailing party in an action brought under this section, [costs and fees,] including attorney's fees.

(h) A knowing or intentional violation of a restraining order or injunction issued pursuant to this section is a misdemeanor. The court shall sentence a violator to appropriate counseling and shall sentence a person convicted under this section as follows:

- (1) For a violation of an injunction or restraining order that occurs after a conviction for a violation of the same injunction or restraining order, [a violator] the person shall be sentenced to a mandatory minimum jail [sentence] term of not less than forty-eight hours[;] and be fined not less than \$150 nor more than \$500; and
- (2) For any subsequent violation that occurs after a second conviction for violation of the same injunction or restraining order, the person shall be sentenced to a mandatory minimum jail [sentence] term of not less than thirty days[.] and be fined not less than \$250 nor more than \$1,000.

The court may suspend any jail sentence, except for the mandatory sentences under paragraphs (1) and (2), upon [appropriate conditions, such as] condition that the defendant remain alcohol and drug-free, conviction-free, [or] and complete court-ordered assessments or counseling. The court may suspend the mandatory sentences under paragraphs (1) and (2) [where] if the violation of the injunction or restraining order does not involve violence or the threat of violence. Nothing in this section shall be construed as limiting the discretion of the judge to impose additional sanctions authorized in sentencing for a misdemeanor offense.

(i) Nothing in this section shall be construed to prohibit constitutionally protected activity.”

## Bail Issues

Section 804-5, Hawaii Revised Statutes, authorizes the county chief of police to admit persons to bail where the punishment for the offense charged may not exceed two years. Accordingly, in the case of misdemeanors, petty misdemeanors, and violations, bail is generally set by the county police department according to a bail schedule adopted by the chief of police. There has been some concern that the applicable bail for cases involving domestic abuse is inadequate. In 1993, in *Pelekai v. White*,<sup>83</sup> the Hawaii Supreme Court ruled that the Senior Judge of the Family Court lacked authority to issue a bail schedule overriding the authority of the police chief because section 804-5, Hawaii Revised Statutes, granted the Chief of Police with independent authority and discretion to admit person charged with misdemeanor offenses to bail.

The current bail schedule for the Police Department of the City and County of Honolulu excepts cases involving domestic abuse from the typical misdemeanor case, which provides for a minimum of \$100 and a maximum of \$2,000. Under the Honolulu Police Department's schedule, the following bail amounts apply to cases involving domestic abuse:

- (1) Abuse of family or household member (section 709-906, Hawaii Revised Statutes):
  - (a) For a first offense, the minimum is \$1,000 and the maximum is \$2,000;
  - (b) For a second offense, the minimum is \$2,000 and the maximum is \$2,000;
- (2) Violations of domestic abuse protective orders (sections 586-4, 586-11, and 580-10(d) Hawaii Revised Statutes):
  - (a) For a first offense, the minimum is \$1,000 and the maximum is \$2,000;
  - (b) For a second offense, the minimum is \$2,000 and the maximum is \$2,000.

The maximum bail amount may be charged if any of the following circumstances apply:

- C. Maximum bail may be charged if any of the following circumstances are applicable to the defendant:
  1. Is on probation for a felony conviction.
  2. Is on parole.
  3. Has a pending felony charge.
  4. Is being charged with the use or threatened use of a firearm or other offensive or deadly weapon.
  5. Has been previously convicted for two or more separate offenses.

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<sup>83</sup> 75 Haw. 357 (1993).

6. Has been diagnosed by a psychologist or psychiatrist to be dangerous.
7. Has inflicted serious bodily injury on anyone or is charged with attempted murder, rape, robbery, assault or kidnapping.
8. Has no permanent or local address (transient).
9. States a false address.
10. Has ever been in contempt of court.
11. Used force in the commission of the offense for which he/she was arrested.
12. Is unable to verify his/her own identity.
13. Is charged with an offense which occurred in a Weed and Seed geographical area.

The other county police departments have bail schedules with similar amounts with the exception of Hawaii County (See Appendix F and G for bail schedules for Maui and Kauai Counties). The Hawaii County Police Department's bail schedule imposes: for a second offense, a minimum of \$1,500 and a maximum of \$2,000, and \$2,000 for a third offense. See Appendix H for Hawaii County's bail schedule. Given the bail schedules applicable to cases involving domestic abuse, the Bureau makes no recommendations concerning bail amounts for domestic abuse cases. If the Legislature believes the amount of bail set in these cases continues to be too low, it could amend section 804-5 to impose a higher bail amount by statute. However, given case law concerning excessive bail, if the Legislature decides on this course of action, the Bureau would recommend the Legislature include a purpose section in the law amending section 804-5, to justify the need for high bail in cases involving domestic abuse.

Some commentators also urged the Bureau to consider other changes to the present law relating to bail, such as requiring a suspect in a domestic abuse case to be held without bail, until the suspect could be brought before a judge to confirm bail. The Bureau does not believe this is practical, given jail space constraints, nor advisable given present case law.

## **Firearms Issue**

Persons convicted of abuse of a family or household member are prohibited from possessing firearms. In addition, pursuant to section 134-7(f), Hawaii Revised Statutes, a person restrained from contacting, threatening, or physically abusing any other person shall be prohibited from possessing or controlling any firearm or ammunition as long as the protective order, or any extension thereof, is in effect; unless a good cause shown exception exists. The section specifically includes ex parte orders under chapter 586, Hawaii Revised Statutes.

The Bureau raises two issues with respect to this section. First, because sections 580-10(d) and 604-10.5 are not specifically mentioned, commentators expressed concern that it may not be clear that they are included in the firearms prohibition in section 134-7(f). The first sentence of section 134-7(f) states:

“No person who has been restrained pursuant to an order of any court, including an ex parte order as provided in this subsection, from contacting, threatening, or physically abusing any person, shall possess or control any firearm or ammunition therefor, so long as the protective order or any extension is in effect, unless the order, for good cause shown, specifically permits the possession of a firearm and ammunition.”

This language arguably may be sufficient to cover these sections; however, the statutory language defining protective orders differs between chapter 586 and sections 580-10(d) and 604-10.5. Consequently, the Bureau believes a specific reference would ensure application of the firearms prohibition to orders issued pursuant to these sections. Therefore, the Bureau recommends that the first sentence to section 134-7(f), include a reference to chapter 586 and section 604-10.5. For example:

“No person who has been restrained pursuant to an order of any court[,] under chapter 586 or section 604-10.5, including an ex parte order as provided in this subsection ...”

Any reference to section 580-10(d) obviously will depend upon what the Legislature decides to do with this section. If the Legislature decides to provide for all domestic abuse protective orders through chapter 586, no further amendment would be needed to section 134-7(f). If the Legislature decides to retain the ability to obtain a protective order, but require the protective order to comply with chapter 586, as proposed by the Bureau, section 580-10(d) should specifically be included in section 134-7(f). If the Legislature decides to delete section 580-10(d), but add a new section to chapter 580 relating to protective orders similar to that in the Bureau’s alternative proposal, section 134-7(f) should refer to the new section as “section 580- ”.

The second issue concerns language appearing in approximately the middle of section 134-7(f) that reads: “The ex parte order *shall be effective* upon service pursuant to section 586-6.” (emphasis added) Section 586-6 details the manner of service of process of the protective order upon the respondent; however, section 586-5.6 states that an ex parte temporary restraining order *is effective* as of the date of signing and filing.<sup>84</sup> Accordingly, the language in section 134-7(f) may make it somewhat ambiguous as to when an ex parte temporary restraining order under chapter 586 is effective. It appears obvious to the Bureau that section 586-5.6 should control when an ex parte temporary restraining order under chapter 586 is effective. Therefore, to clarify the meaning of this language in section 134-7(f), the Bureau suggests that it be amended to include the phrase: “for purposes of this subsection”. In addition, ex parte restraining orders also are authorized by section 604-10.5(e) but are not included in section 134-7(f). Therefore, the Bureau proposes that the language in section 134-7(f) be amended to read:

“The ex parte order shall be effective for purposes of this subsection upon service pursuant to section 586-6[,] or 604-10.5(f), as applicable.”

<sup>84</sup> If the order is stated orally in the presence of all parties, however, and the court has determined each party understands the order and its conditions, the order is effective as of the date it is orally stated. Section 586-5.6(a), Hawaii Revised Statutes (emphasis added).

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# SENATE CONCURRENT RESOLUTION

REQUESTING A STUDY OF HAWAII'S LAWS RELATING TO DOMESTIC  
VIOLENCE.

1           WHEREAS, domestic violence and abuse continues to be the  
2 greatest threat to the safety and welfare of many families in  
3 our society; and

4  
5           WHEREAS, between 1992 and 1997, domestic violence and  
6 abuse homicides made up 24.3 per cent of the total number of  
7 homicides in Hawaii; and

8  
9           WHEREAS, among women who are murdered in Hawaii, the  
10 majority are killed as a result of a dispute involving someone  
11 with whom they have or had an intimate relationship; and

12  
13           WHEREAS, domestic violence and abuse often begins in an  
14 elusive and insidious manner, as a perpetrator systematically  
15 attempts to gain power and control over another by undermining  
16 the victim's self-esteem, identity, and choices; and

17  
18           WHEREAS, domestic violence and abuse is not an isolated  
19 event, but is a continuum that may begin as manipulation,  
20 humiliation, or intimidation before it escalates to violence;  
21 and

22  
23           WHEREAS, domestic violence and abuse includes verbal and  
24 emotional abuse as well as physical abuse; and

25  
26           WHEREAS, the dynamics of domestic violence and abuse in  
27 certain "lesser" criminal offenses, such as harassment, are not  
28 recognized under present law, thus precluding the opportunity  
29 to provide meaningful protection to the victim and appropriate  
30 intervention and sanctions for the offender; and

31  
32           WHEREAS, although arrests for domestic violence and abuse  
33 have increased over the past decade, the conviction rate  
34 remains at about 30 per cent; and

35  
36           WHEREAS, without court intervention to break the cycle of  
37 violence, many women and children remain at substantial risk of  
38 harm or death; and

1 WHEREAS, it is apparent that there are a number of "pukas"  
2 in our system that prevent women and children from receiving  
3 the protection our laws are intended to afford; and  
4

5 WHEREAS, each legislative session, numerous laws relating  
6 to domestic violence and abuse are introduced to resolve such  
7 problems and strengthen protections to women and children; and  
8

9 WHEREAS, during the Regular Session of 1999, over one  
10 hundred bills relating to domestic violence or to abuse were  
11 introduced; and  
12

13 WHEREAS, much of Hawaii's domestic violence and abuse laws  
14 has been enacted on a piecemeal or "patchwork" basis, thus  
15 allowing for loopholes and inconsistencies; and  
16

17 WHEREAS, for example, a number of inconsistencies exist  
18 between provisions relating to protective orders that may be  
19 issued by the district court and those issued by the family  
20 court; and  
21

22 WHEREAS, a thorough review is needed of Hawaii's domestic  
23 violence and abuse laws to identify loopholes and  
24 inconsistencies; now, therefore,  
25

26 BE IT RESOLVED by the Senate of the Twentieth Legislature  
27 of the State of Hawaii, Regular Session of 1999, the House of  
28 Representatives concurring, that the Legislative Reference  
29 Bureau is requested to study Hawaii's domestic violence and  
30 abuse laws, including laws relating to protective orders; and  
31

32 BE IT FURTHER RESOLVED that the Bureau is requested to  
33 include in its study:  
34

- 35 (1) A review of relevant statutory provisions;
- 36
- 37 (2) An examination of those bills relating to domestic  
38 violence and abuse introduced during the Regular  
39 Session of 1999 that, in the Bureau's opinion,  
40 deserve consideration for purposes of the study;
- 41
- 42 (3) A discussion of any progressive laws relating to  
43 domestic violence and abuse from other states that,  
44 in the opinion of the Bureau, may contribute to a  
45 better understanding or elucidation of the issues  
46 raised herein or to possible solutions; and  
47
- 48 (4) Recommendations for a recodification of the domestic  
49 violence and abuse laws as necessary to enhance the  
50 protection of victims and provide for uniformity and

1 consistency, where applicable, particularly in laws  
2 relating to protective orders and bail restrictions;  
3 and  
4

5 BE IT FURTHER RESOLVED that the following are requested to  
6 provide assistance to the Bureau upon request: the Judiciary,  
7 the Department of the Attorney General, the State Public  
8 Defender, the office of the prosecuting attorney and the police  
9 department in each of the counties, and the Hawaii State  
10 Commission on the Status of Women, the Hawaii State Coalition  
11 Against Domestic Violence, Child and Family Services, Parents  
12 and Children Together, and the Domestic Violence Clearinghouse  
13 and Legal Hotline; and  
14

15 BE IT FURTHER RESOLVED that the Bureau submit its findings  
16 and recommendations, including any proposed legislation, to the  
17 Legislature no later than twenty days before the convening of  
18 the Regular Session of 2000; and  
19

20 BE IT FURTHER RESOLVED that certified copies of this  
21 Resolution be transmitted to the Attorney General, the State  
22 Public Defender, the prosecuting attorney and the chief of  
23 police in each of the counties, and a representative of the  
24 Hawaii State Commission on the Status of Women, the Hawaii  
25 State Coalition Against Domestic Violence, Child and Family  
26 Services, Parents and Children Together, and the Domestic  
27 Violence Clearinghouse and Legal Hotline.



## Appendix B

### **DOMESTIC VIOLENCE WORKING GROUP MEMBERS** **(HCR 65, HD 1)**

#### **Domestic Violence Service Providers**

(1) Nanci Kreidman  
Executive Director  
Domestic Violence Clearinghouse and Legal  
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(2) **Karen Tan**  
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(3) Sandra-Joy Eastlack  
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Child and Family Service  
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Hawaii Lawyers Care  
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#### **Hawaii State Coalition Against Domestic Violence**

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#### **Department of Public Safety**

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#### **Honolulu Police Department**

(7) **Capt. George McKeague**  
Honolulu Police Department  
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#### **Department of the Prosecuting Attorney-Honolulu**

(8) **Iwalani White**  
First Deputy Prosecuting Attorney or  
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(9) **Dennis Dunn**  
Director, Victim Witness Kokua Services  
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#### **Family Court**

(10) **The Honorable Darryl Choy**  
Family Court of the First Circuit  
777 Punchbowl Street  
Honolulu, HI 96813-5093  
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Fax: 538-4504

(11) **Maureen Kiehm**  
Program Specialist  
Family Court of the First Circuit  
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Honolulu, HI 96811-3498  
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Fax: 539-4402

**District Court**

**(12) The Honorable Marcia J. Waldorf**  
Administrative Judge  
District Court of the First Circuit  
1111 Alakea Street, 11<sup>th</sup> floor  
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Fax: 538-5232

**Circuit Court**

**(13) The Honorable Elwin Abu**  
Circuit Court of the First Circuit  
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**Hawaii Paroling Authority**

**(14) Kathy Shimata**  
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**Adult Probation Division**

**(15) Cheryl Inouye**  
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**Department of the Attorney General**

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**Legal Aid**

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**Hawaii State Commission on the Status of Women**

**(18) Ailicyn Hikida Tasaka**  
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**Consumer/Survivor**

**(19) Rumri Murakami**  
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**OTHER ATTENDEES**

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**Senate Judiciary**

**(21) Laurel Johnston**  
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**Department of the Attorney General**

**(22) Lari Koga**  
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**FACILITATORS**

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## Appendix C

### **FULL FAITH AND CREDIT COMMITTEE MEMBERS**

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12. **Nanci Kreidman, Executive Director  
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- 13, **Carol Lee  
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16. **Lt. John Matassa  
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- 21, **Laureen Pang**  
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22. **Nancy Ralston**  
**Dept. Of ths AttorneyGeneral**  
**Crime Preventionand Justice Asslstanee Div.**  
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23. **Commander Judy Schevtchuk**  
**735 Bishop Street, Suite 430**  
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**Fax: 523-2838**

9/1/99

- 24, **Lieutenant Timothy Slovak**  
**Honolulu Police Department**  
**801 S. Beretania Street**  
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**Fax: 529-3525**
25. **The Honorable Michael Town**  
**First Circuit Court**  
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- 26, **The: Honorable Marcia J. Waldorf**  
**Administrative Judge**  
**District Court of the First Circuit**  
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**Honolulu, Hawaii 96813-2897**  
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28. **Tony Wong**  
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- 2 % **Lynne Youmans**  
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9/1/99



Appendix D

**VAWA State Planning Committee – FY 2000  
Members List**

<b>The Honorable Earl I. Anzai, Chair</b> Attorney General 425 Queen Street Honolulu, Mawaii 968 13	<b>586-1282</b> FAX: 586-1239
Ms. Haunani Apoliona Office of Hawaiian Affairs 711 Kapiolani Boulevard, 12' Floor Honolulu, Hawaii 96813	594-1859 FAX: 594- 1875
Ms. Melba Bantay Catholic Charities Immigrant Services 712 North School Street Honolulu , Hawaii 968 17	528-5234 (x309) FAX: 531-1970
<b>The Honorable Richard Bissen</b> <b>Prosecuting Attorney</b> <b>County of Maui</b> <b>200 South High Street</b> <b>Wailuku, Hawaii 96793</b>	(808) 270-7777 FAX: 808-270-7623
The Honorable Wayne Carvalho <b>Chief of Police</b> Hawaii County Police Department 349 Kapiolani Street Hilo, Hawaii 96728	(808) 961-2244 <b>FAX: (808) 961-2389</b>
The Honorable Lee Donohue <b>Chief of Police</b> Honolulu Police Department 801 South Beretania Street Honolulu, Hawaii 96813	5299 162 FAX: 529-3030
<b>Ms. Nanci Kreidman</b> Executive Director Domestic: Violence Clearinghouse and Legal Hotline P.O, Box 3198 <b>Honolulu , Hawaii 96801-3 198</b>	534-0040 FAX: 53 1-7228

Ms. Phoebe Lambeth, R.N., B.S.N.  
Manager  
**Hawaii Pacific Oncology Center**  
**1285 Waiianuenu Avenue**  
**Hilo, Hawaii 96720**

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Ms. Carol Lee  
**Executive Director**  
**Hawaii State Coalition Against Domestic Violence**  
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486-6939  
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**Mr. Kenneth Ling**  
**Director**  
Family Court of the **First Circuit**  
777 Punchbowl Street  
Honolulu, Hawaii 96813

~~539-4401~~  
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Ms. **Adriana Ramelli**  
**Executive Director**  
Sex Abuse Treatment Center  
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535-7600  
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The Honorable Michael Soong  
**Prosecuting Attorney**  
**County of Kauai**  
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Ms. Leslie Wilkins  
Chair  
**Hawaii State- Commission on the Status of Women**  
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The Honorable Steven Ah (ex-officio)  
United States Attorney  
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541-2850  
FAX: 541-2958

September 27,



# Appendix F

## MAUI COUNTY POLICE DEPARTMENT BAIL SCHEDULE

	<u>MINIMUM</u>	<u>MAXIMUM</u>
a. Abuse of Family and Household Members		
First Offense	\$1,000.00	\$2,000.00
Second/Subsequent offense	\$2,000.00	\$2000.00
b. Violation of an Order for Protection		
First Offense	\$1,000.00	\$2,000.00
Second/Subsequent offense	\$2,000.00	\$2,000.00

Special Order 98- 10  
Revision of Bail Schedule

# Appendix G

## KAUAI COUNTY POLICE DEPARTMENT

### BAIL SCHEDULE

	<u>MINIMUM</u>	<u>MAXIMUM</u>
2. ABUSE OF HOUSEHOLD MEMBER		
1st offense	\$1,000.00	\$2,000.00
2nd/subsequent offense	\$2,000.00	\$2,000.00
3. DOMESTIC ABUSE PROTECTIVE ORDERS (HRS 586-4 and 586-11)		
1st offense	\$1,000.00	\$2,000.00
2nd/subsequent offense	\$2,000.00	\$2,000.00

ADMINISTRATIVE NOTICE

No. 98-01

## Appendix H

### HAWAII COUNTY POLICE DEPARTMENT

#### BAIL GUIDELINES FOR MISDEMEANORS AND LESSER CRIMES

<b><u>OFFENSE</u></b>	<b><u>BAIL</u></b>	<b><u>STANDARD</u></b>	<b><u>HIGH</u></b>
Misdemeanor offenses (as Terroristic Threatening, Assault, Negligent Homicide, Negligent Injury Family Court Cases)	\$ 250		\$1,000
Violation of Order and Abuse Household Member			
<b>1st offense</b>	1,000		2,000
<b>2nd offense</b>	1,500		2,000
<b>3rd/subsequent offense</b>	2,000		2,000