



Office of the Public Defender State of Hawaii



Testimony of the Office of the Public Defender, State of Hawaii to the House Committee on Judiciary

January 29, 2020

H.B. No. 1741: RELATING TO SEXUAL ASSAULT

Chair: Representative Chris Lee, Vice Chair: Representative Joy San Buenaventura and Members of the Committee:

The Office of the Public Defender opposes to H.B. 1741. The purpose of H.B. 1741 is to hold perpetrators *strictly liable* for sexual assaults against persons who are “mentally defective”. In other words, the prosecution in a sexual assault case involving a mentally defective victim, would not have the burden of proving beyond a reasonable doubt that the defendant knew the person he/she had sexual relations with was in fact mentally defective. The further purpose herein is to treat those considered as mentally defective the same as minors and prison inmates in the context of sexual relations, which is to deny them the ability to consent to sexual relations with another person.

The goals of H.B. 1741 are noteworthy, but unnecessary based upon current statutory law. The definition of the term “mentally defective” in HRS Section 707-700 clearly states that such a person is “incapable of appraising the nature of the person’s conduct”. This definition coupled with HRS Section 702-235 (Ineffective Consent) clearly would prohibit a finding of consent being given for a sexual relationship by someone defined as “mentally defective”, but does so on a case by case fact driven basis. Therefore, any issue regarding consent would be decided based upon the circumstances of that particular case, and not upon strict liability.

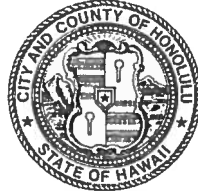
The danger of creating these types of “strict liability” prohibitions is that they do not take into consideration those individual cases, wherein due to the uniqueness of their circumstances, injustice can occur. The present law

already prevents the feared outcomes that this bill hopes to alleviate, and therefore is unnecessary, but its passage could lead to greater injustice not yet contemplated. For example, the preamble to H.B. 1741 equates minors and incarcerated prisoners to those considered “mentally defective”. However, the definition of the term “mentally defective” in HRS Section 707-700 is not clear enough for such a comparison. A minor is a minor until they are eighteen, a prisoner is a prisoner until they are discharged from their sentence, but someone considered “mentally defective” has no end date to their status per the statutory definition. Therefore, if someone is considered “mentally defective”, but their symptomology is abated by medication or other treatment can they become sound of mind enough to be removed from the category of “mentally defective” and therefore be allowed to legally consent to sexual relations with another person? This would be a legal question that would need to be answered by making factual findings unique to a specific case, but the passage of H.B. 1741 could make such a decision moot and the possible result unjust. A person suffering from a mental illness can be considered “defective” under the law, however like many suffering from mental illness they can be lucid at times and thus capable of proper decision making, and at other times not. Isn’t such a person capable of giving proper legal consent at certain times, but not so at other times? The passage of H.B. 1741 would remove that question from the law, and make a blanket prohibition regarding consent on those that are suffering from mental illness. The OPD strongly agrees that we must, as a society, protect our most vulnerable members, but we must do so by use of statutes that balance the need for such protection with the understanding that said protection cannot be at the cost of justice. This is a very complicated issue that requires more than a one size fits all solution.

Thank you for the opportunity to comment on H.B. 1741

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OUR REFERENCE

January 30, 2020

The Honorable Chris Lee, Chair
and Members
Committee on Judiciary
House of Representatives
Hawaii State Capitol
415 South Beretania Street, Room 325
Honolulu, Hawaii 96813

Dear Chair Lee and Members:

SUBJECT: House Bill No. 1741, Relating to Sexual Assault

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

The HPD supports House Bill No. 1741, Relating to Sexual Assault.

We agree with the legislature that mentally and developmentally disabled persons have a limited capacity to give knowing and willing consent to sexual relations. They also have a limited understanding of the physical and social impacts of sexual contact and penetration. This makes them especially vulnerable to sexual predators who want to take advantage of them. Therefore, they need enhanced protection by the State. Not requiring proof that the perpetrator knew the victim was mentally defective will allow the State to protect these individuals.

The HPD urges you to support House Bill No. 1741, Relating to Sexual Assault.

Thank you for the opportunity to testify.

APPROVED:

Handwritten signature of Susan Ballard in black ink.

Susan Ballard
Chief of Police

Sincerely,

Handwritten signature of Randall Platt in black ink.

Randall Platt, Captain
Criminal Investigation Division

DEPARTMENT OF THE PROSECUTING ATTORNEY
CITY AND COUNTY OF HONOLULU

LATE

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**THE HONORABLE CHRIS LEE, CHAIR
THE HONORABLE JOY A. SAN BUENAVENTURA, VICE CHAIR
HOUSE COMMITTEE ON JUDICIARY
Thirtieth State Legislature
Regular Session of 2020
State of Hawai'i**

January 30, 2020

RE: H.B. 1741; RELATING TO SEXUAL ASSAULT.

Chair Lee, Vice Chair San Buenaventura, and members of the House Committee on Judiciary, the Department of the Prosecuting Attorney of the City and County of Honolulu submits the following testimony in strong support of H.B. 1741. This bill is part of the Department's 2020 legislative package.

The purpose of this bill is to amend the offenses of Sexual Assault in the First Degree, Hawaii Revised Statutes (HRS) section 707-730 and Sexual Assault in the Third Degree, HRS section 707-732 to make persons who engage in sexual penetration or sexual contact with mentally defective persons strictly liable for their conduct.

We support this bill as it recognizes the need to protect a vulnerable segment of our community, the developmentally disabled, from sexual predation. Such protection would be similar to that presently given to minors in our penal code.

Currently under our penal code, a person is strictly liable for the sexual penetration of or the sexual contact with minors under a certain age. The Hawaii Supreme Court, in State v. Buch, 83 Hawaii 308, 926 P.2d 599 (1996) has upheld strict liability in this context. Citing language by the Michigan Supreme Court, the Buch court stated:

It is well established that the Legislature may, pursuant to its police powers, define criminal offenses without requiring proof of a specific criminal intent and so provide that the perpetrator proceed at his [or her] own peril regardless of his [or her] defense of ignorance or an honest mistake of fact. In the case of statutory rape, such legislation in

the nature of “strict liability” offenses, has been upheld as a matter of public policy because of the need to protect children[.]

And in holding that this legislature had intended strict liability for sexual contact with minors, the Buch court held:

Certainly HRS section 707-732(1)(b) gives reasonable notice to the person of ordinary intelligence that sexual contact with children under fourteen years of age is prohibited and subjects the actor to criminal liability. Because the legislature apparently believed that children are “fragile organism[s] that [are] subject to abuse and require [] vigilant protect,” it placed the risk of a mistake regarding the age of the child squarely on the adult “who deliberately goes perilously close to an area of proscribed conduct.”

We believe these same policy concerns are applicable to the developmentally disabled who are vulnerable to sexual predations and by their nature similarly unable to effectively consent to sexual activity. The definition for mentally defective in HRS Section 707-700 reads as follows:

"Mentally defective" means a person suffering from a disease, disorder, or defect which renders the person incapable of appraising the nature of the person's conduct.

Clearly when an individual's disability is of such great severity they need and deserve all of the protection that the law can provide. This measure goes a long way in achieving that goal. For all of the foregoing reasons, the Department of the Prosecuting Attorney of the City and County of Honolulu supports the passage of H.B. 1741. Thank you for the opportunity to testify on this matter.

HB-1741

Submitted on: 1/29/2020 5:45:14 PM

Testimony for JUD on 1/30/2020 2:45:00 PM

LATE

Submitted By	Organization	Testifier Position	Present at Hearing
Dr. Guy Yatsushiro	Individual	Support	No

Comments:

HB-1741

Submitted on: 1/29/2020 5:49:26 PM

Testimony for JUD on 1/30/2020 2:45:00 PM

LATE

Submitted By	Organization	Testifier Position	Present at Hearing
Dara Carlin, M.A.	Individual	Support	No

Comments:

HB-1741

Submitted on: 1/30/2020 12:46:46 PM

Testimony for JUD on 1/30/2020 2:45:00 PM



Submitted By	Organization	Testifier Position	Present at Hearing
Andre Bisquera	Individual	Support	No

Comments:

I am a male survivor of child sex abuse and strongly support this bill. Thank you.

HB-1741

Submitted on: 1/30/2020 1:14:19 PM

Testimony for JUD on 1/30/2020 2:45:00 PM



Submitted By	Organization	Testifier Position	Present at Hearing
Michael Tada	Individual	Support	Yes

Comments:

I strongly support this bill. As a person with a psysical disability I've experienced sexual molestation in 1999. Although I am fairly over the trauma, I do have my days of flashbacks, although it's now very spordic. I am okay now, but sometimes, even now I have days of grief. If it pleses this body, I would like to give some suggestions to add to this bill.

In the Senate companion bill, sb2308, on page 7, Section 346-c, Commercial sexual exploitation of children steering committee, I would like to request that you add a few parents of children who were sexually exploited to this group. The reaon that I am requesting that is that parents are the first line of defense for their children, and I believe that their voice is very much needed.

I thank you for your time.