

STATE OF HAWAI‘I
OFFICE OF THE PUBLIC DEFENDER

**Testimony of the Office of the Public Defender,
State of Hawai‘i to the House Committee on
Judiciary and Hawaiian Affairs**

February 23, 2021

H.B. No. 177: RELATING TO SEXUAL ASSAULT

Chair Nakashima, Vice Chair Matayoshi, and Members of the Committee:

The Office of the Public Defender is opposed to H.B. No. 177.

The purpose of this measure 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 this measure are noteworthy but unnecessary based upon current statutory law. The definition of the term “mentally defective” in HRS § 707-700 clearly states that such a person is “incapable of appraising the nature of the person’s conduct.” This definition coupled with HRS § 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. No. 177 equates minors and incarcerated prisoners to those considered “mentally defective.” However, the definition of the term “mentally defective” in HRS § 707-700 is not clear enough for such a comparison. A minor is a minor until they reach a designated age; 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 once 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 this measure 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 this measure would remove that question from the law and make a blanket prohibition regarding consent on those that are suffering from mental illness.

We strongly agree 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. No. 177.

HB-177

Submitted on: 2/22/2021 11:36:08 AM

Testimony for JHA on 2/23/2021 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Victor K. Ramos	Maui Police Department	Support	No

Comments:

We support this measure.

DEPARTMENT OF THE PROSECUTING ATTORNEY
CITY AND COUNTY OF HONOLULU

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THE HONORABLE MARK M. NAKASHIMA, CHAIR
HOUSE COMMITTEE ON JUDICIARY AND HAWAIIAN AFFAIRS
Thirty-First State Legislature
Regular Session of 2021
State of Hawai`i

February 23, 2021

RE: H.B. 177; RELATING TO THE DEFINITION OF PROPERTY.

Chair Nakashima, Vice Chair Matayoshi, and members of the House Committee on Judiciary and Hawaiian Affairs, the Department of the Prosecuting Attorney of the City and County of Honolulu ("Department") submits the following testimony in strong support of H.B. 177. This bill is part of the Department's 2021 legislative package.

The purpose of this bill is to amend the offenses of Sexual Assault in the First Degree, Section 707-730, Hawaii Revised Statutes ("HRS"), and Sexual Assault in the Third Degree, HRS §707-732, to make those who engage in sexual penetration or sexual contact with mentally defective persons strictly liable for knowledge that the person was mentally defective. We support this bill as it recognizes the need to protect a vulnerable segment of our community, the developmentally disabled, from sexual predation.

As stated in HRS §707-700, "'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.*" (Emphasis added.) Clearly, when an individual's disability is of such great severity, they need and deserve all of the protection that the law can provide.

Currently, under our penal code, a person is strictly liable for the sexual penetration of, or 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:

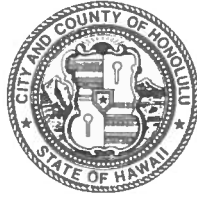
Certainly HRS section 707-732(1)(b) gives reasonable notice to the person of ordinary intelligence that sexual contact with children under fourteen years of age is prohibited and subjects the actor to criminal liability. Because the legislature apparently believed that children are “fragile organism[s] 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 those in our community who are so developmentally disabled that they are unable to effectively consent to sexual activity. By their nature, these individuals are vulnerable to sexual predations, and thus deserve the same level of protection presently given to minors in our penal code. This measure goes a long way in achieving that goal.

For these reasons, the Department of the Prosecuting Attorney strongly supports the passage of H.B. 177. Thank you for this opportunity to testify.

POLICE DEPARTMENT
CITY AND COUNTY OF HONOLULU

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OUR REFERENCE
RP-KK

February 23, 2021

The Honorable Mark M. Nakashima, Chair
and Members
Committee on Judiciary
and Hawaiian Affairs
House of Representatives
Hawaii State Capitol
415 South Beretania Street, Room 325
Honolulu, Hawaii 96813

Dear Chair Nakashima and Members:

SUBJECT: House Bill No. 177, 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. 177, Relating to Sexual Assault.

Mentally disabled persons have a limited understanding of the physical and social impacts of sexual acts. 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 unstable will allow the State to protect these individuals.

The HPD urges you to support House Bill No. 177, 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