

# SB2363

**Measure Title:**  
RELATING TO SEXUAL ASSAULT.

**Report Title:**  
Sexual Assault

**Description:**  
Amends Hawaii Penal Code to make sexual assault against a person who is mentally defective a "strict liability" offense.

**Introducer(s):**  
GABBARD, Chun Oakland, English, Espero, Hanabusa, Inouye, Kim, Nishihara

**Current Referral:**  
HTH, JDL

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February 11, 2008

**THE TWENTY-FOURTH LEGISLATURE  
REGULAR SESSION OF 2008**

**COMMITTEE ON HEALTH**  
**THE HONORABLE DAVID Y. IGE, CHAIR**  
**THE HONORABLE CAROL FUKUNAGA, VICE CHAIR**

**COMMITTEE ON JUDICIARY AND LABOR**  
**THE HONORABLE BRIAN T. TANIGUCHI, CHAIR**  
**THE HONORABLE CLAYTON HEE, VICE CHAIR**

**RE: Senate Bill 2363, Relating to Sexual Assault**

**HEARING: Monday, February 11, 2008, 1:15 P.M.**

Good afternoon, Chairs Ige and Taniguchi and members of the Senate Committees on Health and Judiciary and Labor, the Department of the Prosecuting Attorney submits the following testimony in favor of the intent of Senate Bill 2363.

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 the conduct.

We support the concept of this bill as it is a recognition for the necessity 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 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.

However, we would like to note that as currently drafted, the bill may not provide for strict liability as intended. As drafted, the bill deletes the knowing state of mind for conduct involving sexual penetration of or sexual contact with a mentally defective person. This deletion may cause several problems. First, HRS section 702-204 provides that if a criminal offense does not provide for a state of mind, then culpability is established if the person acts intentionally, knowingly or recklessly as to all elements of the offense. Second, the knowing state of mind applies to more than the actor’s awareness of the condition of the victim; it also applies to the knowledge that the actor is engaging in sexual conduct. For this reason, we suggest that the knowing state of mind be retained in both the sexual assault in the first degree and the sexual assault in the third degree offenses and that language be added to both section 707-730 and 707-732, specifically stating that proof the actor knew that the victim was mentally defective shall not be required. Suggested language would be:

HRS section 707-730(1) (d):

(d) The person knowingly subjects to sexual penetration another person who is mentally defective; provided however that proof that the person knew that the other person was mentally defective shall not be required in any prosecution for an offense under this subsection; or

HRS section 707-732(1) (e)

(e) The person knowingly subjects to sexual contact another person who is mentally defective, or causes such a person to have sexual contact with the actor; provided however that proof that the person knew that the other person was mentally defective shall not be required in any prosecution for an offense under this subsection;

We respectfully request your favorable consideration of this bill with the above amendments and thank you for this opportunity to testify.