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February 26, 2008

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

RE: Senate Bill 2363, S.D. 1, Relating to Sexual Assault

HEARING: Monday, February 25, 2008, 10:00 A.M., Conference Room 016

Good morning, Chair Taniguchi and members of the Senate Committee on Judiciary and Labor, the Department of the Prosecuting Attorney submits the following testimony in support of Senate Bill 2363, S.D. 1.

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 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.

We respectfully request your favorable consideration of S.B 2363, S.D. 1. Thank you for your time and consideration.

testimony

From: hprr@hawaii.rr.com
Sent: Sunday, February 24, 2008 5:13 PM
To: testimony
Subject: Testimony in support of SB 2363, SD1 with some suggestions

TESTIMONY IN SUPPORT REGARDING SENATE BILL # 2363, SD1
with suggestions for changes

TO: Senate Committees on Judiciary and Labor
FROM: Yvonne de Luna
RE: TESIMONY IN SUPPORT SENATE BILL # 2363, SD1
RELATING TO SEXUAL ASSAULT
HEARING: Monday, February 25, 2008, 10:00 am
Conference Room 016, State Capitol

Dear Senate Committee Members:

Thank you for this opportunity to provide testimony in support of the Senate Bill # 2363, SD1 which "amends the Hawaii Penal Code to make sexual assault against a person who is mentally defective a "strict liability" offense." However, in Senate Draft # 1, I noticed that the terminology of "mentally defective" was replaced in certain paragraphs of the bill with "mentally incapacitated" but was not consistently applied. Changes to the terminology for consistency throughout the bill, is suggested.

I support legislation, which will protect the vulnerable from sexual exploitation; however, I would caution against use of language, which may inadvertently infringe or appear to infringe on the rights of persons with developmental disabilities to make choices for themselves, including consensual relations outside of marriage.

Having worked in the field of human services and with people with developmental disabilities and their families for nearly 20 years, I can appreciate the legislators' efforts to raise awareness to this problem and concur that there is need to protect the vulnerable.

However, I would like to point out that the perceived "ability" or "inability" of persons with developmental disabilities to make choices on consensual relations outside of marriage, will certainly draw differing viewpoints amongst persons with disabilities, their families/guardians, people working in the field, protection and advocacy groups and the community in general. There is a growing movement on "self-determination" which advocates for a legal framework and general policy agenda that would reaffirm the right of persons with developmental disabilities to choose or to be empowered to choose, despite the risk of those choices being right or wrong, best interest or not and despite currently held perceptions of the consensual abilities of the developmentally disabled.

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