

Testimony on behalf of the
Office of the Public Defender, State of Hawai'i
to the House Committee on Judiciary

March 13, 2008

RE: S.B.2363, SD2: Relating To Sexual Assault

Representative Waters and Members of the Committee:

SB 2363, SD2 proposes to create so-called "strict liability" for the offenses of Sexual Assault in the First and Third Degrees if the complainant is "mentally defective". In other words, if a person has what the person believes to be consensual sexual relations (which would involve penetration in the first degree offense or sexual contact in the third degree offense) with someone who meets the definition of "mentally defective", the person would be guilty of a felony sexual offense.

For the first degree offense, the defendant would automatically receive a 20 (twenty) year prison term as that offense is not probationable. For the third degree offense, the defendant would receive either a 5 (five) year prison term or a 5 (five) year term of probation. In either case, the defendant would be subject to sex offender registration and public notification upon conviction.

The definition of "mentally defective" for these offenses means "a person suffering from a disease, disorder, or defect which renders the person incapable of appraising the nature of the person's conduct". HRS § 707-700.

We believe the change proposed by this bill is ill-advised and would not accomplish the stated goal of providing additional protection from sexual predators for mentally disabled persons. There is no evidence that sexual offenders stop to read the law before committing sexual offenses. Hawaii has been providing harsher penalties, some even involving strict liability, for sexual offenses against children over the past 10 to 15 years. These offenses have not stopped as a result.

Legislation such as this should not be passed under the guise of providing greater protection for a particular class of victim. It does not do that.

Rather, what it does do, is to create situations where two people engage in what both perceive to be consensual sexual conduct, but because one of them meets the definition of not being able to "appraise the nature" of their conduct, the other is guilty of a felony.

This is simply unfair. The current law, which requires a "knowing state of mind", is able to punish the caregiver or handivan driver or teacher or any other

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person who is in a position to have an awareness that the other person is mentally limited, i.e. mentally defective.

However, there are situations where someone's status as a mentally limited person is not readily apparent. It is not unreasonable to require that the state prove that the alleged offender in that situation was aware, or should have been aware from the surrounding circumstances, that the complainant was not in a position to make an informed decision to have sexual relations.

Our current law provides the necessary extra consideration for mentally limited persons of punishing knowing sexual relations with a person unable to give true informed consent. It should not be changed.

Thank you for the opportunity to comment on this bill.

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TESTIMONY TO THE TWENTY-FOURTH STATE LEGISLATURE, 2008 SESSION

To: House Committee on Judiciary

From: Gary L. Smith, President
Hawaii Disability Rights Center

Re: Senate Bill 2363, SD 2
Relating to Sexual Assault

Hearing: Thursday, March 13, 2008, 3:15 PM
Conference Room 325, State Capitol

Members of the Committee on Judiciary:

Thank you for the opportunity to provide testimony supporting Senate Bill 2363, Relating to Sexual Assault.

I am Gary L. Smith, President of the Hawaii Disability Rights Center, formerly known as the Protection and Advocacy Agency of Hawaii (P&A). As you may know, we are the agency mandated by federal law and designated by Executive Order to protect and advocate for the human, civil and legal rights of Hawaii's estimated 180,000 people with disabilities.

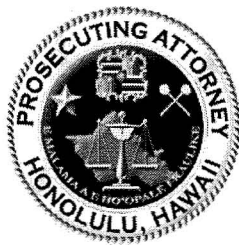
We support this bill because it will provide important protection for members of a vulnerable population. The term "mentally defective" can include individuals with certain developmental disabilities or individuals with mental retardation or other intellectual disability. Current law already recognizes such individuals to be members of a protected class since it outlaws sexual penetration of such individuals. We understand that there have been difficulties in prosecuting such cases because the state had been unable to prove that the perpetrator knew of the victim's mental capabilities. This bill appropriately puts the burden upon the offender by eliminating any defense of "ignorance" of the victim's mental status. It will make it easier to punish those who may prey upon this very special population and will therefore provide greater protection.

Thank you for the opportunity to provide testimony in support of this bill.

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DEPARTMENT OF THE PROSECUTING ATTORNEY
CITY AND COUNTY OF HONOLULU

ALII PLACE
1060 RICHARDS STREET • HONOLULU, HAWAII 96813
PHONE: (808) 547-7400 • FAX: (808) 547-7515



PETER B. CARLISLE
PROSECUTING ATTORNEY

DOUGLAS S. CHIN
FIRST DEPUTY PROSECUTING ATTORNEY

March 13, 2008

HOUSE COMMITTEE ON JUDICIARY
THE HONORABLE TOMMY WATERS, CHAIR
THE HONORABLE BLAKE K. OSHIRO, VICE CHAIR

RE: Senate Bill 2363, S.D. 2, Relating to Sexual Assault

HEARING: Thursday, March 13, 2008, 3:15 P.M., Conference Room 325

Good afternoon, Chair Waters and members of the House Committee on Judiciary, the Department of the Prosecuting Attorney submits the following testimony **in support of Senate Bill 2363, S.D. 2.**

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:

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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. 2. Thank you for your time and consideration.

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POLICE DEPARTMENT
CITY AND COUNTY OF HONOLULU

801 SOUTH BERETANIA STREET · HONOLULU, HAWAII 96813
TELEPHONE: (808) 529-3111 · INTERNET: www.honolulu-pd.org

MUFI HANNEMANN
MAYOR



BOISSE P. CORREA
CHIEF

PAUL D. PUTZULU
MICHAEL D. TUCKER
DEPUTY CHIEFS

OUR REFERENCE JC-NTK

March 13, 2008

The Honorable Tommy Waters, Chair
and Members
Committee on Judiciary
House of Representatives
State Capitol
Honolulu, Hawaii 96813

Dear Chair Waters and Members:

Subject: Senate Bill No. 2363, S.D. 2, Relating to Sexual Assault

I am Carlton S. Nishimura, Major of the Criminal Investigation Division of the Honolulu Police Department, City and County of Honolulu.

The Honolulu Police Department supports Senate Bill No. 2363, S.D. 2, Relating to Sexual Assault.

This bill would provide similar protection to mentally challenged individuals that already is in place for children under the age of fourteen. By basing the criteria on strict liability, we do not need to prove that the perpetrator knew the victim was mentally challenged and so simplify the prosecution. In this way, we hope to protect the mentally challenged from those who would use their disability against them.

Thank you for the opportunity to testify.

Sincerely,

Handwritten signature of Carlton S. Nishimura in black ink.

CARLTON S. NISHIMURA, Major
Criminal Investigation Division

APPROVED:

Handwritten signature of Boisse P. Correa in black ink.

for BOISSE P. CORREA
Chief of Police

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DISABILITY AND COMMUNICATION ACCESS BOARD

919 Ala Moana Boulevard, Room 101 • Honolulu, Hawaii 96814
Ph. (808) 586-8121 (V/TDD) • Fax (808) 586-8129

March 13, 2008

TESTIMONY TO THE HOUSE COMMITTEES ON HEALTH AND HUMAN SERVICES AND HOUSING

Senate Bill 2363, SD2 – Relating to Sexual Assault

The Disability and Communication Access Board (DCAB) is a statewide board with seventeen (17) members appointed by the Governor, thirteen (13) of whom are persons with disabilities or family members. The Board's mission is to advocate and promote full integration, independence, equal access, and quality of life for persons with disabilities in society. This testimony represents a position voted upon by the Legislative Committee of the Board.

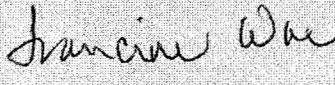
We support Senate Bill 2363, SD2, as it holds perpetrators strictly liable for sexual assault against persons who are "mentally defective." Although we support the bill, the terminology "mentally defective" and "mentally incapacitated" as defined under Section 707-700, Hawaii Revised Statutes and used here in this bill are obsolete and offensive to individuals with disabilities. We understand that definitions for disability-related terminology as used in this section may require more research before any modifications or updates can be made.

We recommend that this measure be passed as written with the intention of making corrections to the language at a later time. The substantive issue of providing additional protections, for individuals with cognitive or learning disabilities or who are incapable of making their own decisions, takes precedence at this time.

Thank you for the opportunity to testify.

Respectfully submitted,


PATRICIA M. NIELSEN
Chairperson
Legislative Committee


FRANCINE WAI
Executive Director

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Testimony Regarding SB 2363 SD2

Relating to Sexual Assault

March 13, 2008

Conference Room 325

by Thomas P. Huber
President, The Arc in Hawaii

Committee on Judiciary

The House of Representatives

The Twenty-Fourth Legislature, Regular Session of 2008

Representative Waters and Members:

I am Thomas Huber, the volunteer President of The Arc in Hawaii and the parent of an adult with intellectual and developmental disabilities.

The Arc in Hawaii **takes no position in favor of or opposed to SB 2363, SD1**, the stated purpose of which is to make a sexual assault against a person who is “mentally defective” a “strict liability” offense. However, we wish to give you our comments.

The Arc in Hawaii is a nonprofit organization which advocates for and provides services to persons with intellectual disabilities, sometimes called “mental retardation” and included within the category of “developmentally disabled” as described in Section 1 of the Bill.

We appreciate the concern of the Legislature, and of the Prosecuting Attorney, which submitted testimony in the Senate committee hearings on this Bill, to increase protection of persons with disabilities who are vulnerable to sexual and other abuse. We agree that many people with developmental disabilities are often manipulated or forced into inappropriate sexual relations. We favor legislation that increases protection of this vulnerable population, as long it does not, at the same time, reduce the rights and choices of persons with developmental disabilities.

We do not concur entirely in the following general statement in Section 1 of the Bill -- “mentally disabled and developmentally disabled persons have limited, if any, capacity to give knowing and willing consent to sexual acts.” Though this statement may apply to some or even most such persons, some persons with developmental disabilities do have the capacity (perhaps with appropriate guidance and education) to make decisions regarding their sexuality. The position of the our national affiliate, The Arc, and of the American Association on Intellectual and Developmental Disabilities states the following:

The presence of intellectual disabilities and related developmental disabilities, regardless of severity, does not, in itself, justify loss of rights related to sexuality.”

In other words, if persons have the capacity to make rational choices with respect to sexuality, they should not be denied that right even if they happen to be unable to make rational choices with respect to other matters (financial management, for instance).

Therefore, we concur with the addition of new paragraph (e) to Section 707-732 HRS (page 5, lines 3-6) to the extent it adds the category of a person who is “mentally defective” to the category of persons protected from sexual contact.

At this time, we do not object to the addition of the provisos to Section 707-730 (d) and proposed new Section 707-732 (e) (page 3, lines 13-16 and page 5, lines 6-9), which have the effect of relieving the prosecutor of establishing the alleged perpetrator’s knowledge of the alleged victim’s “mental defect.”

Our position is based on the assumption that the term “mentally defective” as defined in the Hawaii Penal Code at Section 707-700 HRS, as “a person suffering from a disease, disorder, or defect which renders the person incapable of appraising the nature of the person’s conduct” will be employed by enforcement authorities and courts in this context to refer only to the person’s capacity or lack thereof to appraise the nature of and consent to the sexual act which is subject of the prosecution.

In a larger context, we suggest that the terminology used in the Hawaii Penal Code be reviewed to assure consistency with modern understanding of disabilities and mental capacity, as well as penal issues.

Thank you for the opportunity to provide this testimony.

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JUDtestimony

From: patricialockwood [REDACTED]
Sent: Wednesday, March 12, 2008 9:21 PM
To: JUDtestimony
Cc: Rock Riggs
Subject: Testimony in support of measure SB2363 SD 2

Good Morning.

My name My name is Patricia Lockwood and I am the Executive Director of Hawaii Centers for Independent Living, a non-profit organization operated by and for people with disabilities to ensure their rights to live independently and fully integrated in the community of their choice, outside of institutional care settings. As a non-profit, statewide resource, HCIL serves people of any age with any type of disability. HCIL was founded on the historical constitutional beliefs of civil rights and the empowerment of people with disabilities to have equal access, opportunities, and choices in life, no matter how severe their disability.

HCIL stands in support of this measure.

We just have one question.

If the Americans with Disabilities Act, which is civil rights legislation, require equal coverage and protection under the law, why do we need "special legislation" for persons with developmental disabilities. Isn't this protection already provided under ADA? If it is there is the problem in terms of prosecution or interpretation of the law?

It is my understanding that there is state law on the books that makes is a lesser offense to commit various acts against persons with developmental disabilities. If this is in fact the case these laws need to be removed from the books so the equal protections provided under the federal law...as civil rights law can be implemented.

To often we think of the ADA as curb cuts and interpreters. We fail to remember that it is in fact civil rights legislation that could not have been enacted unless there was a clear pattern of discrimination and abuse as described in SB 2363 SD2.

Thank you for your time and consideration.

Patricia Lockwood
Executive Director
People with disabilities building access, independence, and choice.
Hawaii Centers for Independent Living

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**THE SEX ABUSE
TREATMENT CENTER**

A Program of Kapi'olani Medical Center for Women & Children

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M. Stanton Michels, M.D.

Willow Morton

R. Carolyn Wilcox

Date: March 13, 2008

To: The Honorable Tommy Waters, Chair
The Honorable Blake K. Oshiro, Vice Chair
Committee on the Judiciary

From: Adriana Ramelli, Executive Director
Sex Abuse Treatment Center
Kapi'olani Medical Center for Women and Children

RE: Support for SB2363 S.D.2
Amends Hawaii's Penal Code regarding sexual assault of those mentally defective

Good afternoon Representatives Waters and Oshiro and members of the Committee on Judiciary. My name is Adriana Ramelli and I am the Executive Director of the Sex Abuse Treatment Center (SATC), a program of the Kapi'olani Medical Center for Women & Children (KMCWC), an affiliate of Hawaii Pacific Health.

The SATC supports SB2363 S.D. 2 which amends Hawaii's penal code to make sexual assault against a person who is mentally defective a "strict liability" offense. We believe that developmentally disabled individuals deserve special protections under the law given their increased vulnerability to sexual victimization. While researchers agree these crimes are largely unreported, existing research suggests that the developmentally disabled of all ages are at a much higher risk of sexual assault than those without disabilities.

In the last 30 years, our Center has served thousands of sexual assault victims of all ages and backgrounds. Our work with victims has made it abundantly clear to us that children and those with disabilities are particularly vulnerable to sexual victimization. Sadly, offenders often prey on those who have little or no capacity to know or understand the gravity of what is happening to them. It is a tragic form of exploitation with often serious consequences for victims.

We strongly urge you to strengthen Hawaii's laws to better protect the developmentally disabled from sexual violence by passing SB2363 S.D. 2.

JUDtestimony

From: hppr [REDACTED]
Sent: Wednesday, March 12, 2008 2:49 PM
To: JUDtestimony
Subject: Testimony in Support of SB 2363 SD2

TESTIMONY IN SUPPORT REGARDING SENATE BILL # 2363 SD 2
with Suggested Amendments

TO: House Committee on Judiciary
FROM: Yvonne de Luna
RE: TESIMONY IN SUPPORT OF SENATE BILL # 2363, SD2
RELATING TO SEXUAL ASSAULT
HEARING: Thursday, March 13, 2008, 3:15 pm
Conference Room 325, State Capitol

Dear House Committee Members:

Thank you for this opportunity to provide testimony in support of the Senate Bill # 2363, SD2, which "amends the Hawaii Penal Code to make sexual assault against a person who is mentally defective a "strict liability" offense." There remains a few sections in the bill in which "mentally defective" as opposed to "mentally incapacitated" is still being used. It seems that the use of "mentally defective," although not the more up-to-date term, is what is currently used in the law books. Whenever possible, I would suggest consistency in use of more up-to-date terms when referencing persons with developmental disabilities or persons with mental disability/impairment.

I support legislation, which will protect the vulnerable from sexual exploitation and sexual perpetrators. I appreciate the legislators' efforts in bringing awareness to this problem and this is one way to do something about it.

However, I would like to point out that the "ability" 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 and the community in general. Each individual with disability is different and there is a movement which challenges current view points and is pushing towards the right (disregarding the question of "ability") of individuals with developmental disabilities and intellectual challenges to make those decisions for themselves -- right or wrong, best interest or not.

Still, this bill will help the vulnerable and, therefore, I ask for your support.

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