

DEPARTMENT OF THE PROSECUTING ATTORNEY
CITY AND COUNTY OF HONOLULU

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THE HONORABLE RUSSELL E. RUDERMAN, CHAIR
SENATE COMMITTEE ON HUMAN SERVICES
Thirtieth State Legislature
Regular Session of 2020
State of Hawai'i

January 29, 2020

RE: S.B. 2181; RELATING TO SEXUAL ASSAULT.

Chair Ruderman, Vice Chair Rhoads, and members of the Senate Committee on Human Services, the Department of the Prosecuting Attorney of the City and County of Honolulu submits the following testimony in strong support of S.B. 2181. 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 S.B. 2181. Thank you for the opportunity to testify on this matter.



Office of the Public Defender State of Hawaii



Testimony of the Office of the Public Defender, State of Hawaii to the Senate Committee on Human Services

January 27, 2020

S.B. No. 2181: RELATING TO SEXUAL ASSAULT

Chair: Senator Russell E. Ruderman, Vice Chair: Senator Karl Rhoads and Members of the Committee:

The Office of the Public Defender is opposed to S.B. 2181. The purpose of S.B. 2181 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 S.B. 2181 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.

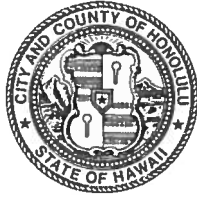
The danger of creating these types of “strict liability” prohibitions is that they do not take into consideration those individual cases, wherein due to the uniqueness of their circumstances, injustice can occur. The present law

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 S.B. 2181 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 S.B. 2181 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 S.B. 2181 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 S.B. 2181

POLICE DEPARTMENT
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OUR REFERENCE
RP-KK

January 29, 2020

The Honorable Russell E. Ruderman, Chair
and Members
Committee on Human Services
State Senate
Hawaii State Capitol
415 South Beretania Street, Room 016
Honolulu, Hawaii 96813

Dear Chair Ruderman and Members:

SUBJECT: Senate Bill No. 2181, 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 Senate Bill No. 2181, Relating to Sexual Assault.

The HPD agrees 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 disabled will allow the State to protect these individuals.

The HPD urges you to support Senate Bill No. 2181, Relating to Sexual Assault.

Thank you for the opportunity to testify.

APPROVED:

A handwritten signature in black ink, appearing to read "Susan Ballard", is written over a horizontal line.

Susan Ballard
Chief of Police

Sincerely,

A handwritten signature in black ink, appearing to read "Randall Platt", is written in a cursive style.

Randall Platt, Captain
Criminal Investigation Division

SB-2181

Submitted on: 1/24/2020 5:50:24 PM

Testimony for HMS on 1/29/2020 2:55:00 PM

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

Comments:

As a victim of sexual assault, and as one who has Cerebral Palsy , I stand in strong support of this bill. I like how this bill is written but I have one slight change to recommend. On page 3, line 20, please replace the word 'defective' with the word, 'disabled'. Please also do the same on page 4, Line one . I fully support this bill,

SB-2181

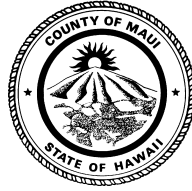
Submitted on: 1/27/2020 11:04:36 PM

Testimony for HMS on 1/29/2020 2:55:00 PM

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

Comments:

MICHAEL P. VICTORINO
Mayor



DON S. GUZMAN
Prosecuting Attorney

ROBERT D. RIVERA
First Deputy Prosecuting Attorney

ANDREW H. MARTIN
Second Deputy Prosecuting Attorney

LATE

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TESTIMONY
ON
S.B. 2181 - RELATING TO
SEXUAL ASSAULT

January 29, 2020

The Honorable Russell E. Ruderman
Chair
The Honorable Karl Rhoads
Vice Chair
and Members of the Committee on Human Services

Chair Ruderman, Vice Chair Rhoads, and Members of the Committee:

The Department of the Prosecuting Attorney, County of Maui respectfully submits the following comments concerning S.B. 2181, Relating to Sexual Assault. Specifically, we would like to express our strong support for S.B. 2181, which would make it significantly easier to prosecute sexual assault cases involving persons deemed “mentally defective” under §707-700 of the Hawaii Revised Statutes (“H.R.S.”).

As noted in the bill’s legislative intent section, the frequency of sexual assault for one of our nation’s most vulnerable demographics is shockingly high. This is due in part to their diminished capacity to truly consent to sexual acts, a vulnerability that is exploited by sexual predators who may not be aware of their victim’s disability.

Under the current versions of H.R.S. §§707-730(d) and 707-732(e), in order to obtain a conviction the State is required to prove beyond a reasonable doubt that a defendant not only committed a sexual assault against a complaining witness who was “mentally defective”, but that the defendant was aware of the witness’ mental status while doing so. Although there are scenarios where there is ample evidence that a defendant was fully aware of a victim’s mental disability, there are also scenarios where there is simply not enough evidence to prove this element beyond a reasonable doubt. In those scenarios, this bill would help us hold a defendant accountable for they did, rather than being limited by what current laws allow us to prove.

For these reasons, the Department of the Prosecuting Attorney, County of Maui strongly supports the passage of S.B. 2181. Please feel free to contact our office at (808) 270-7777 if you

have any questions or inquiries.

Thank you very much for the opportunity to provide testimony on this bill.