



**TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
THIRTY-FIRST LEGISLATURE, 2022**

ON THE FOLLOWING MEASURE:

H.B. NO. 1466, RELATING TO SEXUAL ASSAULT OF A MINOR.

BEFORE THE:

HOUSE COMMITTEE ON HEALTH, HUMAN SERVICES, AND HOMELESSNESS

DATE: Thursday, February 10, 2022 **TIME:** 9:00 a.m.

LOCATION: State Capitol, Room 329, Via Videoconference

TESTIFIER(S): Holly T. Shikada, Attorney General, or
Michelle M.L. Puu, Deputy Attorney General

Chair Yamane and Members of the Committee:

The Department of the Attorney General (Department) supports this bill.

This bill seeks to: (1) rename the current offense of "continuous sexual assault of a minor" found in section 707-733.6, Hawaii Revised Statutes, to "continuous sexual assault of a minor under the age of sixteen in the first degree," (2) create a new offense of "continuous sexual assault of a minor under the age of sixteen in the second degree," and (3) increase the protected age of the minor victims of these offenses from fourteen years of age to sixteen years of age.

Sexual assault is one of the most difficult crimes for any victims to report and testify about in any legal proceeding. This difficulty is even more apparent for child victims. These statutes afford child victims the ability to describe conduct that they have endured over periods of time without requiring specificity as to date and time. The law understands that children are lacking in their ability to precisely recall date and time. Instead, it focuses on the number of times that the sexual penetration and/or contact occurred within a given period of time.

The distinction between the offense of "continuous sexual assault of a minor under the age of sixteen in the first degree" and "continuous sexual assault of a minor under the age of sixteen in the second degree" will be the requisite times that the sexual penetration and/or contact occurred: three times (first degree) or two times (second degree). The penalty for the re-named offense of "continuous sexual assault of a minor under the age of sixteen in the first degree" will remain the same – a class A felony.

The penalty for the new offense of "continuous sexual assault of a minor under the age of sixteen in the second degree" will be a lesser class B felony.

The increase in the age of the protected victim is consistent with the state's current age of valid consent for sexual penetration and contact. These offenses also except sexual relations between an individual who is at least fourteen years old but less than sixteen years old and a partner who is within five years of that individual's age or married to the minor.

The Department notes that increasing the age of the protected victim from fourteen years old to sixteen years old will require an amendment to article I, section 25, of the Constitution of the State of Hawaii to provide that the Legislature may define: what behavior constitutes a continuing course of conduct in continuous sexual assault crimes against minors younger than sixteen years of age; what behavior constitutes a continuing course of conduct in continuous abuse of a minor younger than sixteen years of age; and what constitutes the jury unanimity that is required for a conviction under these two charges. Bills to amend article I, section 25, of the Constitution of the State of Hawaii are pending before the Legislature to accomplish that endeavor. See HB 1465 (2022) and SB 2089 (2022).

The Department respectfully requests passage of this bill.

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
Health, Human Services and Homelessness**

February 10, 2022

H.B. No. 1466: RELATING TO SEXUAL ASSAULT OF A MINOR

Chair Yamane, Vice Chair Tam, and Members of the Committee:

The Office of the Public Defender strongly opposes H.B. No. 1466 and offers comments for the committee’s consideration. The current offense of Continuous Sexual Assault of a Minor Under the Age of Fourteen (“CSAM”), Hawai‘i Revised Statutes (“HRS”) § 707-733.6, already presents an exception to the right of a defendant to a unanimous jury verdict in a criminal prosecution. H.B. No. 1466 would further erode this significant and compelling right. This Bill seeks to amend the HRS by creating the Class B felony offense of CSAM in the Second Degree (“CSAM 2”), retitling HRS § 707-733.6 to CSAM in the First Degree (“CSAM 1”), increasing the age of minors covered under the CSAM offenses to sixteen years and allowing multiple charges of CSAM to be charged which involve the same defendant and same victim.

The significant right implicated by the CSAM offense is the right of a defendant to a unanimous verdict in a criminal prosecution tried before a jury. This right is guaranteed by article I, sections 5 and 14 of the Hawai‘i Constitution and the sixth amendment to the U.S. Constitution. The right to a unanimous verdict extends to all issues that are left to the jury and requires that an accused in a criminal case only be convicted upon proof by the prosecution of every material element of the crime beyond a reasonable doubt. State v. Arceo, 84 Hawai‘i 1, 30, 928 P.2d 843, 872 (1996). This would include proof beyond a reasonable doubt that the underlying criminal act was proved beyond a reasonable doubt.

The original offense of CSAM, under HRS § 707-733.5, was enacted in 1997 in reaction to Hawai‘i Supreme Court Justice Paula Nakayama’s dissenting opinion in Arceo. Justice Nakayama urged the Legislature to enact a “continuous sexual abuse of a minor” statute “to address the problems inherent in the criminal prosecution of sexual abuse cases involving young children who are unable to specify the time, places, or circumstances of each act.” Session Laws of Hawai‘i: Regular Session of 1997, Act 379 at p. 1192. The Legislature enacted HRS § 707-733.5 particularly to address the circumstances “when the accused resides with the victim or has virtually unchecked access to the child, and the abuse has occurred on a regular basis over a prolonged period of time.” Id. In such instances, “the child may have no meaningful reference point of time or detail by which to distinguish one specific act from another ... [and t]he more frequent and repetitive the abuse, the more likely it becomes that the victim will be unable to recall specific dates and places.” Id.

HRS § 707-733.5, was subsequently called into question by the Hawai‘i Supreme Court in State v. Rabago, 103 Hawai‘i 236, 81 P.3d 1151 (2003). In Rabago, the Supreme Court held that to protect the defendant’s right to jury unanimity the prosecutor would have to elect the particular

criminal acts upon which it would rely for conviction or the jury would have to unanimously agree that same underlying criminal acts had been proved beyond a reasonable doubt. The Supreme Court also struck down as unconstitutional subsection (2) of the statute which allowed the jury to convict the defendant if it unanimously agreed that the number of acts had occurred without unanimously agreeing as which specific acts had occurred.

In response to Rabago, in 2006, the Legislature repealed HRS § 707-733.5, enacted the current CSAM statute (HRS § 707-733.6) and amended the Hawai‘i Constitution to add article I, section 25 which allowed the Legislature in continuous sexual assault crimes against minors younger than fourteen years of age to define what behavior constitutes a continuing course of conduct and what constitutes the jury unanimity that is required for a conviction. As a result of the statutory and constitutional amendments, the Legislature defined CSAM as comprising “three or more acts of sexual penetration or sexual contact with the minor over a period of time” and allowed a conviction if the jury only unanimously agreed that the requisite number of acts had occurred; the jury was not required to agree on which specific acts constituted the requisite number. The enactment of HRS § 707-733.6 was a specific and circumscribed exception to the defendant’s right to a unanimous jury verdict.

H.B. No. 1466 seeks to further erode the defendant’s constitutional right to a unanimous jury verdict by creating two degrees of CSAM, expanding the age range for which the CSAM offenses apply from 14 to 16 years of age and allowing a defendant to be charged with and convicted of multiple counts of continuous sexual assault. There are several significant issues with the proposed legislation.

Creation of the offense of CSAM 2 would make it impossible to convict a defendant of CSAM 1 under State v. Modica, be inconsistent with the Legislative purpose of criminalizing a continuous course of conduct and is not necessary to address the difficulty for a child in identifying specific instances when multiple instances of abuse occur on a regular basis over a prolonged period of time.

The creation of the CSAM 2 offense would make it effectively impossible to convict a defendant of CSAM 1. In State v. Modica, 58 Haw. 249, 567 P.2d 420 (1977), the Hawai‘i Supreme Court held that where the same act under the same circumstances is punishable either as a felony or misdemeanor under either of two statutory provisions and elements of proof essential to either are exactly the same, conviction under the felony statute violates due process and equal protection. In other words, *if the same conduct by the defendant is punishable under either under a greater or lesser offense, charging or convicting the defendant under the greater offense would violate the defendant’s rights to due process and equal protection.*

If the amendments set forth in H.B. No. 1466 are implemented a Modica violation would necessarily occur for every CSAM 1 charge. Under the amendments, if a defendant commits three acts of sexual assault against the same victim over a period of time, that specific conduct could either be charged as a Class B CSAM 2 for committing two or more acts of sexual assault or a Class A CSAM 1 for committing three or more acts of sexual assault. Under Modica, it would violate the defendant’s due process and equal protection rights to be charged or convicted of the greater offense of CSAM 1 as the same conduct would be punishable under the lesser offense of CSAM 2. As a result, any CSAM 1 charge would invariably violate Modica and be dismissed.

Further, creating a CSAM 2 offense which is premised on only two occurrences is inconsistent with the Legislature's focus in continuous sexual assault as involving a "continuing pattern of abuse." Session Laws 1997 at p. 1192. While it is the Legislature's prerogative to define what constitutes a "continuing course of conduct" in continuous sexual assault crimes against minors younger than fourteen years of age (*see* Haw. Const., art. I, § 25), the occurrence of two incidents over an unspecified period of time should not be defined as "continuous" or "continuing." A "continuous offense" has been defined as "a continuous, unlawful act or series of acts set on foot by a single impulse and operated by an unintermittent force, however long a time it may occupy, or an offense which continues day by day, or a breach of the criminal law, not terminated by a single act or fact, but subsisting for a definite period and intended to cover or apply to successive similar obligations or occurrences." Arceo, 84 Hawai'i at 18, 928 P.2d at 860. As the statute fails to define what constitutes "period of time," this could mean two temporally distant and distinct incidents or even two incidents committed separately within a day could be considered as "continuous." In neither of these situations would the abuse be occurring on a regular basis over a prolonged period of time. Defining two incidents as a continuous course of conduct is inconsistent with the Legislature's stated purpose in enacting the continuous sexual assault statute – to deal with abuse that occurs "on a regular basis over a prolonged period of time." Id.

In that same vein, defining two incidents as "continuous" is not in line with the underlying legislative purpose for allowing the exception to the defendant's right to a unanimous jury verdict. The Legislature expressed concern that "young children subjected to a continuing pattern of abuse are not likely to clearly identify the specific instances when particular acts took place" and "when the abuse has occurred on a regular basis over a prolonged period of time, the child may have no meaningful referenced point of time or detail by which to distinguish one act from another." Session Laws 1997 at p. 1192. Clearly the difficulty present in identifying multiple incidents which have occurred over a prolonged period of time would not be present if only two incidents occur. Even a younger child would likely be able to remember the circumstances of only two separate incidents, hence it is inconsistent with one of the primary purposes in creating the CSAM offense to define as little as two incidents as "continuous."

Expanding the age range covered under the statute from minors under 14 years of age to minors under 16 years of age is inconsistent with the Legislative purpose for creating the CSAM offense.

The expansion of the age range covered under the continuous sexual assault statutes from under 14 years of age to under 16 years of age is inconsistent with the legislative purpose for enacting the continuous sexual assault offense statute. In 1997, the Legislature enacted the first version of CSAM to address the issue that "many young children who have been sexually abused over an extended period of time may be unable to specifically recall or identify dates, instances, or circumstances surrounding the abuse." Session Laws 1997 at p. 1192. The Legislature cited Justice Nakayama's dissenting opinion in State v. Arceo, 84 Hawai'i 1, 928 P.2d 843 (1996) which had urged the Legislature to enact a continuous sexual abuse of a minor statute "to address the problems inherent in the criminal prosecution of sexual abuse cases involving young children who are unable to specify the time, places, or circumstances of each act." Id. Justice Nakayama described the children at whom the statute was directed as being of "tender years." While "young children" may have difficulty in recall dates, instances or circumstances of acts, teenagers who are nearing the age of majority would not have these same difficulties. It appears that 16 years of age was set as the cut-off to coincide with the age of consent. However, minors covered under the expanded age

range of H.B. No. 1466 are of high school age and can drive cars and hold jobs. Minors in this age group would not have the same difficulties in remembering dates, instances or circumstances surrounding the abuse as “young children” of “tender years” the continuous sexual assault statute was designed to protect and accommodate.

Allowing a defendant to be charged with multiple counts of CSAM would violate Modica and the defendant’s constitutional right to equal protection.

H.B. No. 1466 allows a defendant to be charged with more than one count of either CSAM 1 or CSAM 2 if more than one victim is involved or if the charges involve “separate and distinct time periods having distinguishable circumstances.” The problem is created by the failure to define what constitutes “separate and distinct time periods” or “distinguishable circumstances.” The lack of a definition of these key terms would leave the decision as to whether to charge one or multiple CSAM charges to the interpretation of the prosecutor charging the case. The CSAM offense was specifically designed to address abuse which occurs on a “regular basis over a prolonged period of time.” Session Laws 1997 at p. 1192. Therefore, it would be nonsensical and inconsistent with the statutory purpose to allow the time period over which the abuse occurs to be split into supposed “separate and distinct time periods” at the whim of the prosecutor. This also begs the question of what “distinguishable circumstance” would constitute the break between time periods when the same perpetrator and same victim are involved.

The danger in relying on vague and unspecified terms is that there would be no consistency in charging. There can be no consistency when statutory terms are vague and left to subjective determination. Allowing defendants to be charged with single or multiple charges at the subjective whim of the prosecutor would raise significant constitutional equal protection concerns. Under exactly the same circumstances, one prosecutor might file a single CSAM charge while another might file multiple charges. The lack of specific and objective definitions for such key terms would also leave the statute ripe for challenges to the statute as violating the defendant’s due process right to have adequate notice of the charges against him or her and/or that the statute was unconstitutionally vague and ambiguous.

Further, allowing multiple counts of CSAM to be charged where the same conduct could be charged as a single count would raise Modica concerns. It would violate Modica to allow a defendant to be charged with multiple counts and be subject to enhanced sentencing or consecutive sentences when the defendant could be charged with a single count for the same specific conduct.

Conclusory remarks

The CSAM statute was passed as a strictly circumscribed and directed exception to the defendant’s constitutional right to a unanimous verdict. The passage of H.B. No. 1466 which would allow the exception to swallow the rule are unconstitutional and inconsistent with the Legislative purpose in enacting the CSAM offense. The Office of the Public Defender recognizes the difficulties inherent in prosecuting cases involving sexual assaults of young children. However, the current statutory provisions are adequate to address such cases while striking the delicate balance between prosecuting offenses and protecting the rights of individuals. We respectfully urge the Committee members to vote to reject H.B. No. 1466.

Thank you for the opportunity to comment on this measure.

POLICE DEPARTMENT
CITY AND COUNTY OF HONOLULU

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RADE K. VANIC
INTERIM CHIEF

RICK BLANGIARDI
MAYOR

OUR REFERENCE

BN-KK

February 10, 2022

The Honorable Ryan I. Yamane, Chair
and Members
Committee on Health, Human Services,
and Homelessness
House of Representatives
Hawaii State Capitol
415 South Beretania Street, Room 329
Honolulu, Hawaii 96813

Dear Chair Yamane and Members:

SUBJECT: House Bill No. 1466, Relating to Sexual Assault of a Minor

I am Brandon Nakasato, Captain of the Criminal Investigation Division of the Honolulu Police Department (HPD), City and County of Honolulu.

The health, safety, and wellbeing of Hawaii's keiki, especially those who are victims or witnesses of any crime or violence, continue to be a priority for the HPD and all of its collaborating partners. The HPD is in support of the proposed addition of a new section to Part V, Continuous sexual assault of a minor under the age of sixteen years in the second degree, of Chapter 707 of the Hawaii Revised Statutes (HRS). We also support the amendment to change the age from 14 to 16 years in reference to a minor under Section 707-733.6, HRS. The additional section and amendment will provide an additional means to prosecute offenders.

The HPD urges you to support House Bill No. 1466, Relating to Sexual Assault of a Minor. Thank you for the opportunity to testify.

APPROVED:

Sincerely,

A handwritten signature in black ink, appearing to read "Rade K. Vanic", written over a horizontal line.

Rade K. Vanic
Interim Chief of Police

A handwritten signature in black ink, appearing to read "Brandon Nakasato", written over a horizontal line.
Brandon Nakasato, Captain
Criminal Investigation Division

DEPARTMENT OF THE PROSECUTING ATTORNEY
CITY AND COUNTY OF HONOLULU

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THE HONORABLE RYAN I. YAMANE, CHAIR
HOUSE COMMITTEE ON HEALTH, HUMAN SERVICES, AND HOMELESSNESS
Thirty-First State Legislature
Regular Session of 2022
State of Hawai'i

February 10, 2022

RE: H.B. 1466; RELATING TO SEXUAL ASSAULT OF A MINOR.

Chair Yamane, Vice Chair Tam, and members of the House Committee on Health, Human Services, and Homelessness, the Department of the Prosecuting Attorney of the City and County of Honolulu ("Department") submits the following testimony in **strong support** of H.B. 1466. This bill is part of the Department's 2022 legislative package and we thank you for hearing it.

The purpose of this bill is to raise the age for the offense of Continuous Sexual Assault of a Minor (section 707-736.6, Hawaii Revised Statutes ("HRS")) from under the age of fourteen to under the age of sixteen; and to create the new offense of Continuous Sexual Assault of a Minor Under the Age of Sixteen in the Second Degree. These changes would be consistent with the age at which minors may legally consent to sexual conduct, as outlined in HRS §707-730 and §707-732 (i.e. Sexual Assault in the First and Third Degrees)¹, and account for the fragility of child victims in sexual assault cases.

The prevalence of child sexual abuse is problematic as it is uncommon for sexual abuse to be reported immediately. In fact, the Department of Justice estimates that 86% of child sexual abuse goes unreported altogether.² Additionally, according to reports by the CDC, about 1 in 4 girls and 1 in 13 boys experience child sexual abuse at some point in childhood.³

¹ See https://www.capitol.hawaii.gov/hrscurrent/Vol14_Ch0701-0853/HRS0707/HRS_0707-0730.htm; and https://www.capitol.hawaii.gov/hrscurrent/Vol14_Ch0701-0853/HRS0707/HRS_0707-0732.htm.

² Youth Victimization, Prevalence and Implications, Department of Justice, 2003 Page ii

³ See <https://www.cdc.gov/violenceprevention/childsexualabuse/fastfact.html>

In 1997, to address the difficulty in prosecuting those who repeatedly sexually assault a child—particularly given the difficulty that children have in remembering individual dates on which they were sexually assaulted—the legislature passed a law to prohibit continuous sexual assault of a minor under the age of fourteen. To date, HRS §707-736.6, has remained unchanged since its enactment, and is applicable only to minors under the age of fourteen years old. Unfortunately, over time, the Department has seen that it is not unusual for a parent, relative or close contact to continue sexually assaulting a minor from a young age—well into their teenage years—yet any incidents that occur once the minor turns fourteen years old may not be included in a charge for Continuous Sexual Assault of a Minor Under the Age of Fourteen. In addition, even if incidents of sexual assault occur at multiple, distinct periods, separated by a considerable length of time, the offender may only be charged with one count of HRS §707-733.6. One tragic example of this is the offender who sexually assaults a child when he or she is young, moves away for 5 years, then moves back again and resumes sexually assaulting the child.

To account for a possible, legitimate dating relationship between two young individuals—consistent with language already included Sexual Assault in the First and Third Degree (HRS §707-730 and §707-732)—H.B. 1466 ensures that Continuous Sexual Assault of Minor in the First and Second Degree would not apply to those who have sexual contact or penetration with a minor who is less than five years younger than the defendant, or are legally married to the minor (e.g. moved here from another state or country).

For all of the foregoing reasons, the Department of the Prosecuting Attorney of the City and County of Honolulu **strongly supports** the passage of H.B. 1466. Thank you for the opportunity to testify on this matter.

HB-1466

Submitted on: 2/7/2022 6:09:28 PM

Testimony for HHH on 2/10/2022 9:00:00 AM

Submitted By	Organization	Testifier Position	Remote Testimony Requested
Mike Golojuch, Sr.	Rainbow Family 808	Support	No

Comments:

Rainbow Family 808 definitely supports this bill. Please pass.

Mike Golojuch, Sr., Secretary/Board Member, Rainbow Family 808

Dear Chair Yamane, Vice Chair Tam, and committee members:

I am a survivor of childhood sex abuse and I support HB 1466.

Extending the time to bring suit for civil action is very important due to the nature of childhood sex Abuse (CSA). CSA is confusing, creates feelings of shame, guilt and anger, and destroys your ability to trust. Your ability to connect with other people is crippled since you feel alone and that the abuse was your fault. Many people's lives have been ruined by sex abuse; destructive effects include depression, addiction, and suicide.

Please show that you support survivors and their recovery by giving them the chance to speak out against their perpetrators and feel whole again. Thank you.

Andre Bisquera

HB-1466

Submitted on: 2/9/2022 12:27:47 AM

Testimony for HHH on 2/10/2022 9:00:00 AM

Submitted By	Organization	Testifier Position	Remote Testimony Requested
Ilima DeCosta	Individual	Support	No

Comments:

Mahalo to the introducers for recognizing that sexual assaults against minors are often happening in the home, that the acts are committed by people that we should be able to trust (elder siblings or family members). I think many survivors would still like to see sexual assault of minors by trusted persons to be treated as serious a crime as stealing an automobile, but at least HB 1466 represents a positive step in the right direction to protecting youth from sexual predators at home or in spaces that should be "safe". Please pass HB 1466 and then come back and strengthen the law, next year. Mahalo