Office of the Public Defender
State of Hawaii

Timothy Ho, Chief Deputy Public Defender

**Testimony of the Office of the Public Defender,
State of Hawaii to the House Committee on Judiciary**

January 31, 2014, 2:00 p.m.

H.B. No. 1857: RELATING TO OFFENSES OF SEXUAL ASSAULT

Chair Rhoads and Members of the Committee:

This measure would lessen the state of mind and amount of force required to prove the offense of sexual assault. The Office of the Public Defender strongly opposes this measure.

Proponents of this bill claim that the law must be changed because it is too difficult to obtain convictions for sexual assault. Sexual assault, or rape, is an offense for which even an acquittal cannot remove the stigma attached to the accusation. It is a stain that cannot be erased. Anyone accused of a sexual assault is facing an uphill battle in court. The subject matter is an emotional one for juries selected to try such cases, and the common refrain we hear from prosecutors is "why would someone lie about being sexually assaulted?" I have done enough trials, defended numerous clients accused of sexual assault to know that many defendants are falsely accused of sexual assault, for many different reasons. A step-daughter, upset with her step-father. A young girl, afraid to tell her parents that she has been sexually active without their knowledge, a couple, with relationship problems are some reasons why a person may falsely accuse another person of sexual assault. Mistaken identity is another reason for a false accusation.

According to the Innocence Project, since 1989, there have been 312 post-conviction DNA exonerations in the United States. The average length of time served by each exoneree is 13.5 years. In Hawaii, Alvin Jardine was incarcerated for 20 years until he was exonerated by DNA evidence. He was mistakenly identified by the victim as her assailant. The majority of the DNA exonerations have been for sexual assault and sexual assault/murder cases. For each wrongly convicted person released from jail as a result of DNA testing, there are more wrongly convicted individuals sitting in our prisons unable to be exonerated because of a lack of DNA evidence.

Under this measure, "strong compulsion" would be merged into compulsion, and the requirement of "strong compulsion" would not be required to prove the offense of sexual assault in the first degree. Compulsion, which is defined as the absence of consent, is all that would be required to prove the offense of sexual assault in the first degree, a class A felony punishable by a mandatory 20 year indeterminate prison term. Currently, that offense is categorized as sexual assault in the second degree, a class B felony punishable by up to 10 years imprisonment. In essence, this measure proposes to elevate the current offense of sexual assault in the second degree to a first degree felony. Our sexual assault statutes were patterned after the model penal code, and this measure constitutes a radical departure from the model penal code.

The state of mind should not be lessened to recklessness and negligence. When it comes to committing a sexual assault, the state of mind of the assailant should be clear. It should be an intentional and knowing act. For example, to negligently subject another person to sexual penetration would require a less than criminal state of mind. A person could say that she didn't give consent, didn't say no, but that the other person "should have known" that she didn't want to have sex, which under this measure would constitute sexual assault in the third degree, a class C felony.

The Office of the Public Defender strongly opposes this measure. Thank you for the opportunity to be heard on this matter.

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

KEITH M. KANESHIRO
PROSECUTING ATTORNEY

ARMINA A. CHING
FIRST DEPUTY PROSECUTING ATTORNEY

THE HONORABLE KARL RHOADS, CHAIR
HOUSE COMMITTEE ON JUDICIARY
Twenty-seventh State Legislature
Regular Session of 2014
State of Hawai`i

January 31, 2014

RE: H.B. 1857; RELATING TO OFFENSES OF SEXUAL ASSAULT.

Chair Rhoads, Vice-Chair Har and members of the House Committee on Judiciary, the Department of the Prosecuting Attorney of the City and County of Honolulu submits the following comments, expressing concerns, regarding House Bill 1857.

While the changes proposed in H.B. 1857 appear to be well-intended—in terms of furthering the prosecution of sexual assault cases—the Department is concerned that making such a drastic shift in our statutes may result in unintended consequences.

Since its inception in the 1980's, our Hawai'i Revised Statutes, Chapter 707, Part V (Sexual Offenses), has maintained a consistent approach to grading sexual assault crimes, with different degrees of the offense distinguished largely on the actions taken by the perpetrator, and the risk of physical harm to the victim or others.[1] In the past 30 years, a great deal of caselaw has developed around these statutes, and it would be extremely difficult—if not impossible—to anticipate all of the ways in which these proposed changes would affect the caselaw.

By merging the definition of "strong compulsion" into the definition of "compulsion," this removes any significant distinction between compulsion that puts someone in physical danger—such as threats of bodily injury or kidnapping, use of a dangerous instrument, or use of physical force—and "non-dangerous" scenarios—such as lack of consent, or threats of public humiliation, property damage, or financial loss.

[1] Other subsections of the sexual assault statutes distinguish grade of offense based on special status of the victim and/or special status of the perpetrator, but H.B. 1857 does not propose any changes to those subsections.

We do understand that the foregoing distinction is a matter of public policy, which is at the legislature's discretion. However, without this type of statutory distinction (based on the perpetrator's actions), the only other basis for gradation is the perpetrator's state of mind, which can be a much more difficult distinction for anyone—including juries—to make. The Department is uncomfortable with the notion that rapes occurring at knifepoint, for example, or involving other forms of physical force, could go all the way through trial—requiring the victim to testify and relive their experience under public scrutiny—only to be convicted as a class B felony, a probationable offense.

On the flipside, there is also concern as to whether juries would convict someone for Sexual assault in the first degree—the highest level of sex-crime there is—based solely on lack of consent, or on a threat to cause property damage, financial loss or public humiliation, without any physical force or other threat of physical harm. Moreover, pursuant to HRS §705-502, attempting to commit a crime is classified at the same level of offense as if the offense had been culminated, so even an attempt at any of these things would hereafter be a class A felony.

As noted previously, the Department does appreciate H.B. 1857's perceived intent to facilitate prosecution of sexual assault cases. However, the Department is concerned about the potential effects of these changes in practice, and fears it could ultimately lead to very disappointing and/or unintended consequences. Thank you for the opportunity to testify on this matter.

TESTIMONY OF THE HAWAI`I POLICE DEPARTMENT

HOUSE BILL 1857

RELATING TO OFFENSES OF SEXUAL ASSUALT

BEFORE THE COMMITTEE ON JUDICIARY

DATE : Friday, January 31, 2014

TIME : 2:00 P.M.

PLACE : Conference Room 325
State Capitol
415 South Beretania Street

PERSON TESTIFYING:

Acting Police Chief Paul K. Ferreira
Hawai`i Police Department
County of Hawai`i

(Written Testimony Only)

William P. Kenoi
Mayor

Harry S. Kubojiri
Police Chief

Paul K. Ferreira
Deputy Police Chief

County of Hawai'i

POLICE DEPARTMENT
349 Kapiolani Street • Hilo, Hawai'i 96720-3998
(808) 935-3311 • Fax (808) 961-8865

January 31, 2014

Representative Karl Rhoads
Chairman and Committee Members
Committee on Judiciary
415 South Beretania Street, Room 325
Honolulu, Hawai`i 96813

Re: HOUSE BILL 1857 RELATING TO OFFENSES OF SEXUAL ASSAULT

Dear Representative Rhoads:

The Hawai`i Police Department supports House Bill 1857 with its purpose being to amend the elements of various degrees of Sexual Assault with regard to subjecting another person to sexual penetration by compulsion, and Sexual Assault in the Third Degree with regard to sexual contact by compulsion.

We believe this legislation as written will serve to clarify those instances in which victims of sexual assault or sexual contact as the result of compulsion will no longer be held to the previous higher standard of "Strong" compulsion.

We further believe this legislation will serve to ensure that those persons who commit sexual assault through the use of compulsion will be held accountable for their actions.

It is for these reasons, we urge this committee to approve this legislation.

Thank you for allowing the Hawai`i Police Department to provide comments relating to House Bill 1857.

Sincerely,

PAUL K. FERREIRA
ACTING POLICE CHIEF

"Hawai'i County is an Equal Opportunity Provider and Employer"

Justin F. Kollar
Prosecuting Attorney

Kevin K. Takata
First Deputy

TE TESTIMONY

Rebecca A. Vogt
Second Deputy

Diana Gausepohl-White, LCSW
Victim/Witness Program Director

OFFICE OF THE PROSECUTING ATTORNEY
County of Kaua'i, State of Hawai'i
3990 Ka'ana Street, Suite 210, Lihu'e, Hawai'i 96766
808-241-1888 – FAX 808-241-1758
Victim/Witness Program 808-241-1898 or 800-668-5734

COMMENTS RE:
HB 1857
RELATING TO OFFENSES OF SEXUAL ASSAULT

Justin F. Kollar, Prosecuting Attorney
County of Kaua'i

House Committee on Judiciary

Friday, January 31, 2014
2:00 p.m., Room 325

The Honorable Karl Rhoads, Chair
Vice Chair Har, and Members
Committee on Judiciary
House of Representatives
Hawaii State Capitol
415 South Beretania Street
Honolulu, Hawaii 96813

Dear Chair Rhoads, Vice Chair Har, and Members:

The County of Kauai, Office of the Prosecuting Attorney, submits the following comments, expressing concerns, regarding House Bill 1857.

While the changes proposed in H.B. 1857 appear to be well-intended—in terms of furthering the prosecution of sexual assault cases—our Office is concerned that making such a drastic shift in our statutes may result in unintended consequences.

Since its inception in the 1980's, our Hawai'i Revised Statutes, Chapter 707, Part V (Sexual Offenses), has maintained a consistent approach to grading sexual assault crimes, with different degrees of the offense distinguished largely on the actions taken by the perpetrator, and the risk of physical harm

LATE TESTIMONY

to the victim or others.[1] In the past 30 years, a great deal of case law has developed around these statutes, and it would be extremely difficult—if not impossible—to anticipate all of the ways in which these proposed changes would affect the case law.

By merging the definition of "strong compulsion" into the definition of "compulsion," this removes any significant distinction between compulsion that puts someone in physical danger—such as threats of bodily injury or kidnapping, use of a dangerous instrument, or use of physical force—and "non-dangerous" scenarios—such as lack of consent, or threats of public humiliation, property damage, or financial loss.

We do understand that the foregoing distinction is a matter of public policy, which is at the legislature's discretion. However, without this type of statutory distinction (based on the perpetrator's actions), the only other basis for gradation is the perpetrator's state of mind, which can be a much more difficult distinction for anyone—including juries—to make. The Office is uncomfortable with the notion that rapes occurring at knifepoint, for example, or involving other forms of physical force, could go all the way through trial—requiring the victim to testify and relive their experience under public scrutiny—only to be convicted as a class B felony, a probationable offense.

On the other side, there is also concern as to whether juries would convict someone for Sexual assault in the first degree—the highest level of sex-crime there is—based solely on lack of consent, or on a threat to cause property damage, financial loss or public humiliation, without any physical force or other threat of physical harm. Moreover, pursuant to HRS §705-502, attempting to commit a crime is classified at the same level of offense as if the offense had been culminated, so even an attempt at any of these things would hereafter be a class A felony.

As noted previously, the Office does appreciate H.B. 1857's perceived intent to facilitate prosecution of sexual assault cases. However, the Office is concerned about the potential effects of these changes in practice, and fears it could ultimately lead to very disappointing and/or unintended consequences. Thank you for the opportunity to testify on this matter.

Justin F. Kollar
Prosecuting Attorney
County of Kaua'i

---

[1] Other subsections of the sexual assault statutes distinguish grade of offense based on special status of the victim and/or special status of the perpetrator, but H.B. 1857 does not propose any changes to those subsections.

har3-Micah

LATE TESTIMONY

From: mailinglist@capitol.hawaii.gov
Sent: Thursday, January 30, 2014 2:39 PM
To: JUDtestimony
Cc: richard.minatoya@mauicounty.gov
Subject: Submitted testimony for HB1857 on Jan 31, 2014 14:00PM

HB1857

Submitted on: 1/30/2014

Testimony for JUD on Jan 31, 2014 14:00PM in Conference Room 325

Submitted By	Organization	Testifier Position	Present at Hearing
Richard K. Minatoya	Dept. of the Prosecuting Attorney, County of Maui	Comments Only	No

Comments: The Department of the Prosecuting Attorney, County of Maui, agrees with the concerns raised by the Department of the Prosecuting Attorney, City and County of Honolulu, regarding HB 1857. Thank you very much for the opportunity to provide these comments.

Please note that testimony submitted less than 24 hours prior to the hearing, improperly identified, or directed to the incorrect office, may not be posted online or distributed to the committee prior to the convening of the public hearing.

Do not reply to this email. This inbox is not monitored. For assistance please email webmaster@capitol.hawaii.gov