



TESTIMONY OF THE DEPARTMENT OF THE ATTORNEY GENERAL TWENTY-EIGHTH LEGISLATURE, 2016

ON THE FOLLOWING MEASURE:

S.B. NO. 2312, RELATING TO THE PENAL CODE.

BEFORE THE:

SENATE COMMITTEE ON JUDICIARY AND LABOR

DATE: Monday, February 1, 2016

TIME: 9:30 a.m.

LOCATION: State Capitol, Room 016

TESTIFIER(S): Douglas S. Chin, Attorney General, or
Albert Cook, Deputy Attorney General

Chair Keith-Agaran and Members of the Committee:

The Department of the Attorney General supports this bill in part and opposes it in part.

This bill changes the definition of “sexual conduct” in sections 707-750, 707-751 and 707-752, Hawaii Revised Statutes (HRS), Promoting Child Abuse in the 1st, 2nd, and 3rd degrees. The bill removes the words “homosexuality,” “lesbianism,” and the phrases “sexual penetration” and “a minor.” It replaces the first three phrases with “actual or simulated sexual intercourse, including genital-genital contact, oral-genital contact, anal-genital contact, or oral-anal contact, whether between persons of the same or opposite sex” and replaces the phrase “a minor” with “any person.”

The Department of the Attorney General supports the removal of the terms “homosexuality” and “lesbianism” as they are not defined anywhere in chapter 707, HRS.

However, we oppose the removal of the terms “sexual penetration” and “a minor” for the following reasons. “Sexual penetration” is defined in section 707-700, HRS, as

- (1) Vaginal intercourse, anal intercourse, fellatio, deviate sexual intercourse, or any intrusion of any part of a person's body or of any object into the genital or anal opening of another person's body; it occurs upon any penetration, however slight, but emission is not required. As used in this definition, "genital opening" includes the anterior surface of the vulva or labia majora; or
- (2) Cunnilingus or anilingus, whether or not actual penetration has occurred.

This definition is comprehensive and specific and covers all the terms in the proposed wording as well as actions not covered by the proposed wording. Additionally it is non-gender specific and has withstood appellate challenge. The proposed wording, which is drawn from the federal child

pornography law, is foreign to Hawaii courts and case law and would needlessly complicate a settled area of law.

We also oppose replacing the term “a minor” with “any person” in the phrase “lascivious exhibition of the genital or pubic area of a minor.” As this definition is specifically for prosecution of child abuse in the form of child pornography, the “lascivious exhibition of the genital or pubic area” in question will always be of a minor. Replacing “a minor” with “any person” may unnecessarily raise constitutional challenges as the lascivious exhibition of the genital or pubic area of any person would be pornography, which is legal and constitutionally protected speech.

We respectfully request that the committee consider these objections.

DEPARTMENT OF THE PROSECUTING ATTORNEY
CITY AND COUNTY OF HONOLULU

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ARMINA A. CHING
FIRST DEPUTY PROSECUTING ATTORNEY

THE HONORABLE GILBERT S.C. KEITH-AGARAN, CHAIR
SENATE COMMITTEE ON JUDICIARY AND LABOR
Twenty-Eighth State Legislature
Regular Session of 2016
State of Hawai'i

February 1, 2016

RE: S.B. 2312; RELATING TO THE PENAL CODE.

Chair Keith-Agaran, Vice-Chair Shimabukuro, members of the Senate Committee on Judiciary and Labor, the Department of the Prosecuting Attorney of the City and County of Honolulu ("Department") submits the following testimony in opposition to S.B. 2312 in its current form. The Department does not oppose removal of the terms "homosexuality" and "lesbianism," and in fact, suggests that these terms also be removed from the definition of "sexual conduct" within Section 712-1210, Hawaii Revised Statutes ("HRS").

The purpose of S.B. 2312 is to amend the definition of "sexual conduct," as that term is defined in Sections 707-750, -751 and -752 (child pornography offenses). While the Department appreciates the Legislature's effort to clarify these definitions, we strongly believe it would be inappropriate to remove the term "sexual penetration" from these definitions, as this phrase is clearly defined in HRS §707-700, and its use is well-established among local prosecutors, defense attorneys, and our courts. Moreover, the Department is not aware of any pressing need or reason to amend this portion of the definition.

The language proposed in S.B. 2312 at page 1, lines 4-7; line 15 of page 1 through line 1 of page 2; and page 2, lines 9-12 contains a number of terms that are ambiguous, undefined and unfamiliar to our courts and attorneys, and thus it would likely lead to significant confusion or disrupt existing caselaw. Moreover, this language is vastly different from any other definition of the term "sexual conduct" that is found in Hawaii's Penal Code. While our Penal Code does contain several different definitions of the term "sexual conduct," these definitions are at least similar to one another currently, using much of the same or cross-referenced terminology.

To replace the well-defined and well-established term, "acts of...sexual penetration," with unclear and unfamiliar language, without any pressing reason or need to do so, would be unwise. For all of the foregoing reasons, the Department of the Prosecuting Attorney of the City and County of Honolulu opposes S.B. 2312 in its current form. Thank you for the opportunity to testify on this matter.

POLICE DEPARTMENT
CITY AND COUNTY OF HONOLULU

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OUR REFERENCE **KH-NTK**

February 1, 2016

The Honorable Gilbert S. C. Keith-Agaran, Chair
and Members
Committee on Judiciary and Labor
State Senate
Hawaii State Capitol
415 South Beretania Street
Honolulu, Hawaii 96813

Dear Chair Keith-Agaran and Members:

SUBJECT: Senate Bill No. 2312, Relating to the Penal Code

I am Keith Horikawa, Captain of the Criminal Investigation Division of the Honolulu Police Department, City and County of Honolulu.

The Honolulu Police Department supports Senate Bill No. 2312, Relating to the Penal Code.

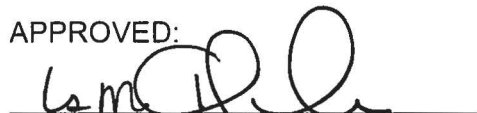
This bill appropriately amends the definition of "sexual conduct" as used in the offenses of child abuse in the first, second, and third degrees to mean actual or simulated sexual intercourse, including genital-genital contact, oral-genital contact, anal-genital contact, or oral-anal contact, whether between persons of the same or opposite sex, masturbation, bestiality, deviate sexual intercourse, sadomasochistic abuse, or lascivious exhibition of the genital or pubic area of any person.

We believe that this definition provides better clarity and specificity for investigators, will aid in the investigation and prosecution of offenders, and better protect minors.

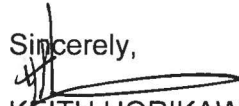
The Honolulu Police Department urges you to support Senate Bill No. 2312, Relating to the Penal Code.

Thank you for the opportunity to testify.

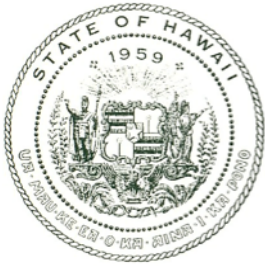
APPROVED:


LOUIS M. KEALOHA
Chief of Police

Sincerely,


KEITH HORIKAWA, Captain
Criminal Investigation Division

HAWAII
STATE
COMMISSION
ON THE
STATUS
OF
WOMEN



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January 30, 2016

To: Senator Gilbert S.C. Keith-Agaran, Chair
Senator Maile S.L. Shimabukuro, Vice Chair
Members of the Senate Committee on Judiciary and Labor

From: Cathy Betts, Executive Director
Hawaii State Commission on the Status of Women

Re: Testimony in Support, SB 2312 Relating to the Penal Code

The Commission supports SB 2312 which would amend our penal code to align with federal law. It would additionally remove antiquated language regarding sexual orientation.

The current definition of “sexual conduct” within our child pornography statute varies greatly from comparable federal child pornography laws, which address sexual intercourse and sexual contact “whether between persons of the same or opposite sex.” In our case, Hawaii’s penal code still includes “acts of homosexuality and lesbianism” within the definition of promotion of child abuse. Not only is this language offensive—likening any acts within a same sex relationship as akin to promotion of child pornography, it is too vague to enforce, raising serious constitutional implications. The Commission supports the change to this language and respectfully urges this Committee to pass SB 2312.

Thank you for this opportunity to testify.



THE SEX ABUSE TREATMENT CENTER

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

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DATE: February 1, 2016

TO: The Honorable Gilbert Keith-Agaran, Chair
The Honorable Maile Shimabukuro, Vice Chair
Senate Committee on Judiciary and Labor

FROM: The Sex Abuse Treatment Center
A Program of Kapi'olani Medical Center for Women and Children

RE: Testimony in Support of S.B. 2312
Relating to the Penal Code

Good morning Chair Keith-Agaran, Vice Chair Shimabukuro, and members of the Senate Committee on Judiciary and Labor.

The Sex Abuse Treatment Center (SATC) supports S.B. 2312, which redefines "sexual conduct" as that term is used in the Hawai'i statutes that describe the crimes of promotion of child abuse in the first, second and third degrees.

The promotion of child abuse statutes are Hawai'i's child pornography laws, which criminalize the creation, possession, or use of materials that depict children engaged in or used for sexual conduct. Sexual conduct is currently defined as "acts of masturbation, **homosexuality, lesbianism**, bestiality, sexual penetration, deviate sexual intercourse, sadomasochistic abuse, or lascivious exhibition of the genital or pubic area of a minor (emphasis added)."

Although we strongly agree with the Hawai'i Penal Code's ban on child pornography and that perpetrators be convicted, the SATC also believes that laws defining criminal offenses should not codify unjust and antiquated attitudes towards specific demographic groups, in this case members of the lesbian, gay, bisexual and transgendered (LGBT) communities.

By singling out unspecified "acts of homosexuality and lesbianism" as being comparable with bestiality, deviate sexual intercourse (necrophilia), and sadomasochistic abuse, while excusing identical acts of heterosexuality, the statutes reflect historical stigmatization of the LGBT communities. The present law could be broadly construed to bar the depiction of two boys or two girls engaged in such 'acts of homosexuality or lesbianism' as holding hands or kissing, although a depiction of a boy and a girl doing the same thing would not be criminalized.

It is also our understanding that the law, as currently written, presents likely constitutional problems due to vagueness, as it fails to adequately define what

constitutes proscribed “acts of homosexuality and lesbianism.” Both the Hawai‘i State Constitution and the Constitution of the United States provide due process protections against laws that lack sufficient clarity to permit citizens to identify what behaviors are illegal. Moreover, the current Hawai‘i law is out of step with comparable federal child pornography laws, which address the depiction of sexual intercourse and contact “whether between persons of the same or opposite sex.”

By more clearly defining the offending behavior that the law intends to criminalize, the proposed amendment would make the definition of “sexual conduct” in Hawai‘i’s promoting child abuse statutes better match the one used in federal law concerning similar subject matter and remove the stigmatizing and discriminatory references to “acts of homosexuality and lesbianism.”

Therefore, we respectfully urge you to support S.B. 2312.

Keith Agaran3 - Ashlee

From: mailinglist@capitol.hawaii.gov
Sent: Friday, January 29, 2016 5:02 PM
To: JDLTestimony
Cc:
Subject: *Submitted testimony for SB2312 on Feb 1, 2016 09:30AM*

SB2312

Submitted on: 1/29/2016

Testimony for JDL on Feb 1, 2016 09:30AM in Conference Room 016

Submitted By	Organization	Testifier Position	Present at Hearing
Laurie Field	Planned Parenthood Votes Northwest and Hawaii	Support	No

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.

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