

**STATE OF HAWAI‘I**  
**OFFICE OF THE PUBLIC DEFENDER**

**Testimony of the Office of the Public Defender,  
State of Hawai‘i to the Senate Committee on Judiciary**

March 18, 2021

H.B. No. 177 HD1: RELATING TO SEXUAL ASSAULT

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

The Office of the Public Defender is opposed to H.B. No. 177 HD1.

This measure amends the offense of sexual assault in the first and third degree perpetrated against a person who is mentally defective. The original bill sought to hold perpetrators strictly liable for sexual assaults against persons who are “mentally defective.” HD1 amended the measure by providing a rebuttable presumption that the person assaulted was mentally defective instead of holding offenders strictly liable. (See Stand Com. Rep. No. 766).

Although HD1’s proposed rebuttable presumption is fairer than holding the alleged offender strictly liable, we believe that the measure (in its current form or in its original form) is unnecessary based upon current statutory law. First, the likely issue at trial is not whether the victim was mentally defective; the issue is likely whether the alleged offender knew or was aware the victim was mentally defective. Second, the definition of the term “mentally defective” in HRS § 707-700 clearly states that such a person is “incapable of appraising the nature of the person’s conduct.” This definition coupled with HRS § 702-235 (ineffective consent) would clearly 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.

Furthermore, we believe that the burden on whether a person is mentally defective should remain with the prosecution who has the ability and the resources to establish such. Shifting the burden to the alleged offender and requiring the offender to prove that an alleged victim is not mentally defective may have unintended consequences. Because the alleged offender has the burden, the offender may subject the victim to a mental examination by his/her own expert witness. The defense may also need to access the victim’s private mental health and psychiatric records to meet its burden.

Finally, if this committee considers reverting the measure to its original form (i.e., strict liability), the present law already prevents the feared outcomes that this measure (in its current form or in its original form) hopes to alleviate, and therefore is unnecessary, but its passage could lead to greater injustice not yet contemplated. For example, the preamble to H.B. No. 177 equates minors and incarcerated prisoners to those considered “mentally defective.” However, the definition of the term “mentally defective” in HRS § 707-700 is not clear enough for such a comparison. A minor is a minor until they reach a designated age; 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 once 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 this measure 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 this measure would remove that question from the law and make a blanket prohibition regarding consent on those that are suffering from mental illness.

We strongly agree 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 H.B. No. 177 HD1.

**HB-177-HD-1**

Submitted on: 3/12/2021 9:56:30 AM

Testimony for JDC on 3/18/2021 9:15:00 AM

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

Comments:

Stand in Support

**HB-177-HD-1**

Submitted on: 3/12/2021 3:16:57 PM

Testimony for JDC on 3/18/2021 9:15:00 AM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Mike Goljuch, Sr.	Individual	Support	No

Comments:

I support HB177. Please pass this bill.

DEPARTMENT OF THE PROSECUTING ATTORNEY  
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**THE HONORABLE KARL RHOADS, CHAIR**  
**SENATE COMMITTEE ON JUDICIARY**  
**Thirty-First State Legislature**  
**Regular Session of 2021**  
**State of Hawai`i**

March 17, 2021

**RE: H.B. 177, H.D. 1; RELATING TO SEXUAL ASSAULT.**

Chair Rhoads, Vice Chair Keohokalole, and members of the Senate Committee on Judiciary, the Department of the Prosecuting Attorney of the City and County of Honolulu ("Department") submits the following testimony, **supporting the intent** of H.B. 177, H.D. 1., with **requested amendments**. This bill is part of the Department's 2021 legislative package.

The original purpose of this bill was to amend the offenses of Sexual Assault in the First Degree, Section 707-730, Hawaii Revised Statutes ("HRS"), and Sexual Assault in the Third Degree, HRS §707-732, to make those who engage in sexual penetration or sexual contact with mentally defective persons strictly liable for knowledge that the person was mentally defective. The current draft maintains the existing state of mind requirement—knowingly—but adds a rebuttable presumption that the victim was mentally defective at the time of offense.

As stated in HRS §707-700, "'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.*" (Emphasis added.) Clearly, when an individual's disability is of such great severity, they need and deserve all of the protection that the law can provide.

The Department would urge this committee to adopt the original language of H.B. 177, which applies a standard of strict liability, as it relates to sexual assault of a mentally defective person. Currently, under Hawaii law, a person is strictly liable for the sexual penetration of, or 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.”*

With this in mind, we believe the same policy concerns are applicable to those in our community who are so developmentally disabled that they are unable to effectively consent to sexual activity. By their nature, mentally defective individuals are exceedingly vulnerable to sexual predations—much like children—and thus deserve the same level of protection presently given to minor victims of sexual assault.

**While the Department appreciates the amendments made by the House Committee on Judiciary and Hawaiian Affairs—clearly trying to find compromise language between proponents and opponents of the bill—the actual effect of a “rebuttable presumption,” as written in H.B. 177, H.D. 1, could create a constitutional issue and infringe on the defendant’s Fifth Amendment right to not testify. A defendant’s Fifth Amendment right could potentially be violated by being “forced” into testifying, in order to rebut the presumption of knowledge. Additionally, the creation of a rebuttable presumption does not necessarily address the issue this bill was intended to resolve, which is proving the defendant knew—beyond a reasonable doubt—that the victim was mentally defective, for purposes of a conviction.**

Based on all of the foregoing reasons, the Department of the Prosecuting Attorney supports the intent of H.B. 177, H.D. 1., and humbly **requests that this committee re-insert the strict liability language from the original bill, H.B. 177.** Thank you for this opportunity to testify.