

ACT 61

H.B. NO. 2254

A Bill for an Act Relating To Chapter 707, Hawaii Revised Statutes.

Be It Enacted by the Legislature of the State of Hawaii:

SECTION 1. The purpose of this Act is to amend chapter 707, Hawaii Revised Statutes. Part I of this Act clarifies the definitions for “sexual contact” and “sexual penetration.” Part II of this Act provides greater consistency between the elements constituting the criminal offenses of sexual assault in the second degree and sexual assault in the third degree, when the offense occurs in a correctional facility by an employee against a committed person.

PART I

SECTION 2. The purpose of this part is to clarify the legislature’s intent that the definition of “sexual penetration” includes the acts of cunnilingus and anilingus whether or not actual penetration has occurred. This clarification is necessitated by the Hawaii supreme court’s opinion in State v. Mueller, 102 Haw. 391, 76 P.3d 943 (2003), which held that the plain language of the definition of “sexual penetration” required that there be proof of actual penetration for the acts of cunnilingus or anilingus to be encompassed under the definition. The decision in Mueller overruled a previous Hawaii supreme court decision, State v. Rulona, 71 Haw. 127, 785 P.2d 615 (1990), which had held that it was clear that the act of cunnilingus is an act of “sexual penetration” under the statutory definition of “sexual penetration”, irrespective of whether there was proof of actual penetration.

The legislature finds that this clarification is needed since it is usually difficult for the sexual assault victim to know whether penetration, however slight, occurred during the act of cunnilingus. Moreover, the failure to provide such a clarification would reduce sexual assaults involving acts of cunnilingus or anilingus on children under the age of consent, from sexual assault in the first degree, a class A felony, to sexual assault in the third degree, a class C felony. If reduced to a sexual assault in the third degree, sexual assaults involving cunnilingus or anilingus would

be punished with the same severity as the touching of clothed intimate parts of the minor. The legislature finds that this part is necessary to prevent such an occurrence.

SECTION 3. Section 707-700, Hawaii Revised Statutes, is amended by amending the definitions of “sexual contact” and “sexual penetration” to read as follows:

““Sexual contact” means any touching, other than acts of “sexual penetration”, of the sexual or other intimate parts of a person not married to the actor, or of the sexual or other intimate parts of the actor by the person, whether directly or through the clothing or other material intended to cover the sexual or other intimate parts.

“Sexual penetration” means [~~vaginal~~]:

- (1) Vaginal intercourse, anal intercourse, fellatio, [~~eunnilingus, anilingus,~~] 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[.]; or
- (2) Cunnilingus or anilingus, whether or not actual penetration has occurred.

For purposes of this chapter, each act of sexual penetration shall constitute a separate offense.”

PART II

SECTION 4. Section 707-731, Hawaii Revised Statutes, is amended by amending subsection (1) to read as follows:

- “(1) A person commits the offense of sexual assault in the second degree if:
- (a) The person knowingly subjects another person to an act of sexual penetration by compulsion;
 - (b) The person knowingly subjects to sexual penetration another person who is mentally defective, mentally incapacitated, or physically helpless; or
 - (c) The person, while employed:
 - (i) In a state correctional facility;
 - (ii) By a private company providing services at a correctional facility;
 - (iii) By a private company providing community-based residential services to persons committed to the director of public safety and having received notice of this statute;
 - (iv) By a private correctional facility operating in the State of Hawaii; or
 - (v) As a law enforcement officer as defined in section 710-1000(13), knowingly subjects to sexual penetration an imprisoned person, a person confined to a detention facility, a person committed to the director of public safety, a person residing in a private correctional facility operating in the State of Hawaii, or a person in custody; provided that paragraph (b) and this paragraph shall not be construed to prohibit practitioners licensed under chapter 453, 455, or 460, from performing any act within their respective practices; and further provided that this paragraph shall not be construed to prohibit a law enforcement officer from performing a lawful search pursuant to a warrant or exception to the warrant clause.”

ACT 61

SECTION 5. Section 707-732, Hawaii Revised Statutes, is amended by amending subsection (1) to read as follows:

- “(1) A person commits the offense of sexual assault in the third degree if:
- (a) The person recklessly subjects another person to an act of sexual penetration by compulsion;
 - (b) The person knowingly subjects to sexual contact another person who is less than fourteen years old or causes such a person to have sexual contact with the person;
 - (c) The person knowingly engages in sexual contact with a person who is at least fourteen years old but less than sixteen years old or causes the minor to have sexual contact with the person; provided that:
 - (i) The person is not less than five years older than the minor; and
 - (ii) The person is not legally married to the minor[-];
 - (d) The person knowingly subjects to sexual contact another person who is mentally defective, mentally incapacitated, or physically helpless, or causes such a person to have sexual contact with the actor;
 - (e) The person, while employed [~~in a state correctional facility~~];
 - (i) In a state correctional facility;
 - ~~(ii)~~(ii) By a private company providing services at a correctional facility;
 - ~~(iii)~~(iii) By a private company providing community-based residential services to persons committed to the director of public safety and having received notice of this statute; [Ø]
 - ~~(iv)~~(iv) By a private correctional facility operating in the State of Hawaii[-]; or
 - (v) As a law enforcement officer as defined in section 710-1000(13), knowingly subjects to sexual contact an imprisoned person, a person confined to a detention facility, a person committed to the director of public safety, [Ø] a person residing in a private correctional facility operating in the State of Hawaii, or a person in custody, or causes the person to have sexual contact with the actor; or
 - (f) The person knowingly, by strong compulsion, has sexual contact with another person or causes another person to have sexual contact with the actor.

Paragraphs (b), (c), (d), and (e) shall not be construed to prohibit practitioners licensed under chapter 453, 455, or 460, from performing any act within their respective practices[-]; provided further that paragraph (e)(v) shall not be construed to prohibit a law enforcement officer from performing a lawful search pursuant to a warrant or an exception to the warrant clause.’’

SECTION 6. This Act does not affect rights and duties that matured, penalties that were incurred, and proceedings that were begun, before its effective date.

SECTION 7. Statutory material to be repealed is bracketed and stricken. New statutory material is underscored.

SECTION 8. This Act shall take effect upon its approval.

(Approved May 10, 2004.)