**Hawai‘i Civil Rights Commission**

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**RESPONSE TO INQUIRIES**

FROM: Bill Hoshijo, Executive Director, Hawaiʻi Civil Rights Commission

RE: Marriage Equality, Religious Organizations and Facilities, and Public Accommodations Law

As the Legislature prepares for a special session to consider marriage equality legislation, questions have arisen regarding how the proposed bill will affect religious organizations and religious facilities. Specifically, the Hawaiʻi Civil Rights Commission has been responding to numerous inquiries about the application of state law prohibiting discrimination in public accommodations, and the effect of proposed exemptions for religious facilities under certain circumstances.

This general response has been prepared in answer to the multiple inquiries. Please be advised that this is not an advisory opinion or legal advice, and should not be considered a predetermination of any complaint.

**The Proposed Bill Provisions Regarding Clergy Solemnization and Religious Facilities**

While this discussion may be relevant and useful in discussion of various proposals, it specifically addresses the provisions of the draft bill posted on Governor Abercrombie’s website, revised 9/9/13.

The proposed bill contains two religious exemption provisions:

The proposed HRS §572-F relates to the refusal to solemnize a marriage. It codifies constitutional protection of free exercise of religion, providing that no minister, priest, officer of a religious denomination or society, or religious society that doesn’t have clergy but provides solemnizations, that are authorized to perform solemnizations of marriages is required to solemnize any marriage, and will not be subject to any fine, penalty, or civil action for failure or refusal to solemnize any marriage.

The proposed HRS §572-G relates to religious facilities, providing:

**§572-G Religious organizations and facilities; liability exemption under certain circumstances.** (a) A religious organization shall not be required to make a religious facility owned or leased by the religious organization available for

solemnization of a particular marriage; provided that:

(1) The religious facility is regularly used by the religious organization for its religious purposes;

(2) For solemnization of marriages pursuant to this chapter, the religious organization restricts use of the religious facility to its members; and

(3) The religious organization does not operate the religious facility as a for-profit business.

(b) A religious organization that refuses to make a religious facility available for solemnization of a marriage under subsection (a) shall not be subject to any fine, penalty, injunction, administrative proceeding, or civil liability for the refusal.

(c) Nothing in this section shall be interpreted to exempt the owner or operator of any religious facility from the requirements of chapter 489 if the religious facility is a place of public accommodation as defined in section 489-2.

**Hawaiʻi State Law Prohibiting Discrimination in Public Accommodations, HRS Chapter 489**

HRS §489-3 prohibits discrimination in places of public accommodation:

**§489-3  Discriminatory practices prohibition.**  Unfair discriminatory practices that deny, or attempt to deny, a person the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation on the basis of race, sex, including gender identity or expression, sexual orientation, color, religion, ancestry, or disability are prohibited.

“Place of public accommodation” is defined in HRS §489-2:

**§489-2  Definitions.**  As used in this chapter:

**\* \* \* \* \***

"Place of public accommodation" means a business, accommodation, refreshment, entertainment, recreation, or transportation facility of any kind whosegoods, services, facilities, privileges, advantages, or accommodations are extended, offered, sold, or otherwise made available to the general public as customers, clients, or visitors.  By way of example, but not of limitation, place of public accommodation includes facilities of the following types:

1. A facility providing services relating to travel or transportation;
2. An inn, hotel, motel, or other establishment that provides lodging to transient guests;
3. A restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises of a retail establishment;
4. A shopping center or any establishment that sells goods or services at retail;
5. An establishment licensed under chapter 281 doing business under a class 4, 5, 7, 8, 9, 10, 11, or 12 license, as defined in section 281-31;
6. A motion picture theater, other theater, auditorium, convention center, lecture hall, concert hall, sports arena, stadium, or other place of exhibition or entertainment;
7. A barber shop, beauty shop, bathhouse, swimming pool, gymnasium, reducing or massage salon, or other establishment conducted to serve the health, appearance, or physical condition of persons;
8. A park, a campsite, or trailer facility, or other recreation facility;
9. A comfort station; or a dispensary, clinic, hospital, convalescent home, or other institution for the infirm;
10. A professional office of a health care provider, as defined in section 323D-2, or other similar service establishment;
11. A mortuary or undertaking establishment; and
12. An establishment that is physically located within the premises of an establishment otherwise covered by this definition, or within the premises of which is physically located a covered establishment, and which holds itself out as serving patrons of the covered establishment.

**ANALYSIS & APPLICATION**

Under the proposed HRS §572-F, no clergy are required to perform solemnization of any marriage.

Under the proposed HRS §572-G, a religious organization is not required to make a religious facility available for solemnization of a marriage, and shall not be subject to fine, penalty, injunction, administrative proceeding, or civil liability for refusal; however, this exemption does not apply if the religious facility is a place of public accommodation under HRS §489-2.

The key distinction here is between private and public facilities. Religious organizations are free to limit the use of their facilities for a particular purpose if they do not offer the use of those facilities to the general public for that purpose. However, if they offer goods, services, facilities, privileges, advantages, or accommodations to the general public, HRS chapter 489 state law prohibitions against discrimination in public accommodations apply to what is offered to the general public.

In cases that raise questions regarding the intersection and relationship between the proposed HRS 572-G religious facility exemption and the existing HRS Chapter 489 public accommodations law, there will be two parts to the analysis:

**Jurisdiction / coverage.** The threshold issue is whether the religious facility is a place of public accommodation covered under HRS Chapter 489. The question is: does the religious organization offer the use of the facility to the general public as customers, clients, or visitors? A religious facility that is used only for religious purposes and is not offered to the public is not a place of public accommodation. Welcoming the public to attend religious services does not make the facility a place of public accommodation. But, if a religious organization makes the choice to offer the rental or use of its facility for commercial or public use, it will be a place of public accommodation for that purpose.

This threshold analysis is similar to the determination of whether a facility is a private club or a place of public accommodation. *e.g.*, the Pacific Club, Elks, and Outrigger Canoe Club are private membership clubs that do not fall under the jurisdiction of HRS Chapter 489, unless they offer their goods, services, facilities, etc. to the general public. Only to the extent that any private club or organization operates a place of public accommodation, would it be subject to the public accommodations law.

**Prohibited discrimination.** HRS §489-3 prohibits discriminatory denial of the full and equal enjoyment of goods, services, facilities, privileges, advantages, and accommodations of a public accommodation on the basis of race, sex, including gender identity or expression, sexual orientation, color, religion, ancestry, or disability. Denial on any basis other than these protected bases is not prohibited under Hawaiʻi state public accommodations law.

A religious organization can allow the use of its facilities for some public uses while restricting other uses on a non-discriminatory basis. *e.g.*, a church allows the use of its facility for birthdays or graduation parties, but not for weddings or fundraising events. Such a restriction, applied in a non-discriminatory manner, would not be unlawful under the public accommodations law.

Thus, in any particular case, the inquiry will be two-fold: Is this a place of public accommodation? And, is there prohibited discrimination based on race, sex (including gender identity or expression), sexual orientation, color, religion, ancestry, or disability? This is the inquiry under the existing public accommodations law. The proposed marriage equality law does not change the analysis.

**Example 1**

A religious organization has a facility that it uses for religious purposes. It allows the use of the facility for only one other use, allowing a neighborhood board to hold monthly meetings there.

The religious organization is concerned whether this use makes its facility a public accommodation, and whether it is required to allow the use of its facility for same-sex wedding celebrations.

Application of the two-part inquiry:

1) Is this a place of public accommodation? The religious facility is being offered for public use. This is a fact-based, case by case threshold determination.

2) Is there prohibited discrimination? Assuming this facility is a place of public accommodation, restriction of use based on the type of activity is not unlawful, if not based on prohibited discrimination (*i.e.*, not based on race, sexual orientation, etc.). Restricting the public use of the facility to regular neighborhood board meetings is not discrimination prohibited by the state public accommodations law.

**Example 2**

A religious organization owns a facility that it uses for religious purposes. It allows the rental of the facility for weddings for a fee, with a large number of international visitors paying to have their weddings at the site without regard to their religion. The religious organization wonders whether it may decline to rent the facility to same-sex couples for weddings.

Two-part inquiry:

1) Is this a place of public accommodation? Yes, the religious organization offers the use of its facility to the public as customers, clients, or visitors. This is a fact-based, case by case threshold determination.

2) Is there prohibited discrimination? Yes. The religious organization offers its facility for rent to the public for weddings, and does not require the couples getting married in the facility to be members or followers of the religious denomination. Discriminatory denial of use of the facility on the basis of sexual orientation is prohibited under the public accommodations law.

**Example 3**

A private school sponsors an annual carnival fundraiser. Does this make the school a place of public accommodation subject to the state public accommodations law?

Threshold inquiry:

Is the school carnival a place of public accommodation? The carnival is a place of public accommodation, but that does not make the entire operation of the school into a place of public accommodation. The Hawaiʻi Civil Rights Commission does not exercise jurisdiction over educational institutions under our state public accommodations law, so does not have jurisdiction to investigate complaints of discriminatory admissions, discipline, grading, curricula, etc. However, educational institutions as employers fall under the coverage of state and federal fair employment laws. And, a school can operate a place of public accommodation (*e.g.*, the Punahou Carnival, University of Hawaiʻi Stan Sheriff Center athletic events, the KCC dining room, theater performances, etc.). The school carnival in this example would be a place of public accommodation if goods, services, facilities, are offered to the public. That does not bring all other aspects of the educational institution under the coverage and jurisdiction of state public accommodations law.

**Example 4:**

A church has a facility that it rents out for weddings, with a policy restricting its use to weddings performed by its own minister. Can the minister refuse to perform same-sex wedding ceremonies?

A church can restrict the use of a religious facility for weddings to be conducted by its own minister. Under the statutory protection provided by the proposed HRS § 572-F, consistent with constitutionally protected free exercise of religion, clergy are not required to solemnize any marriage, and there is no civil liability for refusal to solemnize a marriage.

**CONCLUSION**

The Hawaiʻi Civil Rights Commission supports the proposed marriage equality legislation, as offered in the draft bill posted by Governor Abercrombie, dated 9/9/13, including the proposed HRS §§ 572-F and 572-G religious exemptions for clergy who refuse to solemnize marriages and for religious organization that refuse to make religious facilities available for solemnization of a marriage, if the religious facility is not a place of public accommodation. The HCRC will oppose proposals to create religious exemptions that diminish protections against discrimination under our state public accommodations law.

The State of Hawaiʻi has a compelling state interest in eliminating discrimination in public accommodations.[[1]](#footnote-1) Our public accommodations law is a law of general applicability that serves a compelling state interest and does not target any religion. Enactment of marriage equality legislation should not be a vehicle or excuse to weaken or diminish existing protections under HRS Chapter 489. Opening the door to broad or numerous exemptions or exceptions to our state civil rights laws undermines the state’s compelling interest in prohibiting discrimination, weakens our discrimination laws, and invites constitutional challenges. It is not necessary to create exemptions to our civil rights laws in order to enact marriage equality legislation, and to do so will weaken existing civil rights protections.

1. HRS §368-1 states, in relevant part:

   The legislature finds and declares that the practice of discrimination because of race, color, religion, age, sex, including gender identity or expression, sexual orientation, marital status, national origin, ancestry, or disability in … public accommodations … is against public policy. [↑](#footnote-ref-1)