



HAWAI‘I CIVIL RIGHTS COMMISSION

KOMIKINA PONO KĪWILA O HAWAI‘I

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MINUTES

Hawai‘i Civil Rights Commission Office
via Zoom
January 23, 2023
1:00 p.m.

Present: Liann Ebesugawa, Joan Lewis, William Puette, Jon Matsuoka, and Arsima Muller, Commissioners; Robin Wurtzel, Bill Hoshijo, Marcus Kawatachi, Heather McVay, and Constance Yonashiro, Staff.

Chair Liann Ebesugawa called the meeting to order.

Approval of Minutes

The Commissioners reviewed the draft minutes of the October 31, 2022, and November 9, 2022, meetings, which had been circulated.

Those minutes were approved as circulated.

The Commissioners also reviewed the draft minutes of the December 12, 2022, meeting, which were presented.

Those minutes were approved as presented.

Executive Director’s Report

Deputy Executive Director (DED) Marcus Kawatachi presented an FY 2023 HCRC Mediation Program year-to-date summary.

Summary & Details (7/1/22 through 1/20/23)

Referrals 11
Dispositions: 11
Settlements: 7
Non-agreements: 4
Settlement Rate: 63.6%

Dual-filed (EEOC/HCRC and HUD/HCRC) settlements: 5 (HUD or EEOC dual-filed)
State-only settlements: 2

Employment cases settled: 2
Housing cases settled: 5

Primary Bases for Complaints Settled in Mediation

Disability 3
Familial Status 2
Religion 1
Retaliation 1

Dispositions by Mediation Center

Mediation Center of the Pacific 2/2 (settlement rate 100%)
Mediation Services of Maui
Private Mediators
Ku‘ikahi Mediation Services (Hilo)
West Hawaii Mediation Center
Kauai Economic Opportunity, Inc.
Hawai‘i Civil Rights Commission 5/9 (settlement rate 55.6%)
OVERALL 7/11 (settlement rate 63.6%)

DED Kawatachi also presented a data and production report showing caseload data through January 20, 2023.

As of January 20, 2023, the written report showed 306 299 open cases, an increase of 7 cases from the number reported as of October 28, 2022.

Of the 306 open investigation cases, 1 (0.3%) was filed in 2017, 14 (4.6%) in 2018, 36 (11.8%) in 2019, 49 (16.0%) in 2020, 65 (21.2%) in 2021, 133 (43.5%) in 2022, and 8 (2.6%) in 2023.

DED Kawatachi reported a breakdown of the status of the open cases by type of case and investigation stage.

	2017	2018	2019	2020	2021	2022	2023	Total
Housing Cases	0	0	2	6	9	24	1	42
Response Monitoring	0	2	13	29	40	97	7	188
Mediation	0	0	3	7	13	9	0	32
Pending Assignment	0	7	17	4	2	1	0	31
Active Investigation	1	5	1	3	1	2	0	13
TOTAL	1	14	36	49	65	133	8	306

The report indicated no new subpoena enforcement litigation.

Case Aging (Last report – 10/28/22)

33.0 % of all cases are 2 years or older (33.8 %)

8.2 % of all cases are over 18 months, but less than 2 years old (7.7 %)

13.7 % of all cases are over 12 months, but less than 18 months old (9.4 %)

21.6 % of all cases are over 6 months but less than 12 months (20.7 %)

23.5 % of all cases are 6 months or less (28.4 %)

DED Kawatachi noted that the FY 2022 year-end caseload and data report was added, based on the FY 2022 Annual Report, which had been submitted and posted.

The report also covered the year-to-date data for the past five fiscal years:

Category	7/1/18 – 1/20/19	7/1/19 – 1/20/20	7/1/20 – 1/20/21	7/1/21 – 1/20/22	7/1/22 – 1/20/23
PCQ Received	346	378	236	276	259
Intake Decision	286	382	210	239	255
Complaint Filed	165	192	113	108	85
Investigation Closed	179	127	116	158	98
Notice of Cause	7	5	7	14	5
Enforcement Closure	11	3	3	6	0

Executive Director (ED) Bill Hoshijo publicly announced on the record his scheduled retirement, effective at the end of February 2023.

Chair Ebesugawa then announced that after a deliberate recruitment and selection process, the Commission had selected and appointed Marcus Kawatachi from a strong applicant pool to be the next HCRC Executive Director, effective March 1, 2023.

Chief Counsel’s Report

Chief Counsel (CC) Robin Wurtzel reported no change on *Morning Hill Foods, LLC dba Mana Bu’s v. The Hawaii Civil Rights Commission*, Civil No. 18-100034-01 KKH, pending in the ICA.

CC Wurtzel reported that the Hearings Examiner had on that day filed the Findings of Fact, Conclusions of Law, and Recommended Order in DN 22-01-H-D-RET, *William D. Hoshijo, Executive director, on behalf of the complaint filed by Tereza Kristall and S. Joshua Kristall-Wagner v. Elizabeth Dutdut; David & Floralee D. Letarte Trust; Garden Island Realty LLC; and Bryan Miyake*, so no extension of time was required.

2023 Legislation

The Commissioners reviewed 2023 Legislative Summary 1(A), with staff recommendations, and decided on HCRC positions as follows:

EMPLOYMENT

RELATING TO MEDICAL CANNABIS

HB238 https://www.capitol.hawaii.gov/sessions/session2023/bills/HB238_.pdf

SB377 https://www.capitol.hawaii.gov/sessions/session2023/bills/SB377_.pdf

Prohibits an employer from discriminating against a person in hiring, termination, or any term or condition of employment based on the person's status as a medical cannabis registry card holder, under certain conditions. Authorizes an employer to use a fit-for-duty test for medical cannabis qualifying patients in potentially dangerous occupations. Exempts certain occupations.

Discussion: Staff recommended support. HCRC supported similar legislation in the past, including SB2543 in 2020 and SB 64 in 2021. This bill places jurisdiction in HRS Chapter 329, within the statute governing the DOH's administration of the medical cannabis program. This is appropriate because their definition of "debilitating medical condition" differs from the HRS Chapter 378, Part I statutory definition of disability. Therefore, not every person with a medical cannabis card is entitled to a reasonable accommodation for disability.

Position: Support.

RELATING TO EQUAL PAY.

HB745 https://www.capitol.hawaii.gov/sessions/session2023/bills/HB745_.pdf

Conforms statutory prohibitions against wage discrimination with other prohibitions on employment discrimination. Clarifies allowable justifications for compensation differentials and remedies for pay disparity. Requires employers to disclose wage ranges to employees and prospective employees. Exempts wage disclosure and discussion from

the prohibitions on employer retaliation or discrimination if knowledge of the wages stems from human resources, payroll, or legal professional responsibilities in the workplace.

Discussion: Staff recommended support. This bill amends HRS § 378-2.3, a statute which HCRC enforces. This equal pay bill creates a definition of “substantially similar work,” and provides for pay transparency. In 2020 the HCRC supported equal pay bills, HB 1701 and SB 2253.

Position: Support.

RELATING TO GENDER EQUITY.

SB873 https://www.capitol.hawaii.gov/sessions/session2023/bills/SB873_.pdf

HB736 https://www.capitol.hawaii.gov/sessions/session2023/bills/SB873_.htm

Appropriates funds for the Department of Human Resources to contract for a study on the gender pay gap within the government of the State. Requires a report to the Legislature.

Discussion: Staff recommended support. Information about the gender pay gap specifically in Hawaii would be helpful in determining discriminatory conduct, and bring greater awareness of the issues. It was noted that the proposed DHRD study would focus exclusively on a gender pay gap, assuming there is one, in state government employment. It would not address or provide data or analysis of the gender pay gap in the private sector.

Position: Support.

HOUSING

RELATING TO HOUSING DISCRIMINATION.

SB327 https://www.capitol.hawaii.gov/sessions/session2023/bills/SB327_.pdf

Allows counties to prohibit discrimination against renters based on their source of income.

Recommendation: Support. The 2022 Legislature passed Act 310, SB 206, prohibiting discrimination based on participation in Section 8. However, the newly enacted law has several limitations. This bill would allow the counties to pass a stronger ordinance.

Position: Support.

PUBLIC ACCOMODATIONS

RELATING TO GENDER EQUITY

SB137 https://www.capitol.hawaii.gov/sessions/session2023/bills/SB137_.pdf

Requires that restrooms and toilet facilities of public amusement facilities constructed, renovated, retrofitted, or installed after 1/1/2024 have two female-use toilets for each male-use toilet or urinal. Requires certain state building construction that is constructed or substantially modified after 1/1/2024 to provide for the installation of a gender-neutral bathroom with at least three stalls.

Discussion: Staff recommended offer comment and strong concern that the bill would place this new statutory requirement within Chapter 489, under HCRC enforcement jurisdiction. Chapter 489 remedies expressly do not allow HCRC to mandate construction. The bill would make Chapter 489 internally inconsistent, and placement in Chapter 489 would preclude any remedy mandating construction.

Position: Comment and strong concern over placement in Chapter 489.

PROCEDURAL ISSUES

RELATING TO AN OFFICE OF ADMINISTRATIVE HEARINGS.

HB373 https://www.capitol.hawaii.gov/sessions/session2023/bills/HB373_.pdf

HB424 https://www.capitol.hawaii.gov/sessions/session2023/bills/HB424_.pdf

Establishes a 2 year pilot program of an office of administrative hearings to conduct contested case hearings in the departments of budget and finance, land and natural resources, and taxation.

Discussion: Staff recommended comment and express concern. While the bill would establish a pilot program, which would not directly affect HCRC, the HCRC has concerns over future expansion of the pilot program. The HCRC has a need for specialized hearing officers who are familiar with and have expertise on the laws HCRC enforces. The Commission has authority pursuant to statute, HRS § 368-3(8) to appoint hearings examiners. The HCRC opposed bills mandating a centralized state administrative hearings office in 2019 and 2021.

Position: Comment and concern.

OTHER/ MISCELLANEOUS

RELATING TO VITAL STATISTICS.

SB38 https://www.capitol.hawaii.gov/sessions/session2023/bills/SB38_.pdf

Allows a qualified applicant to change their sex designation on their birth certificate, with options of male, female or X. Establishes information required for an applicant to do so, and requires DOH to create necessary forms.

Discussion: Staff recommended support. In 2019 Act 142 expanded gender designations for Hawai'i driver's licenses and State IDs to F, M or X. This bill would similarly expand the designations on birth certificates to male, female, or X, and amend the information required by statute for an applicant to change their sex designation on their birth certificate. The HCRC supported similar bills in 2022 (HB 2451) and 2021 (HB 1231) in 2021, neither was set for hearing.

Position: Support.

RELATING TO BIRTH CERTIFICATES.

SB1176 https://www.capitol.hawaii.gov/sessions/session2023/bills/SB1176_.pdf

Requires any document that constitutes a certificate of birth issued under the laws of this State to allow for "nonbinary" or "X" to be a sex or gender marker choice.

Discussion: Staff recommended support. This bill differs from SB 1176, discussed above. It does not relate to changing a sex designation on birth certificates, but provides for 3 options on a birth certificates issued going forward.

Position: Support.

RELATING TO MARRIAGE.

SB956 https://www.capitol.hawaii.gov/sessions/session2023/bills/SB956_.pdf

HB485 https://www.capitol.hawaii.gov/sessions/session2023/bills/HB485_.pdf

Provides for the replacement of certificates of marriage for individuals who have changed their gender, sex, and, if applicable, name.

Discussion: Staff recommended support. This has not been proposed previously, but is an extension of the concept advanced by SB 38, the bill discussed above, which would provide for

changing an applicant's birth certificate sex designation. This bill would provide for issuance of a new replacement marriage certificate that reflects a change in gender or sex identifiers and name (if applicable).

Position: Support.

PROPOSING AN AMENDMENT TO THE CONSTITUTION OF THE STATE OF HAWAII TO PROVIDE INDIVIDUALS WITH THE RIGHT TO MARRY ANY HUMAN BEING AND FOR THAT RIGHT NOT TO BE ABRIDGED BY THE STATE.

SB897 https://www.capitol.hawaii.gov/sessions/session2023/bills/SB897_.pdf

Proposes an amendment to the Hawaii State Constitution to provide individuals with the right to marry any human being and for that right not to be abridged by the State.

Discussion: Initially staff recommended support. On first read, this bill relates to marriage equality, proposing a constitutional amendment. In discussion ED Hoshijo raised a concern that on closer reading, the bill language was problematic, as it could render the state marriage statute, HRS § 572-1, unconstitutional, noting that § 572-1 prohibits child marriages, marriages between blood relatives in the first degree, polygamy, and forced marriages. In that light, he suggested it might be better to oppose the bill.

Chair Ebesugawa suggested it would be better to support the intent of the bill and offer language to fix the problematic bill language.

The discussion and decision on a position on SB No. 897 was postponed, to give staff time to draft suggested language that would cure the problematic bill language that would nullify HRS § 572-1 Requisites of valid marriage contract. (Prohibiting child marriage, marriages between blood relatives in the first degree, polygamy, and forced marriages).

RELATING TO IN VITRO FERTILIZATION INSURANCE COVERAGE

SB993 https://www.capitol.hawaii.gov/sessions/session2023/bills/SB993_.pdf

Removes discriminatory requirements for mandatory insurance coverage of in vitro fertilization procedures to create parity of coverage for same-sex couples, unmarried women, and opposite-sex couples for whom male infertility is the relevant factor. Requires the insured or the insured's dependent spouse to have a history of infertility of at least two years rather than five years.

Discussion: Staff recommended support. The HCRC had supported similar bills in the past to support equality in insurance coverage based on a protected basis.

Position: Support.

RELATING TO DISCRIMINATION

SB40 https://www.capitol.hawaii.gov/sessions/session2023/bills/SB40_.pdf

Establishes provisions relating to civil remedies for discriminatory reporting to a law enforcement officer. Provides that a person who summons or reports to a law enforcement officer, without reason to suspect a crime, offense, or imminent danger has occurred or is occurring, because of that person's belief or perception involving a member of a protected class shall be civilly liable.

Status:

Discussion: Initially staff recommended support. These bills are a recognition of racism and innate bias in our society. False reporting has historically been a threat to minority communities, and a cause of racial violence. Other jurisdictions with these laws include New York, California, and the City of San Francisco. In a 2021 review of a similar bill, the Commission discussed whether civil action is the most effective remedy, or whether these acts should be criminalized. There are criminal sanctions under the criminal code, for the offense of false reporting. In that 2021 discussion of a similar bill, the Commission questioned whether affected minority communities were on board with the creation of civil liability as a means to address the problem, but noted that such legislation would provide a warning that people will be held accountable for discriminatory false reporting.

Chair Ebesugawa stated that it was important to include a Hawai'i perspective in the discussion, to draw connections to what happens in Hawai'i.

Commissioner Joan Lewis, referring to the *Massie* case, said that criminal liability may not be enough, and civil liability and remedy may make people think twice about making a false report – and will encourage reporting from people who have been subjected to false reporting.

Commissioner William Puette expressed concern that the bill as written might have a chilling effect on reporting to police and requesting assistance when needed, from those in the community who already underreport crimes and dangerous situations.

Commissioner Arsima Muller, raised the question of whether there were already current civil remedies under tort law.

ED Hoshijo suggested it might be better to support the intent of the bill, but point out technical flaws in the bill as drafted, pointing out problematic language in the new statutory § __-1(a)(1) & (2).

Commissioner Muller suggested that the technical flaws could be addressed by tracking some of the elements from the criminal false reporting statute, HRS § 710-1015.

Chair Ebesugawa expressed concern over the effect of power imbalances on access and ability to obtain any civil remedy.

Commissioner Jon Matsuoka added that the HCRC should support the intent, but go beyond the intent to reflect on historical experience and context.

Position: Support intent, with comments and concerns.

RELATING TO EDUCATION.

SB138 https://www.capitol.hawaii.gov/sessions/session2023/bills/SB138_.pdf

Requires the Board of Education to include in its curriculum a unit of instruction studying the events of Asian American history. Requires the Superintendent of Education to prepare and make available to all school complex areas instructional material that shall be the guidelines for development of the Asian American history education in each school and monitor compliance. Requires that each school complex area determines the minimum amount of instructional time that qualifies as a unit of instruction in Asian American history. Requires Asian American history to be taught in each public school commencing the 2023-2024 school year.

Discussion: Support intent with comments. The curriculum should be done in an informed and balanced way, and include Native Hawaiian and Pacific Island history.

Commissioner Lewis provided a baseline context for the discussion, sharing that currently all schools are required to include a unit of Pacific Islander History in 7th grade curriculum and a unit of Modern Hawaiian History in high school curriculum, leaving it to each complex to determine the amount of instructional time for each required unit and who will teach it.

Adding a similar requirement to include a unit of Asian American history and leaving the minimum amount of instructional time to each complex will lead to inconsistency, and any new mandate should come with resources.

Position: Support intent, with comments.

RELATING TO AMERICAN SIGN LANGUAGE.

SB610 https://www.capitol.hawaii.gov/sessions/session2023/bills/SB610_.pdf

Recognizes American Sign Language as a fully developed, autonomous, natural language with its own grammar, syntax, vocabulary, and cultural heritage.

Discussion: Staff recommended support. The HCRC has supported greater recognition of ASL, and deaf culture, and supported SB537 in 2021.

Position: Support.

RELATING TO SERVICE ANIMALS.

SB612 https://www.capitol.hawaii.gov/sessions/session2023/bills/SB612_.pdf

Requires that a disclaimer be provided by sellers or providers of emotional support animals or certificates, identifications, tags, vests, leashes, and harnesses for emotional support animals that the animal is not a service animal. Establishes penalties.

Discussion: Staff recommended offer comments and support § (b) only. This bill is identical to SB 2438 and HB 1944 in 2022, and this was the HCRC’s position last year. Note that this bill states “Service animals enjoy specific privileges.” This is untrue. Animals do not enjoy privileges and are not granted an accommodation. A person with a disability, who uses a service animal, is granted an accommodation. The dog does not.

§ (b) is aimed at the numerous online businesses selling vests and certificates, and we support that section. It is unclear how this would affect sellers of puppies, dogs, cats, rabbits etc. including non-profits, when the buyer/adopter does not mention that the animal is an assistance animal rather than a pet.

Position: Offer comments and support § (b) only.

RELATING TO SELECTIVE SERVICE.

SB1162 https://www.capitol.hawaii.gov/sessions/session2023/bills/SB1162_.pdf

Requires compliance with the federal Military Selective Service Act for an individual to enroll in a state-supported post-secondary educational institution, qualify for state financial assistance for post-secondary education, or be eligible for employment by or service for the State or any of its political subdivisions. Provides exceptions.

Discussion: Staff recommended strongly oppose. The HCRC has consistently opposed this bill based on the grounds that it codified sex discrimination – it only applies to males and imposes a discriminatory burden on men that does not apply to women. Also, the prohibition would likely bar young men who are conscientious objectors based on their religious beliefs from state higher education and county/ state employment, including elected office.

Position: Strongly Oppose.

Announcements

Commissioner Puette highly recommended the docuseries “Amend: The Fight for America,” on the 14th Amendment and the history of the fight for equality in America.

Closed Executive Session

There being no objection, the Commissioners went into Closed Executive Session, to discuss a personnel matter pursuant to HRS §§ 92-4 and 92-5(a)(2).

The Commissioners came out of Closed Executive Session.

Continued Meeting

The meeting was continued to January 30, 2023, at 1:00 p.m.

**Draft minutes circulated by William D. Hoshijo, Executive Director.
Approved by Commission on _____, 2023.**

MINUTES

Hawai`i Civil Rights Commission Office
via Zoom
January 30, 2023*
1:00 p.m.

Present: Liann Ebesugawa, Joan Lewis, William Puette, Jon Matsuoka, and Arsima Muller, Commissioners; Robin Wurtzel, Bill Hoshijo, Marcus Kawatachi, Heather McVay, and Constance Yonashiro, Staff.

Chair Liann Ebesugawa called the continued meeting to order.

2023 Legislation

The Commissioners reviewed 2023 Legislative Summary 1(B) (which also updated status of bills and identified companion bills for bills discussed before), with staff recommendations, and decided on HCRC positions as follows:

EMPLOYMENT

RELATING TO EMPLOYMENT PRACTICES

SB876 [https://www.capitol.hawaii.gov/sessions/session2023/bills/SB876 .pdf](https://www.capitol.hawaii.gov/sessions/session2023/bills/SB876.pdf)

Requires employers to provide employees the right to sit at work when standing is not necessary. Establishes fines.

Status: ref to LBT, JDC

Discussion: Staff recommended offer comments. Take no position on the merits of the measure, but concern about any possibility of placement within HCRC jurisdiction. Seating for employees would only be within HCRC's purview if an employee with a disability is requesting a reasonable accommodation. This proposed statute should not be placed within Chapter 378, part I. It also includes its own remedies, which conflict with § 378-5, remedies applicable to violations of Chapter 378, Part 1.

Position: Comment and concern over any possibility of placement in Chapter 378, Part I.

* Meeting continued from January 23, 2023.

RELATING TO DISCRIMINATION.

HB1284 https://www.capitol.hawaii.gov/sessions/session2023/bills/HB1284_.pdf

Prohibits discrimination by employers based on political affiliation. Prohibits 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 based on political affiliation.

Discussion: Staff recommended oppose. The HCRC has serious concerns because this protected basis is different in kind than other protected bases.

Position: Oppose.

HOUSING

RELATING TO EQUITY.

SB389 https://www.capitol.hawaii.gov/sessions/session2023/bills/SB389_.pdf

Requires all places of public accommodation and state building construction constructed after 12/31/23 to provide universal changing accommodations that are equally accessible to men and women.

Status: ref to GVO, CPN/WAM

Discussion: Staff recommended comment. Section 1 of this bill is placed in Chapter 489, though this part of the bill states that it is excluded from HCRC jurisdiction. It would be better placed in a new chapter. Though “universal changing accommodation” is defined, it is a new term, and refers to use by caregivers for adult use.

Position: Comment, suggesting placement in a new chapter.

RELATING TO ACCESSIBILITY

SB753 https://www.capitol.hawaii.gov/sessions/session2023/bills/SB753_.pdf

Requires a retail establishment with an employee toilet facility to allow a customer suffering from an eligible medical condition to use that restroom during normal business hours, under certain conditions. Exempts a retail establishment and employees from civil

liability in allowing an eligible customer to use an employee toilet facility in certain circumstances. Establishes fines.

Status: ref to HHS, JDC

Discussion: Staff recommended support. The HCRC supported SB 2425 and SB 2913 in 2022. This measure would provide more accessibility to those who need it. At least 15 states have passed a version of this bill.

Position: Support.

RELATING TO ACCESSIBILITY

HB1413 https://www.capitol.hawaii.gov/sessions/session2023/bills/HB1413_.pdf

Requires that the legislature ensure that state facilities, businesses, and recreational facilities meet certain accessibility requirements and comply with the federal Americans with Disabilities Act of 1990, as amended.

Discussion: Staff recommended comment. Commissioner agreed with recommendation, with the suggestion that the HCRC comments should be prefaced by support for accessibility, then express concern over placement in Chapter 368. The bill would create a state law analog to portions of the ADA and assign compliance and enforcement of the state analog of the ADA to the HCRC. The language is ambiguous, and it is unclear if “businesses” refers to all businesses or just those owned by State government. It also affects the airport. No fiscal component which will be needed. The HCRC does not currently enforce Title II of the ADA, and expansion of HCRC jurisdiction would require additional funding.

Position: Comments, prefaced by support for accessibility, then express concern over placement in Chapter 368.

OTHER/ MISCELLANEOUS

PROPOSING AN AMENDMENT TO THE CONSTITUTION OF THE STATE OF HAWAII TO PROVIDE INDIVIDUALS WITH THE RIGHT TO MARRY ANY HUMAN BEING AND FOR THAT RIGHT NOT TO BE ABRIDGED BY THE STATE.

SB897 https://www.capitol.hawaii.gov/sessions/session2023/bills/SB897_.pdf

Proposes an amendment to the Hawaii State Constitution to provide individuals with the right to marry any human being and for that right not to be abridged by the State.

Discussion on 1/23/23: Initially staff recommended support. On first read, this bill relates to marriage equality, proposing a constitutional amendment. In discussion ED Hoshijo raised a concern that on closer reading, the bill language was problematic, as it could render the state marriage statute, HRS § 572-1, unconstitutional, noting that § 572-1 prohibits child marriages, marriages between blood relatives in the first degree, polygamy, and forced marriages. In that light, he suggested it might be better to oppose the bill.

Chair Ebesugawa suggested it would be better to support the intent of the bill and offer language to fix the problematic bill language.

The discussion and decision on a position on SB No. 897 was postponed, to give staff time to draft suggested language that would cure the problematic bill language that would nullify HRS § 572-1 Requisites of valid marriage contract. (Prohibiting child marriage, marriages between blood relatives in the first degree, polygamy, and forced marriages).

Continued discussion on 1/30/23: The discussion and decision on a position on SB No. 897 had been postponed to give time for staff to draft suggested language that would cure the problematic bill language that would nullify HRS § 572-1 Requisites of valid marriage contract (prohibiting child marriage, marriages between blood relatives in the first degree, polygamy, and forced marriages).

ED Hoshijo provided draft language that would cure the problem, but not in this bill. He advised that the curative language was beyond the scope of the very specific bill title of SB No. 897, and there is no way to fix that.

Staff recommendation: Assuming that the intent of the bill is to provide a state constitutional buttress against any possible U.S. Supreme Court reversal on *Obergefell* due process and equal protection constitutional guarantee for marriage equality (there being no purpose section in the bill), **support intent but comment, pointing out problematic language that cannot be fixed because of narrow bill title.**

Position: Support intent but comment, pointing out problematic language that cannot be fixed because of narrow bill title.

REPRODUCTIVE RIGHTS

RELATING TO HEALTH CARE

SB1 https://www.capitol.hawaii.gov/sessions/session2023/bills/SB1_.pdf

Authorizes licensed physician assistants to perform certain abortions. Declares a law of another state that authorizes a person to bring a civil action against a person who: terminates or seeks to terminate a pregnancy; performs or induces the termination of a pregnancy; knowingly engages in conduct that aids or abets the performance or inducement of the termination of a pregnancy; or attempts or intends to engage in the

conduct, as contrary to the public policy of this State and shall not be enforceable in any court of the State and shall not afford any basis for the granting of legal or equitable relief by any court of the State. Prohibits the State from engaging in certain actions with regard to civil and criminal actions from another state.

Status: ref to HHS/CPN (2/1/23), JDC

Discussion: Staff recommended support. Specifically support the amendments to HRS § 453-16 that declare laws of other states that create civil actions against persons for terminating a pregnancy, performing or inducing or aiding and abetting the termination of a pregnancy are contrary to State public policy, and also prohibit recognition and enforcement of other states' laws that impose civil or criminal liability relating to termination of a pregnancy. No position on the proposed amendment to § 453-16 that expands the list of medical professionals authorized to perform abortions. Draft testimony provided. **It was agreed that the Commissioner would consider and approve (in gross) staff recommendations on ten bills relating to reproductive freedom, discussed on pages 9-13 of 2023 Legislative Summary 1(B), consistent with the position laid out in the draft testimony for S.B 1.**

Position: Support. The Commissioners approved (in gross) staff recommended positions on ten bills relating to reproductive freedom, discussed on pages 9-13 of 2023 Legislative Summary 1(B).

RELATING TO HEALTH CARE

SB892 https://www.capitol.hawaii.gov/sessions/session2023/bills/SB892_.pdf

SB893 https://www.capitol.hawaii.gov/sessions/session2023/bills/SB893_.pdf

Requires health insurance coverage for various sexual and reproductive health care services.

Status: ref to HHS, CPN

Discussion: Staff recommended support intent, with comments. No one should be denied reproductive health services based on a protected category. The HCRC has concern that the measure makes discriminatory denial of insurance coverage for reproductive health services under HRS chapter 431 a violation of HRS chapter 489, Discrimination in Public Accommodations, under the enforcement jurisdiction of the HCRC. Enforcement jurisdiction for insurance code violations should not lie with the HCRC.

Position: Support intent, with comments. The Commissioners approved (in gross) staff recommended positions on ten bills relating to reproductive freedom, discussed on pages 9-13 of 2023 Legislative Summary 1(B).

RELATING TO REPRODUCTIVE HEALTH CARE

SB1526 https://www.capitol.hawaii.gov/sessions/session2023/bills/SB1526_.pdf

HB1441 https://www.capitol.hawaii.gov/sessions/session2023/bills/HB1441_.pdf

Explicitly provides that a patient has a right to choose to obtain an abortion, or terminate a pregnancy if the termination is necessary to protect the patient's life or health. Repeals criminal penalties for violations of certain abortion provisions. Clarifies which health care providers may provide abortion care.

Discussion: Staff recommended support intent. The intent of this bill is in keeping with Hawai‘i’s constitution Article I, Section 6 , right to privacy, and current abortion laws. Hawai‘i has supported a woman’s right to choose since 1970.

Position: Support intent. The Commissioners approved (in gross) staff recommended positions on ten bills relating to reproductive freedom, discussed on pages 9-13 of 2023 Legislative Summary 1(B).

RELATING TO HEALTH CARE

HB1428 https://www.capitol.hawaii.gov/sessions/session2023/bills/HB1428_.pdf

Prohibits the State from denying or interfering with a patient's right to choose to obtain an abortion or to terminate a pregnancy if the termination is necessary to protect the life or health of the patient. Repeals a criminal penalty for violations of certain abortion provisions. Clarifies that advanced practice RNs may provide abortion care. Clarifies that physicians, osteopathic physicians, and advanced practice registered nurses may administer a medication abortion via telehealth for a patient residing in the State.

Discussion: Staff recommended support intent. The intent of this bill is in keeping with Hawai‘i’s constitution Article I, Section 6 , right to privacy, and current abortion laws. Hawai‘i has supported a woman’s right to choose since 1970.

Position: Support intent. The Commissioners approved (in gross) staff recommended positions on ten bills relating to reproductive freedom, discussed on pages 9-13 of 2023 Legislative Summary 1(B).

RELATING TO REPRODUCTIVE HEALTH CARE

SB896 https://www.capitol.hawaii.gov/sessions/session2023/bills/SB896_.pdf

HB1427 https://www.capitol.hawaii.gov/sessions/session2023/bills/HB1427_.pdf

Shortened summary- Prohibits a covered entity from disclosing communication or information relating to reproductive health care services. Prohibits the issuance of a subpoena or information in connection with an out-of-state proceeding relating to reproductive health care services legally performed in the State. Prohibits the State from penalizing, prosecuting, or otherwise taking adverse action based on pregnancy outcomes or aiding or assisting a pregnant individual with accessing reproductive health care services. Requires the governor to deny any demand for surrender of a person charged with a crime involving reproductive health care services unless the conduct constitutes a crime in the State. Enumerates laws contrary to public policy and prohibits their application as rules of decision in the courts. Prohibits the issuance of a summons for persons to testify in another state with regard to lawful reproductive health care services. Clarifies discipline under various licensing statutes.

Status: SB 896 ref to HHS/CPN, JDC

Discussion: Staff recommended no position. This is a new chapter and is both detailed and complex. We have nothing to add that would be of help in determining which sections are needed, which are repetitive.

Position: No position. The Commissioners approved (in gross) staff recommended positions on ten bills relating to reproductive freedom, discussed on pages 9-13 of 2023 Legislative Summary 1(B).

RELATING TO HEALTH.

SB1503 https://www.capitol.hawaii.gov/sessions/session2023/bills/SB1503_.pdf

Shortened summary - Prohibits certain boards and insurers from taking adverse action regarding licensing based on provision of abortion or gender affirming treatments, if within the law. Prohibits issuance of subpoenas in connection with out-of-state subpoenas related to abortion care services or gender affirming treatments that are provided in compliance with the laws of the State. Likewise prohibits law enforcement aid in investigations in these areas. Requires the AG routinely submit reports of these requests for participation. Establishes additional protections for patient health information related to reproductive health services or gender affirming treatments. Establishes protections for certain information related to reproductive health services or gender affirming treatments that does not qualify as patient health information. Prohibits the State from penalizing individuals based on the individual's pregnancy outcomes or gender affirming treatments received or for aiding or assisting a third party.

Discussion: Staff recommended no position. This amends HRS §§ 453-7 and 453-12 (in Medicine and Surgery), and adds a new section to chapter 671, Medical Torts. This is beyond the HCRC’s expertise and knowledge.

Position: No position. The Commissioners approved (in gross) staff recommended positions on ten bills relating to reproductive freedom, discussed on pages 9-13 of 2023 Legislative Summary 1(B).

PROPOSING A CONSTITUTIONAL AMENDMENT TO PROTECT THE RIGHT TO REPRODUCTIVE FREEDOM.

SB1528 https://www.capitol.hawaii.gov/sessions/session2023/bills/SB1528_.pdf

Amends the Hawaii State Constitution to prohibit the State from denying or interfering with an individual's reproductive freedom, including the right to choose or obtain an abortion or to choose to obtain or use contraceptives.

Discussion: Staff recommended support intent. This amendment may not be necessary because Hawai‘i has a constitutional right to privacy, Article I, Section 6, determined by voters in 1978. “The right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest. The legislature shall take affirmative steps to implement this right.”

Position: Support intent. The Commissioners approved (in gross) staff recommended positions on ten bills relating to reproductive freedom, discussed on pages 9-13 of 2023 Legislative Summary 1(B).

RELATING TO THE TERMINATION OF PREGNANCY.

SB254 https://www.capitol.hawaii.gov/sessions/session2023/bills/SB254_.pdf

Prohibits the abortion of a fetus that is capable of feeling pain. Prohibits abortions by dismemberment. Provides certain exceptions. Establishes penalties.

Status: ref to HHS, JDC/WAM

Discussion: Staff recommended oppose. Hawai‘i constitution provides a robust, strong right to privacy. Hawai‘i has a history in this area as the first state to decriminalize abortion in 1970. This bill attempts to insert the State into a medical decision between a medical provider and patient.

Position: Oppose. The Commissioners approved (in gross) staff recommended positions on ten bills relating to reproductive freedom, discussed on pages 9-13 of 2023 Legislative Summary 1(B).

RELATING TO CHILDREN.

SB266 https://www.capitol.hawaii.gov/sessions/session2023/bills/SB266_.htm

HB510 https://www.capitol.hawaii.gov/sessions/session2023/bills/HB510_.pdf

Abortion Survivors Protection Act: Ensures the protection and promotion of the health and well— being of all infants born alive in the State. Mandates medically appropriate and reasonable life—saving and life— sustaining medical care and treatment to all born alive infants. Establishes civil and criminal penalties.

Status: SB 266 ref to HHS, JDC/WAM

Discussion: Staff recommended oppose. Hawai‘i constitution provides a robust, strong right to privacy. Hawai‘i has a history in this area as the first state to decriminalize abortion in 1970. This bill attempts to insert the State into a medical decision between a medical provider and patient.

Position: Oppose. The Commissioners approved (in gross) staff recommended positions on ten bills relating to reproductive freedom, discussed on pages 9-13 of 2023 Legislative Summary 1(B).

RELATING TO PROHIBITING CHEMICAL ABORTIONS.

HB1275 https://www.capitol.hawaii.gov/sessions/session2023/bills/HB1275_.pdf

Prohibiting chemical abortion drugs for abortions as specified; providing exceptions; providing a criminal penalty for violating the prohibition on use of chemical abortion drugs for abortions; providing definitions; specifying exceptions; making conforming amendments.

Discussion: Staff recommended oppose. A medical decision of this type is between a health care provider and patient. These drugs are not outlawed or illegal. It is not up to the Legislature to determine the standard of care for an individual patient. Staff recommends support of HB 1428 which includes medical abortions (use of medicine or “chemical abortion drugs).

Position: Oppose. The Commissioners approved (in gross) staff recommended positions on ten bills relating to reproductive freedom, discussed on pages 9-13 of 2023 Legislative Summary 1(B).

Next meeting.

The next meeting of the Commission was scheduled for February 28, 2023, at 12:45 p.m.

Adjournment

Draft minutes circulated by William D. Hoshijo, Executive Director.

Approved by Commission on February 28, 2023.