



EXECUTIVE CHAMBERS
HONOLULU

LINDA LINGLE
GOVERNOR

GOV. MSG. NO. **606**

May 3, 2006

The Honorable Robert Bunda, President
and Members of the Senate
Twenty-Third State Legislature
State Capitol, Room 003
Honolulu, Hawaii 96813

Dear Mr. President and Members of the Senate:

Re: House Bill No. 1233 HD1 SD1

On May 2, 2006, House Bill 1233, entitled "Relating to Civil Rights" became law without my signature, pursuant to Section 16 of Article III of the State Constitution.

The bill would prohibit discrimination based on sexual orientation in public accommodations. The measure would also prohibit discrimination in public accommodations based on gender identity or expression.

"Sexual orientation" has been defined to mean having a preference for heterosexuality, homosexuality, or bisexuality, having a history of any one or more of these preferences, or being identified with any one or more of these preferences. Hawaii law currently prohibits discrimination based on sexual orientation in the areas of housing (HRS 515-3) and employment (HRS 378-2).

Further, it should be noted that HRS Chapter 368 contains the following language in the purpose and intent: "The legislature finds and declares that the practice of discrimination because of race, color, religion, age, sex, sexual orientation, marital status, national origin, ancestry, or disability in employment, housing, public accommodations, or access to services receiving State financial assistance is against public policy." (underlines added) Thus, it would appear that the Hawaii Civil Rights Commission already has a basis in law to enforce prohibitions against discrimination in public accommodations based on sexual orientation and this portion of HB 1233 restates what is already a protected class.

This bill further defines "gender identity or expression" to include a person's actual or perceived gender, gender identity, gender-related self-image, gender-related appearance or gender-related expression, regardless of whether that gender identity, gender-related self-

image, gender-related appearance, or gender-related expression is different from that traditionally associated with the person's sex at birth.

This part of the bill is problematic. The definitions are broad, subjective, and contain no limiting terms or interpretational guidelines. The Hawaii Civil Rights Commission currently interprets "sex discrimination" to include the abuses related to the treatment of individuals who have a gender identity or expression that is different from their birth sex. This interpretation of prohibited sex discrimination is in line with recent court cases in our federal judiciary and sister states. However, the definition in this bill is broader than the current interpretation of sex discrimination. Undefined and overly broad language can lead to disputes and create the potential for escalating reasonable actions by the owners and operators of public accommodations into legal proceedings. Such broad and subjective definitions should not be allowed to become a proxy for socially unacceptable behavior in public places.

It is also unclear how the definitions of gender identity or expression found in section 2 of this bill impact section 489-4 of the Hawaii Revised Statutes. Section 489-4 allows a public accommodation to provide separate facilities for male and female patrons for the protection of personal rights of privacy. People have a legitimate right to privacy and it appears the broad language of this measure could interfere with these legitimate rights. This lack of clarity may result in unintended and unwanted confusions and litigation in public accommodations law that should be addressed promptly by the Legislature.

Because this bill restates an existing protection for the class "sexual orientation" and clarifies those protections extend to public accommodations in Section 489-2 and Section 489-3 of HRS, there is merit in these provisions of the measure.

For the foregoing reasons I allowed House Bill 1233 HD1 SD1 to become law as Act 76 effective May 2, 2006 without my signature.

Sincerely,



LINDA LINGLE

A BILL FOR AN ACT

RELATING TO CIVIL RIGHTS.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

1 SECTION 1. The purpose of this Act is to make state civil
2 rights laws uniform by prohibiting discriminatory practices in
3 public accommodations on the basis of sexual orientation.
4 Presently, the employment and housing laws prohibit
5 discrimination because of sexual orientation. Just as a person
6 should not be denied a job or a home because of the person's
7 sexual orientation (heterosexual, homosexual, or bisexual), a
8 person should not be denied service at a restaurant or store
9 because of the person's sexual orientation.

10 This Act also clarifies that discrimination in public
11 accommodations on the basis of gender identity or expression is
12 prohibited sex discrimination. This is consistent with the
13 purpose and intent expressed in Act 214, Session Laws of Hawaii
14 2005, in which the legislature amended chapter 515,
15 discrimination in real property transactions, to clarify that
16 sex discrimination includes gender identity or expression. The
17 legislature is aware that a growing number of state and federal
18 courts have held that discrimination on the basis of gender



1 identity or expression is a form of sex discrimination. Under
2 existing state civil rights laws, prohibited discrimination on
3 the basis of sex includes discrimination based on gender
4 identity or expression. This is not a new protection, and this
5 clarification should not be interpreted to imply that such
6 protection did not exist prior to this Act.

7 SECTION 2. Section 489-2, Hawaii Revised Statutes, is
8 amended by adding a new definition to be appropriately inserted
9 and to read as follows:

10 "Gender identity or expression" includes a person's actual
11 or perceived gender, as well as a person's gender identity,
12 gender-related self-image, gender-related appearance, or
13 gender-related expression, regardless of whether that gender
14 identity, gender-related self-image, gender-related appearance,
15 or gender-related expression is different from that
16 traditionally associated with the person's sex at birth."

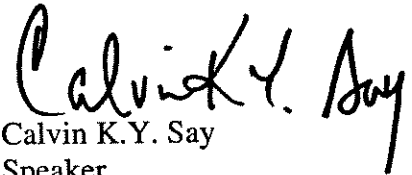
17 "Sexual orientation" means having a preference for
18 heterosexuality, homosexuality, or bisexuality, having a history
19 of any one or more of these preferences, or being identified
20 with any one or more of these preferences. "Sexual orientation"
21 shall not be construed to protect conduct otherwise proscribed
22 by law.



THE HOUSE OF REPRESENTATIVES OF THE STATE OF HAWAII

Date: April 17, 2006
Honolulu, Hawaii 96813

We hereby certify that the foregoing Bill on this day passed Final Reading in the House of Representatives of the Twenty-Third Legislature of the State of Hawaii, Regular Session of 2006.



Calvin K.Y. Say
Speaker
House of Representatives

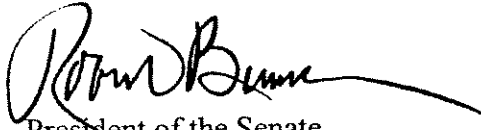



Patricia Mau-Shimizu
Chief Clerk
House of Representatives

THE SENATE OF THE STATE OF HAWAII

Date: April 3, 2006
Honolulu, Hawaii 96813

We hereby certify that the foregoing Bill this day passed Third Reading in the Senate of the Twenty-third Legislature of the State of Hawaii, Regular Session of 2006.


President of the Senate


Clerk of the Senate