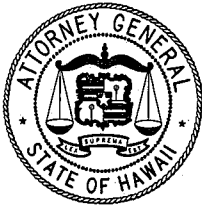


SB2369

SD1



**TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
TWENTY-FIFTH LEGISLATURE, 2010**

ON THE FOLLOWING MEASURE:

S.B. NO. , S.D. 1, RELATING TO .

BEFORE THE:

SENATE COMMITTEES ON JUDICIARY AND GOVERNMENT OPERATIONS

DATE: Tuesday, February , 2010 **TIME:** a.m.

LOCATION: State Capitol, Room

TESTIFIER(S): WRITTEN TESTIMONY ONLY. For more information, call

Chair and Members of the Committee:

The Department of the Attorney General requests that section 15 on pages 28-28 be deleted from this bill and that sections 4 and 5 on pages 8-11 be amended in their application to the state government.

The bill seeks to benefit victims of domestic or sexual violence. It does this in a number of ways, mainly by providing a variety of benefits for employees who take leaves of absence due to the domestic or sexual violence, and by making it unlawful for an employer, as well as for an agency providing public assistance benefits, to discriminate against an individual because the individual is or is perceived to be a victim of domestic or sexual violence.

Section 15 of the bill requires that the Attorney General (1) monitor the Department of Human Services' (DHS) activities to ensure that public assistance recipients are not discriminated against on this basis, (2) make sure that DHS provides the public assistance recipient with the benefits that were lost or denied by reason of DHS's unlawful discrimination against the domestic violence victim, and (3) adopt rules to effectuate these requirements.

The Attorney General objects to section 15 of the bill for four reasons. First, the Attorney General does not have authority over DHS to mandate its actions. Second, the bill does not provide a mechanism by which the Attorney General is to meet the obligations of section 15. Third, the Attorney General does not have the resources to develop and implement a monitoring and enforcement program. Fourth, section 346-12, Hawaii Revised Statutes (HRS), presently grants a public assistance recipient the right to appeal an adverse benefits decision. Chapter 91, HRS, and rules adopted by DHS provide public assistance recipients with due process protections, including the right to appeal the DHS decision to circuit court. When a public assistance recipient prevails in an appeal of an adverse financial assistance or support services decision, section 17-602.1-16(d)(1), Hawaii Administrative Rules (HAR), provides that DHS "shall promptly make necessary corrective payments, retroactive to the date the incorrect action was taken." Similar provisions apply with respect to food stamps and medical assistance programs, respectively, as set out at sections 17-602-1-41(c) and 17-1703-15(d)(1), HAR.

Thus, a mechanism is already in place to address wrongful denials of public assistance benefits, and a duplicative mechanism is unnecessary to ensure that public assistance recipients are not unlawfully discriminated against.

For the foregoing reasons, we respectfully ask this bill be amended by deleting all of section 15, as set out at page 27, lines 19-21, and page 28, lines 1-16.

In addition, sections 4 and 5 on pages 8-11 of the bill may greatly increase the exposure of the State. These provisions appear to, or may potentially, conflict with section 662-2, HRS, which mandates that the State "shall not be liable for interest

prior to judgment or for punitive damages" and section 662-8, HRS, regarding the State's liability for post-judgment interest. The provisions related to the applicable statute of limitations also differ from existing limitations protecting the State - i.e. section 661-5, HRS, and section 662-4, HRS. Therefore, sections 4 and 5 of the bill should be amended, at a minimum, to make its provisions consistent with the existing protections the State has under chapters 661 and 662.



HAWAI‘I CIVIL RIGHTS COMMISSION

830 PUNCHBOWL STREET, ROOM 411 HONOLULU, HI 96813 · PHONE: 586-8636 FAX: 586-8655 TDD: 568-8692

February 23, 2010
Rm. 016, 10:00 a.m.

To: The Honorable Brian Taniguchi, Chair
Members of the Senate Committee on Judiciary and Government Operations

From: Coral Wong Pietsch, Chair, and Commissioners of the Hawai‘i Civil Rights
Commission

Comments on S.B. No. 2369, S.D.1

The Hawai‘i Civil Rights Commission (HCRC) has enforcement jurisdiction over state laws prohibiting discrimination in employment, housing, public accommodations, and access to state and state-funded services. The HCRC carries out the Hawai‘i constitutional mandate that "no person shall be discriminated against in the exercise of their civil rights because of race, religion, sex or ancestry". Art. I, Sec. 5.

The HCRC supports the intent of S.B. No. 2369, S.D.1, which is designed, *inter alia*, to protect victims of domestic or sexual violence or stalking from discrimination in employment. The HCRC recognizes the serious and devastating impact that domestic violence, sexual violence, and stalking have on women’s physical and emotional health and financial security. Domestic abuse takes a heavy toll on both victims and their employers, including increased security and safety concerns, reduced productivity, and increased health care costs. As a result, victims of domestic abuse can face loss of their jobs at a time when employment and financial independence is critical.

However, the HCRC has four main concerns regarding the provisions contained in Part II of S.B. No. 2369, S.D.1, that affect H.R.S. Chapter 378 Part I, the statutes the HCRC enforces:

1. **Need for clarification of what an employer’s obligations are under the newly created protected class established in Section 6 of the bill, which amends H.R.S. §378-2.**

Under Section 6 of the bill, an employer is prohibited from discriminating against a victim of domestic or sexual violence because the victim requests a “reasonable safety procedure or job-related modification” (i.e., safety accommodation). However, the bill does not require an employer to provide a reasonable safety accommodation, does not define what a reasonable safety accommodation is, and does not allow a denial of such a request if the request would cause an undue hardship to the operation of the employer’s business. Without more, it is unclear what the affirmative obligation for an employer to provide a reasonable safety accommodation entails (e.g., schedule or assignment changes, change in telephone number or work location, job restructuring, installation of a lock, etc.).

In addition, the bill does not state how a person establishes he or she is a “victim of domestic or sexual violence” in order to trigger the reasonable safety accommodation. In our initial research, we found that other jurisdictions that included reasonable safety accommodations have allowed employers to require an employee to certify that he or she is a “victim of domestic or sexual violence,” which can be established through: a medical certificate; a signed written statement from a victim services organization, an attorney or advocate, a member of the clergy, or medical or other professional stating that the

employee has sought assistance related to the domestic or sexual violence; a police report or court record (including TRO) related to domestic or sexual violence; or other corroborating evidence related to the domestic or sexual violence. Under H.R.S. Chapter 378 Part VI, such certification may be similarly requested by employers prior to granting leave accommodations for domestic or sexual violence victims.

2. Section 4 of the bill provides for specific remedies for violations of the proposed protections found in Section 6 of the bill, which are unnecessary. H.R.S. §§ 378-5 and 368-17 already provide for a full panoply of remedies, so this additional remedies provision is redundant and unnecessary.

3. Section 5 of the bill proposes to amend H.R.S. Chapter 378, Part VI (Victim Leave law), to provide remedies and a statute of limitations for an employee who brings a direct civil action pursuant to H.R.S. §378-72(j), highlighting a the creation of potentially overlapping jurisdiction with the establishment of a new protected class under H.R.S. §378-2.

4. If the amendments to H.R.S. Chapter 378, Part I, as proposed in Sections 4 and 6 of the bill are enacted, the HCRC will require additional funding and staffing. During the current fiscal biennium, the HCRC has lost 3 of 11 permanent investigator positions and 1 of 4 enforcement attorney positions, in addition to two days per month of work productivity lost to furloughs. As such, our focus will be on timely processing and effective enforcement in the face of a growing caseload and shrinking resources. The proposed new protected basis will require additional funding and staffing, in light of the data suggesting that the affected protected class will be large and we would also request the addition/restoration of one full time investigator position and one enforcement attorney position.

Thank you for considering these comments and concerns.

HAWAII STATE COALITION AGAINST DOMESTIC VIOLENCE

TO: Chair Taniguchi, Vice-Chair Takamine and Members of the Committee

FR: Jane Seymour, Hawaii State Coalition Against Domestic Violence

Hearing date and time: Tuesday, February 23, 2010

RE: Support for SB 2369: Relating to Domestic Violence

Aloha, my name is Jane Seymour and I am representing the HSCADV, a private non-profit agency which serves as a touchstone agency for the majority of domestic violence programs throughout the state. For many years HSCADV has worked with the Hawaii Legislature by serving as an educational resource and representing the many voices of domestic violence programs and survivors of domestic violence.

HSCADV supports SB 2369

Financial independence is vital for victims of domestic violence as they escape an abusive relationship. Ensuring that victims of domestic violence are able to find and maintain stable employment is important in enabling women and their children to gain financial freedom from their abuser.

Many victims of domestic violence need to attend court hearings, doctor's appointments, school meetings, counseling and other appointments that may require them to miss work in order to deal with family and personal issues resulting from the abuse. It is important that a victim of domestic violence not be penalized by her employer or potential employer for the behaviors and actions of the abuser. This bill helps to ensure that victims of domestic violence will be able to take the necessary leave from work and still maintain financial security.

We respectfully ask you to pass SB 2369. Thank you for the opportunity to testify.

AMERICAN COUNCIL OF LIFE INSURERS
TESTIMONY COMMENTING ON SB 2369, SD 1, RELATING TO
DOMESTIC VIOLENCE

February 23, 2010

Via E Mail: jgotestimony@capitol.hawaii.gov

Hon. Senator Brian T. Taniguchi, Chair
Senate Committee on Judiciary and Government Operations
Hawaii State Capital, Conference Room 016
415 S. Beretania Street
Honolulu, HI 96813

Dear Chair Taniguchi and Committee Members:

Thank you for the opportunity to comment on SB 2369, SD 1, relating to Domestic Violence.

Our firm represents the American Council of Life Insurers ("ACLI"), a national trade association, whose three hundred (300) legal reserve life insurer and fraternal and mutual benefit society member companies account for over 90% of the assets and premiums of the U.S. life insurance and annuity industry. ACLI member company assets account for 93% of the life insurance premiums and 98% of the annuity considerations paid in the State of Hawaii. Two hundred thirty-six (236) ACLI member companies currently do business in the State of Hawaii.

ACLI supports legislation that seeks to limit underwriting based on a proposed insured's status as a victim of abuse provided that it permits underwriting based on a proposed insured's medical condition regardless of its cause. Accordingly, ACLI strongly supports the National Association of Insurance Commissioners (NAIC) Unfair Discrimination Against Subjects of Abuse in Life Insurance, Unfair Discrimination Against Subjects of Abuse in Disability Income Insurance, and the Unfair Discrimination Against Subjects of Abuse in Health Benefit Plans Model Acts. In fact, ACLI worked closely with the NAIC and advocates for victims of abuse in the development of these models.

The current language of Hawaii's Insurance Code Section 431:10-217.5 "Policies relating to domestic abuse cases" appears to have been intended to track these NAIC models - as do most of SB 2369's proposed amendments to the Insurance Code. Unfortunately, however, some of these proposed amendments deviate from the NAIC models.

Use, Disclosure and Transfer of Domestic Abuse Information

1. Of grave concern is Section 19 of the Bill that would add a new subsection (e) to Section 431:10-217.5 (at page 38, lines 1-22, and page 39, lines 1-3) which provides that an insurer may not: (i) "use, disclose or transfer" information relating to acts of domestic

abuse or domestic abuse-related medical conditions “for any purpose unrelated to the direct provision of health care services,” without consent of the subject of abuse, unless the use, disclosure or transfer is required by a regulatory authority or court; or (ii) disclose or transfer such person’s contact information, unless required for an insurer to provide insurance coverage and the disclosure or transfer does not endanger the person’s safety without that person’s consent.

These restrictions could operate to jeopardize an insurer’s ability: (i) to underwrite on the basis of information relating to medical conditions resulting from acts of abuse; and (ii) to responsibly disclose such information, for very limited, specified purposes, necessary to the performance of essential insurance business functions.

Accordingly, ACLI respectfully strongly urges that:

The current language of proposed new subsection (e) of Section 431:10-217.5 in section 19 of the Bill be deleted; and that language tracking the NAIC models¹ be substituted in its place, as set forth below:

(e) When the insurer or its representative, meaning a person employed by or contracting with an insurer, has information in its possession that clearly indicates that the insured or applicant is a subject of abuse, the disclosure or transfer of confidential abuse information, as defined in this section for any purpose or to any person is prohibited, except:

- (1) To the subject of domestic abuse or an individual specifically designated in writing by the subject of domestic abuse;
- (2) To a health care provider for the direct provision of health care services;
- (3) To a licensed physician identified and designated by the subject of domestic abuse;
- (4) When ordered by the commissioner or a court of competent jurisdiction or otherwise required by law;
- (5) When necessary for a valid business purpose to transfer information that includes confidential abuse information that cannot reasonably be segregated without undue hardship, confidential abuse information may be disclosed only if the recipient has executed a written agreement to be bound by the prohibitions of this section in all respects and to be subject to the enforcement of this section by the courts of this state for the benefit of the applicant or insured, and only to the following persons:
 - (a) A reinsurer that seeks to indemnify or indemnifies all or any part of a policy covering a subject of domestic abuse and that cannot underwrite or satisfy its obligations under the reinsurance agreement without that disclosure;
 - (b) A party to a proposed or consummated sale, transfer, merger or consolidation of all or part of the business of the insurer or its representative;

¹ Section 4.B of the NAIC models.

- (c) Medical or claims personnel contracting with the insurer, only where necessary to process an application or perform the insurer's or its representative's duties under the policy or to protect the safety or privacy of a subject of domestic abuse (also includes parent or affiliate companies of the insurer that have service agreements with the insurer or its representative); or
 - (d) With respect to address and telephone number, to entities with whom the insurer or its representative transacts business when the business cannot be transacted without the address and telephone number;
- (6) To an attorney who needs the information to represent the insurer or its representative effectively, provided the insurer or its representative notifies the attorney of its obligations under this Act and requests that the attorney exercise due diligence to protect the confidential abuse information consistent with the attorney's obligation to represent the insurer or its representative;
 - (7) To the policyowner or assignee, in the course of delivery of the policy, if the policy contains information about the abuse status; or
 - (8) To any other entities deemed appropriate by the commissioner.

2. Of equally grave concern are: (i) Section 20 of the Bill that would add a new subsection (e) to Section 432:1-101.6 (at page 43, lines 6 – 22, and page 44, lines 1 - 8); and (ii) Section 21 of the Bill that would also add a new subsection (e) to Section 432:2-103.5 (page 48, lines 12-22, and page 49, lines 1 – 15). The language of new subsections 432:1-101.6(e) and 432:2-103.5(e) would be identical to that of new 431:10-217.5(e), discussed above, except subsection 432:1-101.6(e) is applicable to mutual benefit societies and subsection 432:2-103.5(e) is applicable to fraternal benefit societies.

Accordingly, ACLI respectfully strongly urges that the current language of proposed new subsection 432:1-101.6(e) in Bill Section 20 and proposed new subsection 432:2-103.5(e) in Bill Section 21 be deleted; and that language tracking the NAIC models,² urged above with respect to subsection (e) of Section 431:10-217.5, but made applicable to mutual benefit societies and fraternal benefit societies, respectively, be substituted in lieu thereof.

3. ACLI also respectfully strongly urges that proposed new subsection (j) of Section 431:10-217.5 in Bill Section 19 (commencing on page 40), proposed new subsection (j) of Section 432:1-101.6 in Bill Section 20 (commencing on page 45) and proposed new subsection (j) of Section 432:2-103.5 in Bill Section 21 (commencing on page 51) be modified by adding a definition of "confidential abuse information,"³ as set forth below, which term is used in ACLI's proposed new language for subsection (e) of Section 431:10-217.5, Section 432:1-101.6, and Section 432:2-103.5 set forth immediately above.

² Section 4.B of the NAIC models.

³ Section 3.E of the above referenced NAIC models, and is referenced in Section 4.B of the NAIC models.

(j) As used in this section:

“Confidential abuse information” means information about acts of domestic abuse or abuse status of a subject of domestic abuse, the address and telephone number (home and work) of a subject of domestic abuse or the status of an applicant or insured as a family member, employer or associate of, or a person, in a relationship with, a subject of domestic abuse.

Private Cause of Action

Section 17 of the Bill (at page 31, lines 18-22, and page 32, lines 1-18) would amend Section 431 to add a new section to provide for a private right of action and to authorize injunctive relief and compensatory and punitive damages if an insurer acts in violation of Section 431: 10-217.5, HRS. Creation of a private cause of action is contrary to the approach taken in the NAIC models that contemplate amendment of states’ insurance unfair trade practices acts and exclusive enforcement by the state insurance commissioners.

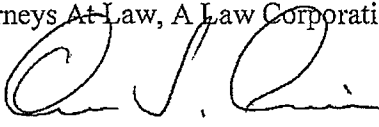
Accordingly, ACLI respectfully strongly urges that the current language of section 17 of the Bill be deleted; and that the language set forth below be substituted in lieu thereof, to provide that a violation of Section 431:10-217.5 be treated as an unfair or deceptive act or practice in the business of insurance under Article 13 (Section 431: 13-101, et. seq.), consistent with the treatment of other unfair trade practices under the Hawaii Insurance Code as well as the NAIC models relating to domestic abuse.

SECTION 17. Chapter 431, Hawaii Revised Statutes, is amended by adding a new section to be appropriately designated and to read as follows:

"§431- Policies relating to domestic abuse cases; enforcement. Any act or practice prohibited by section 431:10-217.5 shall be enforceable by the same means and with the same jurisdiction, powers, and duties as provided under section 431: 13-201 with respect to an act or practice that is a violation of section 431: 13-103.

Again, thank you for the opportunity to comment on SB 2369, SD 1.

CHAR HAMILTON
CAMPBELL & YOSHIDA
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cc: Joann Waiters, Esq.
Roberta B. Meyer, Esq.

From: mailinglist@capitol.hawaii.gov
Sent: Thursday, February 18, 2010 5:17 PM
To: JGO Testimony
Cc: bill@ejlounge.com
Subject: Testimony for SB2369 on 2/23/2010 10:00:00 AM

Testimony for JGO 2/23/2010 10:00:00 AM SB2369

Conference room: 016
Testifier position: oppose
Testifier will be present: No
Submitted by: Bill Comerford
Organization: Hawaii Bar Owners Association
Address: 10 Marin Lane Honolulu, HI
Phone: 808-223-3997
E-mail: bill@ejlounge.com
Submitted on: 2/18/2010

Comments:
We oppose this measure

If one has to support the victim of domestic violence in the maintenance of their job by a violent offender then how does one protect the remaining staff, management and customers from the assailant? It is all well and good to protect the individual but do we not have a responsibility to protect all the others?
This puts the business in jeopardy by being liable in either case.

This is a well intended bill but who is protecting the business that is assessed the funds for actions of someone else?

Is this workman's comp? No
Is it TDI? Perhaps
Is it appropriate for separation from job? The business has not wrongfully let them go.
Why are these funds warranted under law?
Perhaps it should be funded from State Health funds and not private industry.

Though we hope there would be no fraud, how would one determine the existence of violence and the determination of benefits?

Let's leave this to another time when economies are robust and the details are worked out legally. Lets be rational and not emotional.