# SB2571

# HAWAI'I CIVIL RIGHTS COMMISSION

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February 29, 2012
9:35 a.m.
Conference Room 016

To: The Honorable Clayton Hee, Chair
and Members of the Senate Committee on Judiciary and Labor

From: Linda Hamilton Krieger, Chair
and Commissioners of the Hawai'i Civil Rights Commission

Re: S.B. No. 2571, Proposed 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 original S.B. No. 2571 sought to amend various statutory provisions to reconfirm and clarify the original intent of Act 1 (2011) that civil union partners shall have all the same rights, benefits, protections and responsibilities under the law that are granted to those who marry. Specifically, section 12 of S.B. No. 2571 sought to amend H.R.S. §378-2 to add civil union status as a protected basis under the state's fair employment practices law. Section 18 of the bill similarly sought to amend H.R.S.

§ 515-3 to add civil union status as a protected basis under the state's fair housing law.

S.B. No. 2571, Proposed S.D.1 deletes these amendments because it is already clear from H.R.S. §572B-11 that the marital status protections under H.R.S. Chapters 378 and 515 apply to civil union partners, and the clarification is unnecessary. The HCRC agrees that such amendments are not necessary and does not oppose the proposed S.D.1.

**HAWAII CATHOLIC CONFERENCE**
6301 Pali Highway
Kaneohe, HI 96744-5224

Email to: JDLtestimony@Capitol.hawaii.gov
Hearing on: Wednesday, February 29, 2012 @ 9:35 a.m.
Conference Room #016

**DATE:** February 28, 2012

**TO**: Senate Committee on Ways & Means
Senator Clayton Hee, Chair
Senator Maile Shimabukuro, Vice Chair

**FROM**: Walter Yoshimitsu, Executive Director

**RE**: Comments on SB 2571 Relating to Domestic Relations

Honorable Chairs and members of the Senate Committee on Ways and Means, I am Walter Yoshimitsu, **representing the Hawaii Catholic Conference**. The Hawaii Catholic Conference is the public policy voice for the Roman Catholic Church in the State of Hawaii, which under the leadership of Bishop Larry Silva, represents Catholics in Hawaii.

This testimony will not focus on the merits of civil unions in Hawaii as this legislature has already decided to establish them and we are already on record in opposition to their establishment. Our testimony today focuses instead on the language in the current statute that pertains to the protections for those who have objections to civil unions for religious reasons.

As we stated in our testimony before the House Judiciary Committee and the House Committee on Finance (regarding HB 2569 HD1), the language presently contained in HRS § 572B-4(c) is not strong enough and we are concerned about the effect it would have on us as a religious institution, specifically in regards to the use of public accommodations.

We are grateful that the House Committees on Judiciary & Finance listened to the testimony of the religious community and tried to strengthen the language but we strongly believe that the conversation needs to continue so that our ongoing concerns relating to the use of public facilities will be addressed. Even the Attorney General's office offered suggested language and we hope you will take their suggestions, as well as those in the legal profession who support our position, into consideration as you move this bill forward.

Thank you for the opportunity to testify.

# EQUALITY HAWAII

Wednesday, Feb. 29, 2012 • 9:35 a.m. • Senate Conference Room 016
Testifying in Support of SB2571 SD1 On Behalf of Equality Hawaii

Aloha, Chairman Hee, Vice Chair Shimabukuro & Judiciary & Labor Committee Members:

Thank you for allowing Equality Hawaii to testify in support of SB2571 and the proposed SD1.

As the state's largest lesbian, gay, bisexual and transgender organization, Equality Hawaii has fielded a large volume of inquires from our members with questions and concerns about Act 1, which SB2571 and the recommended SD1 addresses.

This bill - with the proposed amended language - seals gaps found in Act 1 that could leave many couples entering into a civil union at risk ... risks that could be eliminated through these administrative clarifications.

A few examples:

- **Parenthood.** SB2571 SD1 clarifies many issues surrounding children born into a civil union and adoption by couples in a civil union. These amendments strengthen Hawaii's families and clear up many ambiguities that could have devastating affects.
- **Sealing Gaps For Couples Leaving A Reciprocal Beneficiary Relationship (RBR).** Couples currently in a RBR are required per Act 1 to terminate their RBR in order to apply for a civil union license. This creates a "gap period" in between the time the RBR is terminated and the civil union is solemnized, causing the couple to forfeit all of their previous legal rights and protections, which could have potential catastrophic consequences relating to health care, inheritance, medical decision making, and real estate tenancy to name just a few examples. Clearly stating that an RBR will terminate upon solemnization of the civil union erases this gap and guarantees no couple at risk.
- **Out-Of-State Relationships.** SB2571 and the suggested SD1 clarifies which out-of-state unions are recognized as civil unions in Hawaii. Many couples in Hawaii have entered into marriages, civil unions, and domestic partnerships from other jurisdictions and have endured a sense of limbo regarding their legal status since Act 1 took effect. This elucidation would allow these families to make informed decisions about their rights and existing legal arrangements.

We also appreciate this bill's preamble which clarifies that it is not the legislature's intent to deny a civil union any of the rights, responsibilities or benefits afforded to marriage simply because those rights, responsibilities or benefits may not be explicitly referenced.

Equality Hawaii believes that passing this bill this the suggest SD1 will allow for a smoother implementation of Act 1. We respectfully request that you consider amending and passing this bill.

Mahalo for allowing us to testify.

Aloha,

Scott Larimer
Co-Chair
Equality Hawaii

Alan R. Spector, LCSW
Legislative Co-Chair
Equality Hawaii

hawaii family forum

Email to: JDLtestimony@Capitol.hawaii.gov
Hearing on: February 29, 2012 @ 9:35 a.m.
Conference Room #016

**DATE:** February 28, 2012

**TO**: Senate Committee on Judiciary
Senator Clayton Hee, Chair
Senator Maile Shimabukuro, Vice Chair

**FROM**: Allen Cardines, Jr., Executive Director &
Sandra Young, Esq., Family Law Practitioner & Hawaii Family Forum Board Member

**RE**: Opposition to portion of SB 2571 Relating to Domestic Relations section 584 relating to "presumption of parenthood"

Honorable Chairs and members of the Senate Committee on Judiciary, I am Allen Cardines, **representing the Hawaii Family Forum**. Hawaii Family Forum is a non-profit, pro-family education organization committed to preserving and strengthening families in Hawaii, representing a network of various Christian Churches and denominations.

Let's be clear at the forefront that the Hawaii Family Forum remains staunchly opposed to the recent establishment of civil unions in Hawaii. We strongly believe, and have stated on the record, that the legalization of these "unions" were just a step toward the legal recognition of same-sex "marriage" in Hawaii. Recent news stories and even public statements by supporters of civil unions have reiterated the fact that they are not satisfied.

The stated purpose of this bill; however, is to rectify the defects in the civil union law, and to give civil union couples the same rights, responsibilities, protections and benefits that are given to married couples. The problem with portions of the bill is that it does not achieve that purpose.

We have no comment with respect to the majority of the bill, but ***we strongly object to the provisions in the bill concerning the presumption of parenthood being applied if one partner in the civil union becomes a biological parent as set forth on pages 7 and 53 (section 584)***.

According to Sandra Young, Esq, a Family Law Practitioner and board member, the bill creates a presumption in a situation that is physically impossible. Two men or two women cannot create a child. It goes beyond what the statutory and case laws state about the presumption of paternity between married couples. In a marriage, the husband is the presumed father of a child born to the mother during the marriage or within 300 days of the termination of the marriage.

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The presumption does not apply if the husband has a child with another woman outside of the marriage; in other words, the wife of a husband is not the presumed mother of a child that the husband fathers with another woman outside of the marriage.

This bill not only expands the rights given to civil union couples, well beyond the rights given to married couples, it redefines the legal definition of presumption altogether.

Black's Law Dictionary, Sixth Edition, defines "presumption" as follows:

> A presumption is a rule of law, statutory or judicial, by which finding of a basic fact gives rise to existence of presumed fact, until presumption is rebutted. ... A legal device which operates in the absence of other proof to require that certain inferences be drawn from the available evidence.

On its face, the entire presumption is rebutted by simply asserting that it is impossible for two lesbians and two gay men to be the biological parent of a child. Case would be closed, and no child support would be ordered, nor any visitation permitted.

The problem occurs when there are 2 male civil union partners, because it appears they can terminate the rights of a natural mother without notice to her. It's sad because under case law, it is a final judgment. Likewise, a lesbian couple could terminate the rights of the natural father without notice to him. We often hear about innocent parties who find out their partner is bisexual and involved with others of the same sex.

Finally, the problem with the presumption is a constitutional one. The biological parent who is not a part of the civil union should receive notice that his/her parental rights to the child are being terminated. The rights are significant, and should not be terminated without legally sufficient notice.

We hope that you will take our concerns into consideration.

Mahalo for the opportunity to testify.

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February 28, 2012

Testimony Suggesting Amendments to SB 2571, Dealing With HRS Section 572B

State of Hawaii
Senate Committee on Judiciary and Labor

**Hearing Date:** February 29, 2012; **9:35 a.m.** Conf 016

**TO**: Committee on JDL
Senator Clayton Hee, Chair
Senator Maile S.L. Shimabukuro, Vice Chair
Committee Members

Honorable Chair, Vice Chair and members of the Senate Committee on Judiciary and Labor, this testimony requests an amendment to SB 2571 Relating to Domestic Relations, consistent with the intent of the bill to clarify Act 1 from the 2011 legislative session. I would also like to suggest a change to better achieve that intent.

My name is Jim Hochberg and I have been an attorney in Honolulu since 1984, during most of which time I have included in my practice a pro bono project protecting the 1st Amendment rights of religious folks in Hawaii. I also served as one of seven members on the Governor's Commission of Sexual Orientation and the Law in 1995. I testify and lobby on my own behalf as part of that pro bono service.

Act 1, creating civil unions in Hawaii, sought to protect persons authorized to solemnize marriages from liability resulting from refusing to solemnize a civil union. While the protection was extended in the broadest terms, including a refusal for any reason, the protection included refusal based on religious conviction related to same gender relationships. There was a loop hole in Act 1 however, because although the licensed solemnizer could refuse to solemnize a civil union, the property of the licensed solemnizer was not also protected from demands that the same sex couple utilize the property in solemnizing and celebrating the civil union with a willing solemnizer. In other words, although the minister of a church could refuse to solemnize a civil union, there was no protection stated in Act 1 for the minister to also refuse a request by a same sex couple to rent the chapel, hall and kitchen for use in the solemnization and celebration of the civil union.

This is particularly troubling in light of the fact that the Deputy Attorney General representing the State of Hawaii Department of Health provided written testimony to the

House Finance Committee concerning HB 2569 HD1 (relating to civil unions) dated February 23, 2012, indicating that the State of Hawaii believes churches are public accommodations subject to the anti-discrimination provisions of Chapter 489. Nothing could be further from the truth. While it is pretty clear that the religious freedom provisions of the United States Constitution and Constitution of the State of Hawaii would be available to defend against a claim of discrimination under the public accommodations statute, HRS 489, an amendment to SB 2571 is needed to clarify this erroneous interpretation of the public accommodations law.

May I suggest the following language be added to SB 2571 SD1 to better clarify the intent of protecting those who would not want to participate in a civil union, including religious organizations and the use of their property and facilities:

> "Notwithstanding any other provision of law, a religious organization may deny use of a religious facility for solemnization and/or celebration of a civil union. No religious organization that denies use of its religious facility to solemnize and/or celebrate a civil union shall be subject to any liability at law, either fine, penalty or injunctive action. A 'religious facility' means a facility owned or leased by a religious organization that is regularly used for the worship or ministry activities in the religious work of the organization."

Public accommodations are extremely broadly defined in HRS Section 489-2. The definition of "place of public accommodation" found in Section 489-2, possibly affords almost no protection to churches. Under that statutory definition, a place of public accommodation includes any:

> "accommodation . . . of any kind . . . whose facilities . . . are extended . . . or otherwise made available to the general public as . . . visitors."

Most religious organizations would not consider themselves to be public accommodations. Public Accommodations are typically thought of as transportation companies, hotels, restaurants, theatres, and other shops or professional offices. The Public Accommodations statute does not expressly include or exclude churches within the definition. But that definition is very broad indeed. There is even currently pending before the Hawaii Civil Rights Commission a claim by a same sex couple who was turned away in just such an instance. The Hawaii Civil Rights Commission did not dismiss the claim on the basis that a church is not a public accommodation. The definition of public accommodation in HRS 489-2 may be causing the Hawaii Civil Rights Commission to deny the request that the existing claim be dimissed. I believe the State of Hawaii can go further to clearly protect religious freedom in the context of civil unions.

Contrary to the position of the Attorney General's office, religious institutions are not

in and of themselves public accommodations. At common law, public accommodations were defined narrowly, to include only places of lodging, modes of travel, and businesses offering vital services such as selling and serving food. By implication, then, churches and other religious organizations were never understood to be places of public accommodation at common law. This narrow understanding of public accommodations is what prompted every state to supplant the common law with statutes expanding the definition of a public accommodation.

Many States have created an express exemption for churches or religious organizations, and in other States like New Jersey, the State and courts have read an exemption into the statute because of the constitutional concerns that would arise from applying nondiscrimination laws to churches.

First, the U.S. Supreme Court in Dale v. Boy Scouts recognized that the expansion of the public accommodation concept has created more instances where those laws might be applied in an unconstitutional manner. See Dale, 530 U.S. at 657, 120 S. Ct. at 2456 ("As the definition of 'public accommodation' has expanded [under state law] . . . , the potential for conflict between state public accommodations laws and the First Amendment rights of organizations has increased."). Second, in Wazeerud-Din v. Goodwill Home and Missions, Inc., 325 N.J. Super. 3, 10-11 (App. Div. 1999), a New Jersey appellate court acknowledged that "serious constitutional questions" would arise if the government were to apply nondiscrimination laws broadly and impermissibly "entangle" itself with religion.

To look in particular at the Hawaii law, even the Hawaii Civil Rights Commission's printed response sheet refers to the respondent as a "business." Churches are not businesses. Most are tax-exempt 501(c)(3) Hawaii nonprofit corporations that hold and administer their assets in Hawaii. Even without obtaining a 501(c)(3) designation from the IRS, churches in Hawaii remain tax exempt at the federal level, although the State Department of Taxation looks for the 501(c)(3) exemption for state tax purposes.

The wording and legislative history of Hawaii Revised Statutes ("HRS") Ch. 489 do not indicate that the Legislature intended to give the Commission authority to regulate the activities of churches or religious institutions. Although the statute does not expressly exclude churches and religious facilities, neither does it include them in the list of entities indicated as "places of public accommodation." Cases from a number of other jurisdictions have concluded that churches and religious institutions are not public accommodations. See, *e.g.*, Roman Catholic Archdiocese of Philadelphia v. Commonwealth of Pennsylvania, 119 Pa. Comwlth. 445, 448-53, 548 A.2d 328, 329-31 (Pa. Comwlth 1988); Traggis v. St. Barbara's Greek Orthodox Church, 851 F.2d 584, 586 (2d Cir. 1988)(referencing lower court decision holding that St. Barbara's Church was not a public accommodation); Saillant v. Greenwell, 2003 WL 24032987, *7 (S. D. Ind. Apr. 17, 2003); Wazeerud-Din v. Goodwill Home and Missions, Inc. 325 N.J. Super. 3, 8 – 11, 737 A.2d 683, 686 – 87 (N.J.

App.1999); Vargas-Santana v. Boy Scouts of America, 2007 WL 995002 (D. Puerto Rico Mar. 30, 2007). This is true even where the types of public accommodations set forth in the statute are illustrative and not exclusive. Roman Catholic Archdiocese of Philadelphia, supra, 119 Pa. Comwlth. at 448-49, 548 A.2d at 329-30.

The fact that a church may make its facility available for use by groups other than strictly its own members does not make that church a place of public accommodation. Id., 119 Pa. Cmwlth. at 451, 548 A.2d at 330 (allowing non-Catholic students to attend Catholic school to the extent there were vacancies did not make Catholic schools public accommodations).

The right of a church to engage in the free exercise of its religious beliefs and practices is guaranteed under the First Amendment to the United States Constitution and Article I, Section 4 of the Hawaii Constitution. The government does not have a right to force a church to allow use of its facilities by individuals or groups who do not share the religious beliefs of the church, or who, as in this case, may be actively antagonistic to the teachings and beliefs of a church.

The Hawaii Civil Rights Commission simply does not have jurisdiction to consider a complaint against a church under the public accommodations statutes found in HRS Chapter 489, and a church's free and unfettered use of its property is protected by the First Amendment to the United States Constitution and Article I, Section 4 of the Hawaii Constitution. The position taken on this issue by Jill Nagamine, the Deputy Attorney General who represents the Department of Health, in her testimony before the House Finance Committee last week with regard to HB 2569 H.D.1, turns the above-cited legal precedents on their head.

It is important to make it abundantly clear that religious institutions are typically not public accommodations, even though there is one church in this state that owns a golf course, club house and restaurant that are open to the public Monday through Saturday as a regular golf course. One could say that such a church is a public accommodation. That however, is not the longstanding typical experience for religious organizations in Hawaii. The language suggested above clearly differentiates most Hawaii churches from a church-owned golf course, club house and restaurant open to the public Monday through Saturday and operated during that time primarily as a golf course rather than as a religious facility.

While the State of Hawaii made the determination last year that it would create civil unions in Hawaii, the law failed to take into account the discrimination prohibitions in the public accommodations laws where the civil union relationship is inconsistent with the religious tenets of a religious organization. We are asking the legislature to remain tolerant toward Hawaii's religious organizations in this regard while the State of Hawaii last year

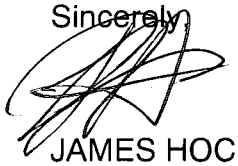
asked the people of Hawaii to be tolerant toward civil union relationships.

As was stated in January, 2012 by the a three judge panel of the Sixth Circuit Court of Appeals:

> **"Tolerance is a two-way street. Otherwise, the rule mandates orthodoxy, not anti-discrimination."** JULEA WARD V. VERNON POLITE; United States Court of Appeals, Sixth Circuit. Decided and Filed: Jan. 27, 2012.

Thank you for your consideration of my testimony and I remain available to assist in any way that I can to resolve this issue to protect the religious freedom of the churches in Hawaii with respect to the use of their properties concerning civil unions.

Sincerely,



JH:lz

JAMES HOCHBERG

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**Lee M. Yarbrough**
Attorney At Law & Certified Public Accountant

**LMY**

Wednesday, February 29, 2012 Time: 9:35am

Senate Judiciary and Labor Committee
Conference Room 016
415 South Beretania Street
Honolulu, HI 96813

RE: Senate Bill 2571 – Proposed Draft SD1 - Relating to Domestic Relations – Support

To: Senator Clayton Hee, Chair
Senator Maile S.L. Shimabukuro, Vice Chair
Members of the Committee

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My name is Lee M. Yarbrough. I am an attorney and CPA practicing in the areas of Estate Planning and Taxes. I have been an active participant in the process of passing Act 1 Relating to Civil Unions over the past few years and have offered frequent testimony on bills affecting Reciprocal Beneficiaries and Civil Unions.

I favor the clarification of some aspects of the implementation of Act 1, as covered by SB2571 and proposed draft SB2571 SD1, a bill which had a significant amount of input from the Civil Unions Task Force -- made up of staff members from the Attorney General's office, personnel from the Department of Health, and members of the legislature, the Hawaii Tourism Authority and LGBT organizations.

Along with the implementation process, the task force was also able to discuss areas within Act 1 that could be made clearer, consistent and more appropriate. It is my understanding that a sub-committee was also established to look into various Statutes that relate to Act 1 and to propose clarifying legislation, which is being presented here in SB 2571 Proposed Draft SD1.

I support the passage of SB2571 Proposed Draft SD1, but I would like to suggest that several items still need to be addressed and revised from Proposed Draft SD1 prior to passage of the bill out for a floor vote.

First, proposed draft SD1 does not address the "gap period" for benefits for couples who previously had a Reciprocal Beneficiary relationship which they were previously (and presently) required to terminate in order to obtain a Hawaii Civil Union license. After termination of their Reciprocal Beneficiary relationship these couples could have their Civil Union licensed and solemnized – but only since Civil Unions became legal on January 1, 2012. While proposed language in this SD1 includes provisions for an automatic termination of the RB upon solemnization of a Civil Union or recognition of an equivalent out of state legal relationship as a Hawaii Civil Union going forward from date of enactment, there is still a gap for benefits for those who have had to actively terminate their RB relationships up to the date of enactment of this bill. This gap could be bridged by

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appropriate language allowing for a continuous period of benefits where the parties are the same in the RB and the Civil Union, but only where the benefits are afforded under both the RB relationship and the Civil Union. Language similar to that found in Section 1 of HB2569 HD1 (regarding HRS Section 572B-A on page 1), for continuation of equivalent rights and benefits when the same two people transition from a Reciprocal Beneficiary (RB) relationship to a Civil Union, is good, but the proposed 6 month transition period there is too long and should be shortened. In my opinion, allowing a one (1) month period would allow a reasonable time frame for past and present RB participants to formally terminate their RB when required to do so (previously and up to the date of enactment of this bill), upon receipt of their Certificate of Termination of RB immediately to apply for a Civil Union license, and thereafter to have their Civil Union solemnized during the one month validity period of the Civil Union license. Future RB terminations should be automatic and therefore substantially concurrent with solemnization (as provided for in this bill), but adding a 1 month maximum time frame for continuous benefit recognition should permit timely and reasonable transitions from one status to another in order to receive continuous equivalent benefits under the law, while still requiring a timely transition to a CU (through solemnization) in order to continue those previous benefits uninterrupted.

Second, while the proposed SD1 addresses and clarifies that out of state equivalent legal relationships will be treated as Hawaii Civil Unions prospectively going forward after enactment (in Section 22, relating to HRS Section 572B-10), SD1 does not address those couples who had out of state legal relationships (Marriage, Domestic Partnerships, or Civil Unions) entered into prior to January 1, 2012 when Civil Unions became available in the State of Hawaii, and where those same couples had a Reciprocal Beneficiary in Hawaii prior to January 1, 2012 (which was required to be terminated in order to have the out of state relationship as a Hawaii Civil Union on or after January 1, 2012). I would propose changes to the Proposed Draft SD1 to require affirmative/active termination of the RB relationship up to the date of enactment of SB2571 for couples with a previous existing RB relationship (in order for the out of state relationship to be recognized as a Civil Union). This would mean those previous existing relationships would not automatically terminate the RB. After enactment of SB2571 and going forward any couples would be clearly aware that entering into an equivalent out of state legal relationship after that date would result in automatic termination of their Hawaii RB, with simultaneous recognition of their out of state relationship as a Hawaii Civil Union.

SB 2571 Proposed Draft SD1 has done a good job in addressing concerns of the CUTF members and Hawaii governmental agencies/departments. The recent proposed draft SD1 has also addressed issues raised by the Attorney General's office staff as well as attorneys from the LGBT community. I write in support of SB 2571 Proposed Draft SD1 and ask that you consider my additional comments above regarding clarifying the length of time for bridging the gap period for benefits when transitioning from a Reciprocal Beneficiary Relationship to a Civil Union. Please also consider my comments regarding the recognition of out of state relationships --in particular with regard to the automatic termination (going forward from enactment) and affirmative termination (prior to enactment) of RB relationships when passing out this bill.

Thank you for this opportunity to testify in support of SB 2571 Proposed Draft SD1.

Lee M. Yarbrough
Attorney at Law/CPA

**From:** mailinglist@capitol.hawaii.gov
**To:** JDLTestimony
**Cc:** marcyfrommaui@gmail.com
**Subject:** Testimony for SB2571 on 2/29/2012 9:35:00 AM
**Date:** Saturday, February 25, 2012 11:18:14 AM

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Testimony for JDL 2/29/2012 9:35:00 AM SB2571

Conference room: 016
Testifier position: Support
Testifier will be present: No
Submitted by: Marcy Koltun-Crilley
Organization: Individual
E-mail: marcyfrommaui@gmail.com
Submitted on: 2/25/2012

Comments:
I SUPPORT SB2571 !

While it is not part of this bill, I also support Marriage regardless of gender, which would also take care of the need for this bill in the first place.

I am happily married in a heterosexual marriage for 31 years and do no see how depriving others of the same rights I have enjoyed can possibly be fair in a state or country that claims to not discriminate.