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LATE

February 4, 2014

To: Hon. Suzanne Chun-Oakland - Chair, Senate
Committee on Human Services

From: Charles K.Y. Khim, Attorney at Law *CKYK*

Re: SB 2188 - Concerning Disclosure of Adoption
Records

I am herewith providing you with the legal citations and justifications in support of my testimony regarding the above referenced proposed legislation.

As I stated in today's hearing, article I, section 6 of the Hawaii State Constitution provides, by its own terms via an "enforcement clause," that the legislature has the authority to adopt legislation to effectuate the protections of the constitutional provision in question. Specifically, article I, section 6 states that:

"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."

Thus, as I stated in today's testimony, the representative of the attorney general's office was mistaken when she said that the legislature lacked legal authority to adopt legislation to implement the provisions of article I, section 6 of the Hawaii Constitution. To the contrary, the opposite is true; the legislature has an affirmative duty to implement the constitutional protections of article I, section 6.

Indeed, as I testified today, this constitutional provision was adopted primarily to ensure that there would be Hawaii constitutional protection of the right of women

to control essential privacy rights, especially the right to make private choices regarding their bodies, such as their right to refrain from bearing and begetting offspring, should there be an erosion of the federal constitutional right to privacy in women having the right to control their bodies in a manner they alone saw fit.

However, this was not the only purpose of this constitutional provision. There was a general two prong privacy right created by article I, section 6: (1) the right to personal autonomy, such as the right to refrain from bearing and begetting offspring, etc.; and (2) the right to privacy over personal and confidential information, see, *Brende v. Hara*, 113 Hawai'i 424 (2007).

In the present legislation both prongs of this article I, section 6 right are involved. Article I, section 6 protects the right of the parties to an adoption, especially the natural mother, *i.e.*, birth mother, to keep the adoption information in the hands of the government private from public disclosure.

There is also a constitutional duty to effectuate the personal autonomy prong of article I, section 6. This personal autonomy prong is enunciated in the purpose of the foregoing legislation, namely to promote the mental health and wellbeing of adoptees by allowing them learn who their natural parents are and the circumstances of their adoption, to the extent that said information is contained in the court file.

Since there are competing and countervailing constitutional interests involved in this legislation, **the attorney general and I were wrong in stating that the compelling state interest and least drastic means test applied**, notwithstanding the language in article I, section 6. The Hawaii Supreme Court had adopted the almost universally accepted test for analyzing these types of cases where there are conflicting constitutional interests. This test is **the balancing of countervailing constitutional interests test**, and has been enunciated by the Hawaii Supreme Court in many cases, *e.g.*, *State v. Cramer*, 129 Hawai'i 296 (2013).

I hope that this has been of aid to you in crafting this legislation. If you have any questions, please feel free to contact me.

CKYK

RIGHT TO PRIVACY

Section 6. 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. [Add Const Con 1978 and election Nov 7, 1978]

Attorney General Opinions

Bargained for random drug testing program for public school teachers with appropriate procedural protections is constitutional and would not violate either the federal or state Constitution. If a court were to find such a program to violate either the federal or state Constitution, the doctrine of qualified immunity would bar personal liability for any state official; if a court were to impose personal liability, based upon past history and practice, the legislature would fund payment of the claims. Att. Gen. Op. 08-1.

Law Journals and Reviews

State v. Kam: The Constitutional Status of Obscenity in Hawaii. 11 UH L. Rev. 253.

State v. Rothman: Expanding the Individual's Right to Privacy Under the Hawaii Constitution. 13 UH L. Rev. 619.

Employee Rights Under Judicial Scrutiny: Prevalent Policy Discourse and the Hawai'i Supreme Court. 14 UH L. Rev. 189.

The Lum Court and the First Amendment. 14 UH L. Rev. 395.

For Better or for Worse, in Sickness and in Health, Until Death Do Us Part: A Look at Same Sex Marriage in Hawaii. 16 UH L. Rev. 447.

Vernonia Sch. Dist. v. Acton: Now Children Must Shed Their Constitutional Rights at the Schoolhouse Gate. 18 UH L. Rev. 869.

Should The Right To Die Be Protected? Physician Assisted Suicide And Its Potential Effect On Hawai'i. 19 UH L. Rev. 783.

When Children Prey on Children: A Look at Hawai'i's Version of Megan's Law and its Application to Juvenile Sex Offenders. 20 UH L. Rev. 477.

Privacy Outside of the Penumbra: A Discussion of Hawai'i's Right to Privacy After State v. Mallan. 21 UH L. Rev. 273.

Emergency Contraception in Religious Hospitals: The Struggle Between Religious Freedom and Personal Autonomy. 27 UH L. Rev. 65.

Your Body, Your Choice: How Mandatory Advance Health-Care Directives Are Necessary to Protect Your Fundamental Right to Accept or Refuse Medical Treatment. 27 UH L. Rev. 201.

Don't Smile, Your Image Has Just Been Recorded on a Camera-Phone: The Need For Privacy in the Public Sphere. 27 UH L. Rev. 377.

Reconsidering Hawai'i's HIV Statute: The Need to Protect an Individual's Basic Liberties. 28 UH L. Rev. 169.

Physician Assisted Suicide: Expanding the Laboratory to the State of Hawai'i. 29 UH L. Rev. 269.

Prostitution: Protected in Paradise? 30 UH L. Rev. 193.