



**TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
THIRTY-FIRST LEGISLATURE, 2022**

ON THE FOLLOWING MEASURE:

H.B. NO. 2079, RELATING TO SOVEREIGN IMMUNITY.

BEFORE THE:

HOUSE COMMITTEE ON PANDEMIC AND DISASTER PREPAREDNESS

DATE: Thursday, February 3, 2022 **TIME:** 10:00 a.m.

LOCATION: State Capitol, Via Videoconference

TESTIFIER(S): Holly T. Shikada, Attorney General,
Caron Inagaki, Deputy Attorney General, or
Marie Gavigan, Deputy Attorney General

Chair Ichiyama and Members of the Committee:

The Department of the Attorney General (Department) supports this bill.

The purpose of this bill is to clarify the scope of the State's waiver of sovereign immunity. In particular, the purpose of this bill is to clarify and expressly state that the State's sovereign immunity is not waived with respect to claims arising out of an act or omission that caused or contributed to, directly or indirectly, a person contracting coronavirus disease 2019 (COVID-19) from the SARS-CoV-2 virus or its variants.

The COVID-19 pandemic has been extraordinarily disruptive and has imposed significant challenges across all aspects of government. Against this backdrop, it is expected that litigants will attempt to develop and litigate novel and aggressive legal theories that will attempt to hold taxpayers liable for the effects of an unprecedented and unpredictable worldwide pandemic.

As a general matter, "the State as sovereign is immune from suit except as it consents to be sued." *Figueroa v. State*, 61 Haw. 369, 381, 604 P.2d 1198, 1205 (1979). This bill clarifies and is intended to provide clear guidance that the waiver of sovereign immunity set forth in section 662-2, Hawaii Revised Statutes, does not apply to claims that an act or omission caused or contributed to, directly or indirectly, an individual contracting COVID-19.

In order to refer to the virus that causes COVID-19 in more accurate and precise terms, we request that the wording of the bill be amended at page 2, lines 21-22, as follows:

- (8) Any claim arising out of an act or omission that caused or contributed to, directly or indirectly, a person contracting [~~coronavirus disease 2019 (COVID-19) or its variants.~~] COVID-19 (coronavirus disease-19), caused by SARS-CoV-2, including the variants of SARS-CoV-2.

We respectfully ask that the Committee pass this bill with the requested amendments. Thank you for the opportunity to testify.

COMMUNITY ALLIANCE ON PRISONS

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COMMITTEE ON PANDEMIC & DISASTER PREPAREDNESS

Representative Linda Ichiyama, Chair

Representative Stacelynn, Vice Chair

Thursday, February 3, 2022

10:00 AM

HB 2079 - STRONG OPPOSITION TO SOVEREIGN IMMUNITY

Aloha Chair Ichiyama, Vice Chair Eli and Members of the Committee!

My name is Kat Brady and I am the Coordinator of Community Alliance on Prisons, a community initiative promoting smart justice policies in Hawai'i for more than two decades. This testimony is respectfully offered on behalf of the more than 4,100 Hawai'i individuals living behind bars or under the "care and custody" of the Department of Public Safety or the corporate vendor on any given day. We are always mindful that 1,113 of Hawai'i's imprisoned people are serving their sentences abroad thousands of miles away from their loved ones, their homes and, for the disproportionate number of incarcerated Kanaka Maoli, far, far from their ancestral lands.

HB 2079 amends Chapter 662-15 that basically holds the state harmless for the spread of COVID in Hawai'i's jails and prisons. This bill is incredibly confusing because one has to go to Chapter 662-2 that talks about waivers of immunity. However, Chapter 662-15 adds another exception: **(8) Any claim arising out of an act or omission that caused or contributed to, directly or indirectly a person contracting coronavirus disease 2019 (COVID-19) or its variants.**

This bill is outrageous and spotlights the state's deliberate indifference to the health and safety of the people it incarcerates. **When the state incarcerates a person, it assumes responsibility for the healthcare of that person.**

What is so egregious about this immoral, and perhaps unconstitutional, bill is that the former Attorney General testified before the Hawai'i Supreme Court that they were "caught off guard" when the virus raged through our facilities. She further noted that the department could not comply with their Pandemic Response Plan, which they continually tout.

Throughout the pandemic, Halawa was running waves of 60 people for meals, despite the department saying that they were only running waves of 30 at a time. I am in constant contact with families and people inside who have confirmed this violation of CDC rules and their own Pandemic Response Plan.

Today I received a call from another family whose loved one has been paroled. The release date was last month, but then COVID hit and the facility was locked down. The new date is this month and the family reports that Halawa is moving people around and putting new admissions that test positive in with the people who have earned parole. This is causing lots of stress and tension in the prison because these folks have nowhere to run while the state is not being honest or transparent about what is happening to incarcerated people.

Does the state really want to broadcast their deliberate indifference toward the people it incarcerates? THIS IS SO IMMORAL!

Please hold this bad bill.

Mahalo for this opportunity to express our outrage.



**Testimony to the House Committee on Pandemic and Disaster Preparedness
Thursday, February 3, 2022; 10:00 a.m.
State Capitol, Conference Room 309
Via Videoconference**

RE: HOUSE BILL NO. 2079, RELATING TO SOVEREIGN IMMUNITY.

Chair Ichiyama, Vice Chair Eli, and Members of the Committee:

The Hawaii Primary Care Association (HPCA) is a 501(c)(3) organization established to advocate for, expand access to, and sustain high quality care through the statewide network of Community Health Centers throughout the State of Hawaii. The HPCA **SUPPORTS THE INTENT** of House Bill No. 2079, RELATING TO SOVEREIGN IMMUNITY.

By way of background, the HPCA represents Hawaii's FQHCs. FQHCs provide desperately needed medical services at the frontlines in rural and underserved communities. Long considered champions for creating a more sustainable, integrated, and wellness-oriented system of health, FQHCs provide a more efficient, more effective and more comprehensive system of healthcare.

This bill, as received by your Committee, would clarify and explicitly state that sovereign immunity shall not be waived with respect to claims arising out of an act or omission that caused or contributed to, directly or indirectly, a person contracting coronavirus disease 2019 (COVID-19) or its variants.

When COVID-19 hit our islands, Hawaii's health care providers were called upon to meet the needs of our citizenry under extremely difficult situations. First, providers were confronted with severe shortages of personal protection equipment, essential medical equipment and medications. As people got sick, FQHCs saw increased demands for our services requiring our staff to be creative and steadfast in the deliver of these services.

One of the reasons why we were able to do this was because of the immunity from liability provided by the Governor in his COVID Proclamation. However, this immunity will last only as long as the Proclamation remains valid unless it is enacted into law by the Legislature.

We note that the bill before you would make permanent in statute, rather than through Executive Proclamation, sovereign immunity for the State and its employees for claims resulting from COVID-19.

Testimony on House Bill No. 2079

Thursday, February 3, 2022; 10:00 a.m.

Page 2

While one could argue that in accordance with the Governor's Emergency Proclamation, health workers who answered the call during the COVID-19 pandemic were acting as "agents" of the State in the provision of vaccination and ancillary health care services directly related to COVID-19, the law is most definitely not explicit nor permanent in this regard.

The Governor's Emergency Proclamation does indeed provide liability immunity for health care workers performing COVID-19 related activities. However, this protection will only last for the duration of the State Emergency Proclamation.

Also, because the long-term effects of COVID-19 are not yet known, Hawaii's dedicated health care workers may be subject to civil liability for actions performed for the State after the public health emergency ends.

While this Administration bill may not be the most appropriate vehicle to address this concern because of its title, the HPCA believes that the State has a moral obligation to clarify and make permanent the civil immunity to health care workers who are not employed by the State but answered the call when COVID-19 hit our islands if the State intends to provide that same immunity for itself.

It is our hope that this Committee will do what is right by the health care workers in our State.

Thank you for the opportunity to testify. Should you have any questions, please do not hesitate to contact Public Affairs and Policy Director Erik K. Abe at 536-8442, or eabe@hawaiiipca.net.

**TESTIMONY OF EVAN OUE ON BEHALF OF
THE HAWAII ASSOCIATION FOR JUSTICE (HAJ) IN STRONG
OPPOSITION TO H.B. NO. 2079**

DATE: Thursday, February 3, 2022

TIME: 10:00 am

Aloha, Chair Linda Ichiyama, and Members of the House Committee on Pandemic & Disaster Preparedness:

My name is Evan Oue and I am presenting this testimony on behalf of the Hawaii Association for Justice (HAJ) in **STRONG OPPOSITION** to H.B. 2079, relating to Liability.

The purpose of this measure is to expressly state that sovereign immunity is not waived for any claim that an act or omission caused or contributed to, directly or indirectly, a person contracting coronavirus disease 2019 (COVID-19) or its variants. Specifically, H.B. 2079 provides blanket immunity to state employees by amending the language of HRS § 662-15 to include a new subsection that provides for exception to Hawaii's State Tort Liability Law.

HAJ greatly appreciates the work and efforts of our essential workers in response to the current global pandemic, however, the language in this measure is overly broad and places our most vulnerable at risk.

The current language grants any state employee broad immunity from any claim that could arise out of any individual directly or indirectly contracting COVID-19 from the employee. The "any claim" language is concerning as it could exempt the State from liability for any negligent act or omission that can affect our residents leaving them without recourse. For instance, employees working in state facilities

such as the Hawaii State Hospital would be cloaked with immunity. HAJ believes it is not intent of the bill to grant all state employees with blanket immunity even when their acts are negligent or outside the scope of their employment.

Further, it is during times of emergency when we need to protect our most vulnerable population. For example, students and their families who contract COVID-19 from a negligent act of staff at school will be unable to protect their rights in court should this measure pass. Additionally, vulnerable groups such as our Kūpuna in senior nursing facilities impacted by the pandemic would not be able to protect their rights in court. Likewise, patients in State operated medical facilities whom are amongst the most vulnerable of our residents will be disproportionately and unfairly impacted by the immunity provided in this bill. Broad waivers of liability such as is being proposed in H.B. 2079 creates a barrier to obtain redress when individuals are harmed or injured.

As a policy, the focus should be on protecting residents. A state of emergency does not warrant the lessening of: 1) an individual's right to redress; or 2) the need for taking the necessary safety measures at state facilities. The standard of care that should be applied in any given situation is based on the specific circumstance. In other words, negligent acts cannot and should not be overlooked, without recourse for those harmed, just due to the pandemic. The standard of care in an emergency is specific to that situation and what a reasonable person should do under those circumstances.

Maintaining a safe and reasonable standard of care for state employees would be a beneficial approach rather than providing blanket immunity for any claims arising from individuals contracting COVID-19.

For these reasons, HAJ opposes this measure and urges the committee to look at alternative ways to support state employees in times of emergency rather than reducing the rights of individuals. Mahalo for the opportunity to testify on this measure.

HB-2079

Submitted on: 2/2/2022 8:01:10 PM

Testimony for PDP on 2/3/2022 10:00:00 AM

Submitted By	Organization	Testifier Position	Remote Testimony Requested
Rev Kyle Lovett	Individual	Oppose	No

Comments:

Aloha e Chair Ichiyama, Vice Chair Eli, and PDP Committee Members,

My name is Rev. Kyle Lovett, a clergy member of the United Church of Christ.

I strongly **oppose** this bill.

I am **aghast** to learn about HB2079, the Sovereign Immunity bill, an attempt by our Governor to avoid compassion and responsibility for what has happened to our fellow citizens in our jails and prisons. How can a bill even be considered that would hold the State harmless for the spread of COVID in Hawaii's jails and prisons?

The latest DPS numbers show COVID in facilities: the numbers in our jails and prisons are again blowing up: **WCCC** - 68%; **MCCC** - 61%; **HCCC** - 47%; **HALAWA** - HMSF only - 34%; if including SNF - 30%; **KCCC** - 21%; **Waiawa** - 17%; **OCCC** - 15%

The families of those lost in our jails during the pandemic – loved ones and our fellow citizens – should not receive this double-whammy from us!

Please hold this bill in committee.

Mahalo for this opportunity to testify,

~Kyle

Rev. Kyle Lovett

HI House District 27

Member of Faith Action for Transformative Justice Task Force