



# **HAWAI‘I CIVIL RIGHTS COMMISSION** **KOMIKINA PONO KIWILA O HAWAI‘I**

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Tuesday, February 13, 2024

10:00am

Conference Room 016 & Videoconference  
State Capitol, 415 South Beretania Street

To: The Honorable Karl Rhoads, Chair  
The Honorable Mike Gabbard, Vice Chair  
Members of the Senate Committee on Judiciary

From: Liann Ebesugawa, Chair  
and Commissioners of the Hawai‘i Civil Rights Commission

## **Re: S.B. No. 2683**

**The Hawai‘i Civil Rights Commission (HCRC) offers the following comments on S.B. No. 2683.**

Reporting an incident of sexual assault, sexual harassment, or sexual discrimination comes with fear of retaliation, such as a defamation lawsuit. The HCRC strongly supports this bill’s attempt to address the chilling effect that threats of lawsuits may have on survivors of sexual assault, sexual harassment, or sexual discrimination by providing additional protections for the good-faith reporting of such claims.

However, the HCRC has a concern about the consistency of the bill and respectfully proposes one change to the language.

S.B. 2683 currently provides:

**"§663- Defamation limited in cases of sexual assault, sexual harassment, and sexual discrimination. (a) A protected communication made by an individual, without malice, shall be *immune* [emphasis added] from any defamation action.**

While this section states that a protected communication made without malice shall be *immune* from any defamation action, the following section contemplates that a defamation action may be

brought against a person for making a protected communication and describes what the outcome would be for a prevailing defendant.

The HCRC suggests that the aforementioned language be changed as follows, in order to make this section more consistent with the rest of the bill:

**"§663- Defamation limited in cases of sexual assault, sexual harassment, and sexual discrimination. (a) No individual shall be liable in damages in any defamation action for making a protected communication without malice.**

With that said, the HCRC recognizes the financial and emotional impacts of the threat of lawsuits to survivors and good-faith reporters attempting to report sexual misconduct and strongly supports the intent of the bill.

Thank you for the opportunity to testify on this important matter.



February 13, 2024

Senator Karl Rhoads, Chair  
Senator Mike Gabbard, Vice-Chair  
Senate Committee on Judiciary

**Re:**               **S.B. 2683**, Proposing to protect individuals who make claims of sexual misconduct from defamation lawsuits unless the claims were proven to be made with malice.

**Hearing:**       **Tuesday, February 13, 2024, 10 a.m., Room 016**

Dear Chair Rhoads, Vice-Chair Gabbard and Members of the Committee on Judiciary:

Members of the American Association of University Women (AAUW) of Hawaii thank you for this opportunity to testify in **Strong Support** of S.B. No. 2683 because it proposes to protect individuals who make claims of sexual misconduct from defamation lawsuits unless the claims were proven to be made with malice.

Too often, perpetrators of sexual harassment<sup>1</sup> and/or sexual violence use the courts to punish women for speaking out about abuse even, in some cases, after an official confirmation of the abuse has been made—further victimizing those who choose to come forward: the weaponization of defamation lawsuits.

The decision to speak publicly about one's own experience of sexual harassment and/or violence is personal and often complicated. Due to a culture of stigmatization and shame, sexual harassment complainants and survivors are often reluctant to come forward with their experiences. Additionally, if and when sexual harassment victims and survivors speak

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<sup>1</sup> Not all sexual harassment at the workplace is violent but it can include assault and battery, leading to rape. For more information regarding sexual harassment at the workplace in Hawai'i, *see, e.g.*, legal representative for Rachael Wong in her sexual misconduct case against former House Speaker Joseph Souki and local sexual harassment expert's article: Elizabeth Jubin Fujiwara, **Chapter 5: Harassment at Your Law Firm in Hawaii-- Hawaii Employment Manual** (Hawaii Bar Association 2009). *See also, e.g.*, **American Bar Association: CREO Videos--** June 20, 2022 — *Elizabeth Jubin Fujiwara* answers "Why do we have to fight for rights when we should all just be equal?" <https://www.americanbar.org/groups/crsj/projects-and-initiatives/civil-rights-civics-institute/history-of-inequality/>

out, they are frequently silenced by the same person who threatens their safety or the safety of their loved ones.

In short, society has never made it easy for women and girls to safely report or share their experiences of sexual harassment and violence if they choose to do so.

Defamation lawsuits are a tactic meant to intimidate, discredit and silence victims and future victims of sexual harassment and /or violence.

Survivors have a right to share their stories even when their public expressions offend, shock, disturb or disclose aspects of someone's private life and their experiences are a matter of public interest that can help fundamentally change the social discourse around sexual violence.

Upholding survivors' right to freedom of expression is fundamental to protecting the rights of women, especially the right to live free from violence, and is essential for the prevention of sexual violence.

A predominant characteristic of sexual harassment and/or gender-based violence (GBV) is the unequal power differential that exists between the perpetrator and the survivor, and it is this very same power differential that is exploited in lawsuits that attempt to silence or discredit the survivor. In a report<sup>2</sup> on online violence against women and girls, then-U.N. special rapporteur on violence against women Dubravka Šimonović called the act of threatening survivors with legal proceedings in an attempt to prevent them from reporting their situation, a form of GBV in and of itself. Šimonović cautioned the use of defamation lawsuits "may form part of a pattern of domestic violence and abuse."

In the 2021 report on the promotion and protection of the right to freedom of opinion and expression<sup>3</sup>, U.N. special rapporteur Irene Khan says the perverse use of defamation lawsuits in the #MeToo era is "weaponizing the justice system to silence women ... while also undermining free speech."

Now courts around the world also seem to be recognizing the inappropriate and dangerous use of defamation lawsuits as retaliation. For example, in New York (*Sagaille v. Carrega 2022*), an appellate court frankly admitted that "sexual assaults remain vastly under reported, primarily due to victims' fear of retaliation. It does not escape [the Court] that

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<sup>2</sup> **Report of the Special Rapporteur on violence against women, its causes and consequences on online violence against women and girls from a human rights perspective** (United Nations Human Rights Council, Thirty-Eighth Session, 18 June–6 July 2018).

<sup>3</sup> **Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Irene Kahn** (United Nations Human Rights Council, Seventy-sixth Session, 30 July 2021).

defamation suits like the instant one may constitute a form of retaliation against those with the courage to speak out.”

In a high-profile #MeToo case in France (*Muller c/ Brion*), a court of appeals found that the survivor was in her right to denounce physical and verbal abuse that undermines the dignity of women and, a conviction of defamation, even if only civil, would be a disproportionate interference with the freedom of expression and would likely have a broader deterrent effect on the exercise of this freedom for survivors. The case sparked a viral hashtag: #BalanceTonPorc, or in English, “denounce your pig.”

In its landmark defamation case, the Delhi High Court of India reminded us that the right to freedom of expression is inherently linked to a woman’s right to live a GBV-free life, and when survivors speak out, it is a form of self-defense, of themselves and of others. The judge in the case said “sexual abuse, if committed against [a] woman, takes away her dignity and her self-confidence” and when the woman speaks out about her experience and in turn makes an “attack on the character of [the] sex-abuser or offender,” the woman’s expression is “self-defense after the mental trauma suffered by the victim regarding the shame attached with the crime committed against her.”

It is critical to recognize that the use of defamation lawsuits to restrict or prevent women from publicly sharing their experiences of discrimination and/or violence creates an additional barrier to accessing justice and creates a chilling effect for future victims. When survivors are discouraged from speaking out about their experiences, restricted in their expression of it, or discredited when they do come forward, violence against women persists and perpetrators enjoy impunity.

To advocate against and combat sexual harassment and/or violence against women, we must uplift and protect the voices of survivors and actively monitor and stop the weaponizing of defamation lawsuits.

For all the reasons above AAUW respectfully requests that the Committee **passes S.B.2683**.

Sincerely,  
Public Policy Committee, AAUW of Hawaii  
[publicpolicy-hi@aauw.net](mailto:publicpolicy-hi@aauw.net)

*The American Association of University Women (AAUW) of Hawaii is an all-volunteer, statewide chapter of a national organization and is made up of six branches: Hilo, Honolulu, Kaua’i, Kona, Maui, and Windward Oahu. UH Hilo, UH Manoa, UH Maui College, and Windward Community College are also AAUW partners. AAUW’s mission is to advance gender equity for equal opportunities in education, at workplace and for economic security, and in leadership.*





February 13, 2024

Senator Karl Rhoads, Chair  
Senator Mike Gabbard, Vice-Chair  
Senate Committee on Judiciary

**Re: S.B. 2683, Relating to Defamation**

**Hearing: Tuesday, February 13, 2024, 10 a.m., Room 016**

Dear Chair Rhoads, Vice-Chair Gabbard and Members of the Committee on Judiciary:

Hawaii Women Lawyers ("HWL") submits testimony in **support** of 2683, which proposes to protect individuals who make claims of sexual misconduct from defamation lawsuits unless the claims were proven to be made with malice.

The mission of Hawaii Women Lawyers is to improve the lives and careers of women in all aspects of the legal profession, influence the future of the legal profession, and enhance the status of women and promote equal opportunities for all.

HWL supports this bill because it uplifts and protects the voices of survivors and stop the weaponizing of defamation lawsuits. Too often, perpetrators of sexual harassment<sup>1</sup> and/or sexual violence use the courts to punish women for speaking out about abuse by weaponizing defamation lawsuits. In some cases, this can occur after an official confirmation of the abuse has been made and further victimizes those who choose to come forward.

The use of defamation lawsuits to restrict or prevent women from publicly sharing their experiences of discrimination and/or violence creates an additional barrier to accessing justice and creates a chilling effect for future victims. When survivors are discouraged from

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<sup>1</sup> For more information regarding sexual harassment in the workplace, see, e.g., [Hawaii State Bar Association Hawaii Employment Manual](#), chapter 5 - "Harassment at Your Law Firm in Hawaii" by Elizabeth Fujiwara Jubin, (2009); see also, Elizabeth Jubin Fujiwara, [American Bar Association: Civil Rights and Equal Opportunity Videos](#), "Why do we have to fight for rights when we should all just be equal?" (June 30, 2022)

speaking out about their experiences, restricted in their expression of it, or discredited when they do come forward, violence against women persists and perpetrators enjoy impunity.

A predominant characteristic of sexual harassment and/or gender-based violence (GBV) is the unequal power differential that exists between the perpetrator and the survivor, and it is this very same power differential that is exploited in lawsuits that attempt to silence or discredit the survivor. The decision to speak publicly about one's own experience of sexual harassment and/or violence is personal and often complicated. Sexual harassment complainants and survivors are often reluctant to come forward with their experiences. Additionally, if and when sexual harassment victims and survivors do speak out, they are frequently silenced by the same person who threatens their safety or the safety of their loved ones.

Defamation lawsuits are a tactic meant to intimidate, discredit and silence victims and future victims of sexual harassment and /or violence. Nevertheless, survivors have a right to share their stories even when it may disclose aspects of a perpetrator's private life. Upholding survivors' right to freedom of expression is fundamental to protecting the rights of women, especially the right to live free from violence and harassment.

Courts and other tribunals around the world are beginning to recognize the inappropriate and dangerous use of defamation lawsuits as retaliation.<sup>2</sup>

For all of the above reasons, we respectfully request that the Committee pass S.B.2683. Thank you for the opportunity to submit testimony on this measure.

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<sup>2</sup> See, e.g., Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Irene Kahn, United Nations Human Rights Council, Seventy-sixth Session (July 30, 2021) (finding that that use of defamation lawsuits in the #MeToo era is "weaponizing the justice system to silence women ... while also undermining free speech."); see also *Sagaille v. Carrega 2022 (NY)*, (finding that "sexual assaults remain vastly under reported, primarily due to victims' fear of retaliation. It does not escape [the Court] that defamation suits like the instant one may constitute a form of retaliation against those with the courage to speak out.")



**SB-2683**

Submitted on: 2/9/2024 8:51:31 PM

Testimony for JDC on 2/13/2024 10:00:00 AM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Testify</b>
Michael Olderr	Individual	Comments	Written Testimony Only

Comments:

While I support this bill and its intent, I worry about unintended consequences or people using it in bad faith. While it is important to believe in survivors and protect them from their abusers, especially those in power. Historically, false accusations have been used to justify acts of violence and mob justice. This was seen during the Lynching era on the continental stateside, including the Tusla massacre. Many of those deplorable acts were brought on by false claims of victimhood. Now, I am not trying to imply that passing this bill would lead to those atrocities here on the islands or that Hawaii today is anything like that dark chapter in our nation's history; I think overall, this bill would be a net good for everyone if it passes. But I think that this committee should consider how, under the guidelines of this bill, a determination of good faith can be made. And, importantly, how can it be done without re-traumatizing the victims in the process? I feel like this bill is missing a way to define a good faith argument, and if necessary or possible, I would like to see one added.

**SB-2683**

Submitted on: 2/12/2024 1:29:18 PM

Testimony for JDC on 2/13/2024 10:00:00 AM

Submitted By	Organization	Testifier Position	Testify
Dara Carlin, M.A.	Individual	Support	Written Testimony Only

Comments:

Although I support SB2683, may I please offer a cautionary warning and suggest that you add a line in this measure about those who would *knowingly, intentionally and/or maliciously* falsely report sexual misconduct.

Crimes such as these must be prosecuted and those reporting them must be protected from further victimization however there are little to no repercussions for those (while in a very slim minority) who would falsely report crimes of abuse and/or misconduct. *Everyone* must be held to the standard of telling "the truth, the whole truth and nothing but the truth so help me God" - victims, perpetrators, witnesses, friends and family, etc. *to include all involved professionals.*

Throughout my career I've watched countless lives destroyed and relationships ruined by false reporting precisely because there are no consequences for doing so. Professionals especially need to be held to a higher accountability, particularly with regards to exculpatory evidence; presumably due to the embarrassment (or ego) likely involved, I've seen such evidence tossed to the side in lieu of overzealous prosecution and when all comes to light, nothing - no reparations, no sanctions, no loss of license with no apologies to those falsely accused.

Here's one example of how a false report comes about: as "support and encouragement" from a third party who will not be a party to the case (and therefore completely overlooked and excused from any culpability or wrongdoing from what ensues) -

"I wish you could put a TRO on him... that would make things SO MUCH EASIER You would def have full custody & could collect child support If he wanted to see XXX at all it would have to be supervised If he contacted you in ANY FORM you could call the cops & he'll do an automatic two weeks in jail no matter what he says! A tro can literally ruin his life & I bet you could put one on him"

The above is not good, honest or honorable advice but it's not a crime either, and there are no deterrents in-place to discourage it. While this would be a clear misuse of the TRO/domestic violence response system, the "friend" making this suggestion doesn't seem to care much about any of that nor is there any thought beyond the certainty that "a TRO can literally ruin his life".

Please see fit to add additional language to this measure.

Thank you for this opportunity to provide comments.

