

ACT 354

H.B. NO. 1382

A Bill for an Act Relating to Peer Review.

Be It Enacted by the Legislature of the State of Hawaii:

SECTION 1. The purpose of this Act is to expressly declare that Hawaii elects to opt out of Part A of the Federal Health Care Quality Improvement Act of 1986, and to enact a parallel state health care quality provision. There is also a

need in Hawaii to provide protection for physicians and other individuals who attend the proceedings of hospital or clinic quality assurance committees and for staff and witnesses who assist or participate in peer review committees or hospital or clinic quality assurance committees. Accordingly, section 663-1.7, Hawaii Revised Statutes, is amended to expand quality review immunity.

SECTION 2. The State of Hawaii by this enactment formally elects to opt out of Part A of the federal Health Care Quality Improvement Act of 1986, pursuant to section 411(c)(2)(B) of that Act (42 U.S.C. §11111(c)(2)(B)).

SECTION 3. The Hawaii Revised Statutes is amended by adding a new chapter to be appropriately designated and to read as follows:

“CHAPTER HEALTH CARE PEER REVIEW

PART I. GENERAL PROVISIONS

§ -1 **Short title.** This chapter may be cited as the “Hawaii Health Care Quality Improvement Act of 1989.”

§ -2 **Purpose.** The purpose of this chapter is to provide incentives and protection for physicians engaging in effective professional peer review.

§ -3 **Findings.** The legislature finds the following:

- (1) There is an overriding need to provide incentive and protection for physicians engaging in effective professional peer review;
- (2) The occurrence of medical malpractice actions has become a problem in Hawaii which can be addressed in part by promoting more effective peer review; and
- (3) The threat of private money damage liability under state laws unreasonably discourages physicians from participating in effective professional peer review.

§ -4 **Definitions.** For purposes of this chapter the following words have the following meanings:

“Adversely affecting” includes reducing, restricting, suspending, revoking, denying, or failing to renew clinical privileges or membership in a health care entity.

“Clinical privileges” includes privileges, membership on the medical staff, and the other circumstances pertaining to the furnishing of medical care under which a physician or other licensed health care practitioner is permitted to furnish such care by a health care entity.

“Director” means the director of the department of commerce and consumer affairs.

“Health care entity” means:

- (1) A hospital that is licensed by the State to provide health care services;
- (2) An entity, including a health maintenance organization or group medical practice, that provides health care services and that follows a formal peer review process for the purpose of furthering quality health care as may be determined under rules or guidelines which may be adopted under section -13 of this chapter;

- (3) A professional society or committee thereof of physicians or other licensed health care practitioners that follows a formal peer review process for the purpose of furthering quality health care as may be determined under rules or guidelines which may be adopted under section -13 of this chapter; provided that "health care entity" shall not include a professional society or committee thereof if, within the previous five years, the society has been found by the Federal Trade Commission or any court to have engaged in any anti-competitive practice which had the effect of restricting the practice of licensed health care practitioners.

"Hospital" means an entity described in paragraphs (1) and (7) of section 1861(e) of the Social Security Act.

"Licensed health care practitioner" and "practitioner" mean an individual, other than a physician, who is licensed or otherwise authorized by the State to provide health care services.

"Physician" means an individual licensed under chapter 453 or 460, or both, to practice medicine or surgery or osteopathy; an individual licensed under chapter 448 to practice dentistry or dental surgery; or any individual who, without authority, holds oneself out to be so authorized.

"Professional review action" means an action or recommendation of a professional review body which is taken or made in the conduct of professional review activity, which is based on the competence or professional conduct of an individual physician which conduct affects or could affect adversely the health or welfare of a patient or patients, and adversely affects the clinical privileges, or membership in a professional society, of the physician. Such term includes a formal decision of a professional review body not to take an action or make a recommendation described in the previous sentence and also includes professional review activities relating to a professional review action. For purposes of this chapter an action shall not be considered to be based on the competence or professional conduct of a physician if the action is primarily based on any of the following:

- (1) The physician's association, or lack of association, with a professional society or association;
- (2) The physician's fees or the physician's advertising or engaging in other competitive acts intended to solicit or retain business;
- (3) The physician's participation in prepaid group health plans, salaried employment, or any other manner of delivering health services whether on a fee-for-service or other basis;
- (4) A physician's association with, supervision of, delegation of authority to, support for, training of, or participation in a private group practice with, a member or members of a particular class of health care practitioner or professional; or
- (5) Any other matter that does not relate to the competence or professional conduct of a physician.

"Professional review activity" means an activity of a health care entity with respect to an individual physician to do any of the following:

- (1) To determine whether the physician may have clinical privileges with respect to, or membership in, the entity;
- (2) To determine the scope or conditions of such privileges or membership; or
- (3) To change or modify such privileges or membership.

"Professional review body" means a health care entity and the governing body or any committee of a health care entity which conducts professional review activity, and includes any committee of the medical staff of such an entity when assisting the governing body in a professional review activity.

PART II. PROMOTION OF PROFESSIONAL REVIEW ACTIVITIES

§ -10 Limitation of damages for professional review actions. (a) If a professional review action of a professional review body meets all the standards specified in section -11(a) except as provided in section -11(b):

- (1) The professional review body;
- (2) Any person acting as a member or staff to the body;
- (3) Any person under a contract or other formal agreement with the body; and
- (4) Any person who participates with or assists the body with respect to the action;

shall not be liable in damages under any law of the state with respect to the action except laws relating to the civil rights of any person or persons, including chapter 378, part I. Nothing in this subsection shall prevent the State from bringing an action, including an anti-trust action under chapter 480, where such an action is otherwise authorized.

(b) Notwithstanding any other provision of law to the contrary, no person, whether as a witness or otherwise, providing information to a professional review body regarding the competence or professional conduct of a physician shall be held, by reason of having provided such information, to be liable in damages under any law of the state unless such information is false and the person providing it knew that such information was false.

§ -11 Standards for professional review actions. (a) For purposes of the protection set forth in section -10, a professional review action must be taken:

- (1) In the reasonable belief that the action was in the furtherance of quality health care;
- (2) After a reasonable effort to obtain the facts of the matter;
- (3) After adequate notice and hearing procedures are afforded to the physician involved or after such other procedures as are fair to the physician under the circumstances; and
- (4) In the reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain facts and after meeting the requirement of paragraph (3).

A professional review action shall be presumed to have met the standards necessary for the protection set out in section -10 unless the presumption is rebutted by a preponderance of the evidence.

(b) A health care entity shall be deemed to have met the adequate notice and hearing requirement of subsection (a)(3) with respect to a physician if the following conditions are met or are waived voluntarily by the physician:

- (1) The physician has been given notice stating:
 - (A) That a professional review action has been proposed to be taken against the physician and the reasons for the proposed action;
 - (B) That the physician has the right to request timely hearings on the proposed action, and any time limit of not less than thirty days within which to request such a hearing; and
 - (C) A summary of the hearing procedures as set forth in paragraph (3) of this subsection.
- (2) If a hearing is requested on a timely basis under subsection (b)(1)(B), the physician involved must be given notice stating:
 - (A) The place, time, and date of the hearing, which date shall not be less than thirty days after the date of the notice; and

- (B) A list of the witnesses, if any, expected to testify at the hearing on behalf of the professional review body.
- (3) If a hearing is requested on a timely basis under subsection (b)(1)(B), the health care entity shall determine that the peer review hearing shall be held according to one of the following options, and the hearing shall be so held, subject to the provisions of subsection (b)(4), before:
 - (A) An arbitrator mutually acceptable to the physician and the health care entity; or
 - (B) A hearing officer who is appointed by the entity and who is not in direct economic competition with the physician involved; or
 - (C) A panel of individuals who are appointed by the entity and are not in direct economic competition with the physician involved.
- (4) The right to the peer review hearing may be forfeited if the physician has failed, without good cause to appear.
- (5) In any peer review hearing held under this chapter, the physician involved has the right to:
 - (A) Be represented by an attorney or other person of the physician's choice;
 - (B) Have a record made of the proceedings, copies of which may be obtained by the physician upon payment of any reasonable charges associated with their preparation;
 - (C) Call, examine, and cross-examine witnesses;
 - (D) Present evidence determined to be relevant by the hearing officer, arbitrator, or panel, regardless of its admissibility in a court of law; and
 - (E) Submit a written statement at the close of the hearing.
- (6) Upon completion of any peer review hearing held under this chapter, the physician involved has the right to receive:
 - (A) The written recommendation of the arbitrator, officer, or panel, including a statement of the basis for the recommendations; and
 - (B) A written decision of the health care entity, including a statement of the basis for the decision.

A professional review body's failure to meet the conditions described in this subsection shall not, in itself, constitute failure to meet the standards of subsection (a)(3).

(c) For purposes of section -10, nothing in this section shall be construed as:

- (1) Requiring the procedures referred to in subsection (a)(3):
 - (A) Where there is no adverse professional review action taken;
 - (B) In the case of a suspension or restriction of clinical privileges, for a period of not longer than fourteen days, during which an investigation is being conducted to determine the need for a professional review action; or
- (2) Precluding an immediate suspension or restriction of clinical privileges, subject to subsequent notice and hearing or other adequate procedures, where the failure to take such an action may result in an imminent danger to the health of any individual.

§ -12 Attorney's fees. (a) In any suit brought against a defendant, to the extent that a defendant has met the standards set forth under section -11(a) and the defendant substantially prevails, the court, at the conclusion of the action, shall award to a substantially prevailing party defending against any such claim the cost of the suit attributable to such claim, including a reasonable attorney's fee, if the

claim, or the claimant's conduct during the litigation of the claim, was frivolous, unreasonable, without foundation, or in bad faith.

(b) For the purposes of this section, a defendant shall not be considered to have substantially prevailed when the plaintiff obtains an award for damages, or permanent injunctive or declaratory relief.

§ -13 **Guidelines of the director.** The director, in consultation with the director of the department of health, may adopt pursuant to chapter 91, such rules and voluntary guidelines as may assist the professional review bodies in meeting the standards described in section -11(a).

§ -14 **Construction.** (a) Except as specifically provided in this part, nothing in this part shall be construed as changing the liabilities or immunities under law.

(b) Nothing in this part shall be construed as requiring health care entities to provide clinical privileges to any or all classes or types of physicians or other licensed health care practitioners.

(c) Nothing in this part shall be construed as affecting or modifying any provision of state law with respect to activities of professional review bodies regarding nurses, other licensed health care practitioners, or other health professionals who are not physicians.

(d) Nothing in this chapter shall be construed as affecting in any manner the rights and remedies afforded patients under any provision of state law to seek redress for any harm or injury suffered as a result of negligent treatment or care by any physician, health care practitioner, or health care entity, or as limiting any defenses or immunities available to any physician, health care practitioner, or health care entity."

SECTION 4. Section 663-1.7, Hawaii Revised Statutes, is amended to read as follows:

"§663-1.7 Professional society; peer review committee; hospital or clinic quality assurance committee; no liability; exceptions. (a) As used in this section, "professional society" or "society" means any association or other organization of persons engaged in the same profession or occupation, or a specialty within a profession or occupation, a primary purpose of which is to maintain the professional standards of the persons engaged in its profession or occupation or specialty practice; "peer review committee" means a committee created by a professional society, or by the medical or administrative staff of a licensed hospital or clinic, whose function is to maintain the professional standards established by the bylaws of the society, hospital, or clinic of the persons engaged in its profession or occupation, or area of specialty practice, or in its hospital or clinic; and "hospital or clinic quality assurance committee" means an interdisciplinary committee established by the board of trustees or administrative staff of a licensed hospital or clinic, whose function is to monitor and evaluate patient care, and to identify, study, and correct deficiencies and seek improvements in the patient care delivery process.

(b) There shall be no civil liability for any member of a peer review committee or hospital or clinic quality assurance committee, or for any person who files a complaint with or appears as a witness before such committees, for any acts done in the furtherance of the purpose for which the peer review committee or hospital or clinic quality assurance committee was established; provided that:

(1) The member, witness, or complainant acted without malice; and

- (2) In the case of a member, the member was authorized to perform in the manner in which the member did.

(c) There shall be no civil liability for any person who participates with or assists a peer review committee or hospital or clinic quality assurance committee, or for any person providing information to a peer review committee or hospital or clinic quality assurance committee for any acts done in furtherance of the purpose for which the peer review committee or hospital or clinic quality assurance committee was established, unless such information is false and the person providing it knew such information was false.

[(c)] (d) This section shall not be construed to confer immunity from liability upon any professional society, hospital, or clinic, nor shall it affect the immunity of any shareholder or officer of a professional corporation; provided there shall be no civil liability for any professional society or hospital or clinic in communicating any conclusions reached by one of its peer review committees or hospital or clinic quality assurance committees relating to the conformance with professional standards of any person engaged in the profession or occupation of which the membership of the communicating professional society consists, to a peer review committee or hospital or clinic quality assurance committee of another professional society or hospital or clinic whose membership is comprised of persons engaged in the same profession or occupation, or to a duly constituted governmental board or commission or authority having as one of its duties the licensing of persons engaged in that same profession or to a government agency charged with the responsibility for administering a program of medical assistance in which services are provided by private practitioners.

[(d)] (e) The final peer review committee of a medical society, hospital, or clinic, or other health care facility shall report in writing every adverse decision made by it to the department of commerce and consumer affairs; provided that final peer review committee means that body whose actions are final with respect to a particular case; and provided further that in any case where there are levels of review nationally or internationally, the final peer review committee for the purposes of this subsection shall be the final committee in this State. The hospital or clinic quality assurance committee shall report in writing to the department of commerce and consumer affairs any information which identifies patient care by any person engaged in a profession or occupation which does not meet hospital or clinic standards and which results in disciplinary action unless such information is immediately transmitted to an established peer review committee. The report shall be filed within thirty business days following an adverse decision. The report shall contain information on the nature of the action, its date, the reasons for, and the circumstances surrounding the action; provided that specific patient identifiers shall be expunged. If a potential adverse decision was superseded by resignation or other voluntary action that was requested or bargained for in lieu of medical disciplinary action, the report shall so state. The department shall prescribe forms for the submission of reports required by this section. Failure to comply with this subsection shall be a violation punishable by a fine of not less than \$100 for each member of the committee.

[(e)] (f) In any civil action arising under this section where a party seeks money damages or injunctive relief, or both, against another party, and the case is subsequently decided, the court may, as it deems just, assess against either party, and enter as part of its order, for which execution may issue, a reasonable sum for attorneys' fees, in an amount to be determined by the court upon a specific finding that the party's claim or defense was frivolous; provided the amount shall not exceed twenty-five per cent of any amount originally prayed for by the party assessed.

[(f)] (g) In determining the award of attorneys' fees and the amounts to be awarded under subsection [(e)], (f), the court must find in writing that all claims

or defenses made by the party are frivolous and are not reasonably supported by the facts and the law in the civil action.”

SECTION 5. Section 624-25.5, Hawaii Revised Statutes, is amended to read as follows:

“§624-25.5 Proceedings and records of [medical, dental and optometric] peer review committees and [hospitals.] quality assurance committees. (a) As used in this section:

- (1) “Professional society” or “society” means any association or other organization of persons engaged in the same profession or occupation, or a speciality within a profession or occupation, a primary purpose of which is to maintain the professional standards of the persons engaged in its profession or occupation or specialty practice;
- (2) “Peer review committee” means a committee created by a professional society, or by the medical, dental, optometric, or administrative staff of a licensed hospital or clinic whose function is to maintain the professional standards established by the bylaws of the society, hospital, or clinic of the persons engaged in its profession or occupation, or area of specialty practice, or in its hospital or clinic; and
- (3) “Hospital or clinic quality assurance committee” means an interdisciplinary committee established by the board of trustees or administrative staff of a licensed hospital or clinic providing medical, dental, or optometric care, whose function is to monitor and evaluate patient care, and to identify, study, and correct deficiencies and seek improvements in the patient care delivery process.

[(a)] (b) Neither the proceedings nor the records of peer review committees [of medical, dental or optometric staffs in hospitals having the responsibility of evaluation and improvement of the quality of care rendered in the hospital or peer review committees of local medical, dental, or optometric societies], or hospital or clinic quality assurance committees shall be subject to discovery. For the purposes of this section, “records of hospital or clinic quality assurance committees” are limited to recordings, transcripts, minutes, summaries and reports of committee meetings and conclusions contained therein. Information protected shall not include incident reports, occurrence reports, or similar reports which state facts concerning a specific situation, or records made in the regular course of business by a hospital or other provider of health care. Original sources of information, documents or records shall not be construed as being immune from discovery or use in any civil proceeding merely because they were presented to, or prepared at the direction of, such committees. Except as hereinafter provided, no person in attendance at a meeting of the committee shall be required to testify as to what transpired at the meeting. The prohibition relating to discovery or testimony shall not apply to the statements made by any person in attendance at the meeting who is a party to an action or proceeding the subject matter of which was reviewed at the meeting, or to any person requesting hospital staff privileges, or in any action against an insurance carrier alleging bad faith by the carrier in refusing to accept a settlement offer within the policy limits.

[(b)] (c) The prohibitions contained in this section shall not apply to medical, dental, or optometric society committees that exceed ten per cent of the membership of the society, nor to any committee if any person serves upon the committee when the person’s own conduct or practice is being reviewed.

[(c)] (d) The prohibitions contained in this section shall apply to investigations and discovery conducted by the board of medical examiners, except as required by sections 92-17, 453-8.7₁ or 663-1.7(d).”

SECTION 6. Statutory material to be repealed is bracketed. New statutory material is underscored.

SECTION 7. This Act shall take effect upon its approval; provided that this Act shall not affect any rights or duties that matured, penalties that were incurred, or proceedings that were begun before its effective date.

(Approved June 16, 1989.)