



HB540 HD1 Immunity from Liability for COVID-19

COMMITTEE ON JUDICIARY AND HAWAIIAN AFFAIRS:

- Rep Mark Nakashima, Chair; Rep. Scott Matayoshi, Vice Chair
- Tuesday, Feb. 16, 2021: 2:00 pm: Videoconference

Hawaii Substance Abuse Coalition Supports HB540 HD1:

ALOHA CHAIR, VICE CHAIR AND DISTINGUISHED COMMITTEE MEMBERS. My name is Alan Johnson. I am the current chair of the Hawaii Substance Abuse Coalition (HSAC), a statewide organization of over 30 substance use disorder and co-occurring mental health disorder treatment and prevention agencies.

HSAC supports the goal of the bill is to provide immunity to health-care providers in order to avoid any impediments to needed treatments while having to deal with COVID-19 patients.

In response to the COVID-19 pandemic, and the overwhelming need for medical care, state governments need to support regulations affording immunity to healthcare and non-profit treatment providers.¹

- May not prevent a health-care provider from actually being sued for negligence, since public access to courts cannot be limited,
- Need immunity in regulations to provide protection for providers to defend against lawsuits including from criminal liability from licensure and record-keeping.

When providers are forced to make patient care decisions under the duress of a global pandemic and surge conditions, healthcare providers should not have to make mitigating decisions based on liability. Instead, providers need protection so they can shift to Crisis Standards as opposed to operating under ineffective normal standards in order to respond properly to a surge from a catastrophic emergency.

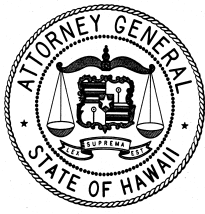
We recommend key details for consideration following the advice of the Institute of Medicine who believe that these standards contain five elements such as 1) community and provider engagement, 2) assurances regarding legal authority, 3) definitions of triggers, 4) strong ethical grounding and 5) evidence-based processes and operations.² We appreciate the opportunity to provide testimony and are available for questions.

¹ **State and Fed Regulations Provide Immunity to Health Care Providers Responding to COVID-19**

<https://www.law.com/njlawjournal/2020/08/12/governments-pass-regulations-providing-immunity-to-health-care-providers-responding-to-covid-19/?slreturn=20210113185754>

² Klitzman RL. Legal Immunity for Physicians During the COVID-19 Pandemic: Needs to Address Legal and Ethical Challenges. *Chest*. 2020;158(4):1343-1345.

doi:10.1016/j.chest.2020.06.007<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7294282/>



**TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
THIRTY-FIRST LEGISLATURE, 2021**

ON THE FOLLOWING MEASURE:

H.B. NO. 540, H.D. 1, RELATING TO LIABILITY.

BEFORE THE:

HOUSE COMMITTEE ON JUDICIARY AND HAWAIIAN AFFAIRS

DATE: Wednesday, February 17, 2021 **TIME:** 2:00 p.m.

LOCATION: State Capitol, Room 325, Via Videoconference

TESTIFIER(S): Clare E. Connors, Attorney General, or
Michael S. Vincent Deputy Attorney General

Chairs Nakashima and Matayoshi and Members of the Committee:

The Department of the Attorney General (Department) has concerns regarding this bill and offers the following comments.

The purpose of this bill is to make immune from civil or criminal liability a health care provider who acts in good faith during a state of emergency or local state of emergency and adheres to crisis standards of care regardless of whether the provider is engaged in emergency management functions.

The Department is concerned that the bill may inadvertently and unnecessarily create situations where health care providers can claim immunity from liability when they should not be entitled to it.

Section 127A-9, Hawaii Revised Statutes (HRS), currently provides significant protections for those engaged in emergency management functions. "Emergency management functions" are broadly defined in section 127A-2, HRS, to include management of resources and personnel as needed to provide relief during an emergency. More often than not, the personnel needed during emergencies are health care workers. The Governor, mayors of any county, and the emergency management agencies of the State and counties regularly identify those engaged in emergency management functions and, for purposes of the ongoing COVID-19 emergency, have identified health care workers to ensure that they enjoy the immunity protections found in Chapter 127A.

Other sections of HRS provide additional protections for health care workers involved in emergency or disaster response. For example, section 321-23.3, HRS, protects various volunteer health care workers licensed in the State or employed by a health care facility while engaged in emergency medical disaster response by deeming them employees of the State or county while in the performance of their duties under the authority of the Governor or a county; and section 325-20, HRS, authorizes the Director of Health to enter into agreements with licensed health care facilities and providers for collaborative assistance to control an epidemic of a dangerous disease, and specifically protects a health care provider acting under the direction of the Director of Health or persons engaged in disease prevention and control functions, including volunteers, from liability for the death of or injury to any person who is provided care unless wilful misconduct is involved.

The concern with this bill is that it would apply immunity from civil or criminal liability to any health care provider, no matter the speciality, and no matter whether the health care provider is engaged in emergency management functions. The expansion of immunity proposed in the bill may be misapplied to a non-emergency situation during an emergency, which would not protect or benefit public health and safety. Existing laws already provide protection from liability for health care workers. Instead of creating a broad exemption that may be misapplied, the specific concerns of health care workers should be identified so they can be addressed by amending already existing applicable statutes.

Thank you for the opportunity to provide these comments.

Hearing: JHA on February 17, 2021. 2:00 PM

1. This hearing was referred to the Committee on Judiciary and Hawaiian Affairs because of the concerns were raised during the hearing in the Committee on Pandemic and Disaster Preparedness on February 9, 2021. regarding the broadness of the language in this measure and that it may have unintended effects on certain at-risk populations who may not have the ability to defend themselves from bad actors. Therefore, your Committee requests that should your Committee on Judiciary & Hawaiian Affairs hear this measure, **that it take into consideration the concerns raised regarding the broadness of the immunity provided to healthcare providers by this measure.**

2. The Legislature and the Public request the document **“Hawai‘i State Crisis Standards of Care Triage Allocation Framework” for content.**

In April 2020, under the direction of the Hawaii Emergency Management Agency (HIEMA) and the Healthcare Association of Hawaii (HAH), intensive care unit physicians from across the major hospitals in the state, convened and developed the **Hawaii State Crisis Standard of Care (CSC), Triage Allocation Framework.** Throughout this pandemic, our caregivers have done tremendous, life changing work with skill and grace. As a system of hospitals, Queen’s has successfully managed the majority of the COVID-19 hospitalizations in our state.

3. **Governor Ige’s Executive Order 20-05 mandates that all health care professionals render care to anyone affected by COVID-19 and grants civil immunity to those health care professionals.**

However, the Order does not provide immunity from criminal liability. HB 540 is a comprehensive and uniform approach to affording both **civil and criminal immunity** to all health care providers acting in good faith during a state of emergency or local state of emergency.

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. [See, Exhibit A of SEVENTEENTH PROCLAMATION RELATED TO THE COVID-19 EMERGENCY, dated December 16, 2020, entitled, Rules Relating to Immunities for Health Care Practices."]. However, this immunity will last only as long as the Proclamation remains valid unless it is enacted into law by the Legislature.

On February 9, 2021, Bill HB540 was heard by the PDP-LAT Committee.

a. Here are some excerpts from the written testimony sent in from that meeting.

OPPOSE

A state of emergency does not warrant the lessening of rights of patients in comparison to patients receiving care in non-emergency times. Understanding the need for heightened safety measures and providing support to health care providers so they may have the necessary protective measures in order to maintain a safe and reasonable standard of care would be a more beneficial approach than carving out an exception to holding them liable if their standards should fall short.

THOSE IN SUPPORT

Note: None of these dire situations have occurred. The need for increased immunity is not substantiated by any data presented in any of these testimonies.

- Granting **immunity** to health care providers during a state of emergency or local state of emergency is both appropriate and necessary. The risk and number of hospitalizations, intensive care unit (ICU) and mechanical ventilator usage is significantly higher in older persons, as well as in younger persons with more than one concurrent chronic medical condition. In August/September 2020, and again in January 2021, some of Hawai'i's hospitals and ICUs were **dangerously close to their reaching their maximum capacity. [CLOSE, IT DID NOT HAPPEN IN ANY HEALTHCARE FACILITY IN HAWAII]**
- Simply put, **if Hawai'i is not able to control the spread of the SARS-CoV-2 virus**, which now includes the B.1.1.7 variant, then difficult choices **may need to be made if** ventilators, ICU beds, or health care personnel are insufficient for the numbers of patients with severe COVID19 disease.
- **If Hawai'i's hospitals reach maximum ICU bed or mechanical ventilator capacity, experience severe shortages of medications, equipment, supplies, or health care personnel shortages due to COVID-19**, then the **Hawai'i State Crisis Standards of Care Triage Allocation Framework** may need to be utilized. The allocation framework is grounded in the highest ethical standards and is consistent with current recommendations for how to allocate scarce critical resources during a public health emergency.

b. Here is an example of what should be done before enacting "Crisis Standards of Care."

Unfortunately, we surged in September 2020. To care for the more than 100 COVID patients at Queen's, **we expanded our COVID units and came together to provide the best care that we could.** We relied on each other, trusted each other, and pulled through the September surge as One Team.

But our mission will remain the same: **to care for as many patients as we can. We will expand past 100% capacity, and then expand even more. We will ask our colleagues to step-up and help us in the ICU.** And we will come together again and continue to put patients first, because that's our commitment to this community.

HB-540-HD-1

Submitted on: 2/15/2021 9:21:50 PM

Testimony for JHA on 2/17/2021 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Max Castanera	Individual	Support	No

Comments:

Aloha,

Please consider passing HB 540. As a fourth year medical student at UH, it is important for me to vouch for my current/future colleagues. Protecting medical professionals from liabilities when they are acting in the best interest of those they are helping is crucial for medical professionals to respond quickly and without hesitation to a medical emergency. If you want the best help that the state of Hawaii has in a medical emergency, please provide appropriate protections to health care workers. Mahalo for your time.



THE QUEEN'S HEALTH SYSTEMS

To: The Honorable Mark M. Nakashima, Chair
The Honorable Scot Z. Matayoshi, Vice Chair
Members, House Committee on Judiciary & Hawaiian Affairs

From: Colette Masunaga, Director, External Affairs, The Queen's Health Systems

Date: February 17, 2021

Re: Support for HB540 HD1: Relating to Liability

The Queen's Health Systems (Queen's) is a nonprofit corporation that provides expanded health care capabilities to the people of Hawai'i and the Pacific Basin. Since the founding of the first Queen's hospital in 1859 by Queen Emma and King Kamehameha IV, it has been our mission to provide quality health care services in perpetuity for Native Hawaiians and all of the people of Hawai'i. Over the years, the organization has grown to four hospitals, and more than 1,500 affiliated physicians and providers statewide. As the preeminent health care system in Hawai'i, Queen's strives to provide superior patient care that is constantly advancing through education and research.

Queen's appreciates the opportunity to provide testimony in support of HB540 HD1, relating to liability. The measure provides for liability protection for health care providers who act in good faith during a state or local state of emergency and adheres to crisis standards of care. We support this measure because caregivers should not be in a position of liability when they are forced to make patient care decisions under the duress of a global pandemic and surge conditions. Queen's would also appreciate the committee's consideration of our amendments to narrow the scope of the bill.

During a surge response to a catastrophic emergency event, where the demand for healthcare services substantially exceeds the supply, providers are forced to shift from normal standards of care to Crisis Standards of Care (CSC). In April 2020, under the direction of the Hawaii Emergency Management Agency (HIEMA) and the Healthcare Association of Hawaii (HAH), intensive care unit physicians from across the major hospitals in the state, convened and developed the Hawaii State Crisis Standard of Care (CSC), Triage Allocation Framework. Throughout this pandemic, our caregivers have done tremendous, life changing work with skill and grace. As a system of hospitals, Queen's has successfully managed the majority of the COVID-19 hospitalizations in our state.

Queen's thanks the committee for hearing this important measure and we appreciate the opportunity to provide testimony in support.

The mission of The Queen's Health Systems is to fulfill the intent of Queen Emma and King Kamehameha IV to provide in perpetuity quality health care services to improve the well-being of Native Hawaiians and all of the people of Hawai'i.

SECTION 1. Chapter 127A-9, Hawaii Revised Statutes, is amended to read as follows:

“Immunities; rights. (a) None of the following:

- (1) The State;
- (2) Any county;
- (3) Any owner or operator of a public utility or critical infrastructure facility;
- (4) Private-sector or nonprofit organizations; or
- (5) Except in cases of wilful misconduct, gross negligence, or recklessness, persons engaged

in emergency management functions pursuant to this chapter, including volunteers whose services are accepted by any authorized person,

shall be civilly liable for the death of or injury to persons, or property damage, as a result of any act or omission in the course of the employment or duties under this chapter.

(b) Except in cases of willful misconduct, gross negligence, or recklessness, a health care provider shall be immune from civil or criminal liability if the health care provider:

(1) Acts in good faith during a proclamation of a state of emergency or local state of emergency, as declared by the governor or mayor, respectively;

(2) Adheres to crisis standards of care, as reviewed and approved by the department of health and adopted by the agency;

and,

(3) The health care provider is engaged in emergent care functions for carrying out of the crisis standards of care.

For the purposes of this subsection:

"Crisis standards of care" means a substantial change in usual health care operations and the level of care it is possible to deliver, which is made necessary by a pervasive or catastrophic disaster, such as a pandemic influenza, earthquake, or hurricane.

"Substantial change in usual health care operations" means a change in the level of care delivered that is justified by specific circumstances via a formal declaration by a state or county government that:

(1) Recognizes that crisis operations will be in effect for a sustained period; and

(2) Enables specific powers and protections for health care providers, in the necessary tasks of allocating and using scarce medical resources and implementing alternate care facility operations.

"health care provider" means a physician, osteopathic physician, surgeon, or physician assistant licensed under chapter 453, a podiatrist licensed under chapter 463E, a health care facility as defined in section 323D-2, and the employees of any of them. Health care provider shall not mean any nursing institution or nursing service conducted by and for those who

rely upon treatment by spiritual means through prayer alone, or employees of the institution or service.

~~(b)~~(c) No act or omission shall be imputed to the owner of any vehicle by reason of the owner's ownership thereof; provided that nothing herein shall preclude recovery by any person for injury or damage sustained from the operation of any vehicle which may be insured under section 41D-8 to the extent of the insurance, and, unless specifically provided, insurance effected under section 41D-8 shall not include coverage of such risk during an emergency period. The governor may insure vehicles owned by the State or in the custody and use of the Hawaii emergency management agency; provided that insurance effected under section 41D-8 on vehicles used for purposes other than emergency management shall not be required to include coverage of the insured vehicle against the risk incurred or which would be incurred under this chapter as a result of the use of the insured vehicle for emergency management.

(c) Members of the United States Army, Air Force, Navy, Marine Corps, or Coast Guard on any duty or service performed under or in pursuance of an order or call of the President of the United States or any proper authority, and the National Guard from any other state ordered into service by any proper authority, to assist civil authorities engaged in emergency functions pursuant to this chapter shall not be liable, civilly

or criminally, for any act done or caused by them in pursuance of duty in such service. [L 2014, c 111, pt of §]

**TESTIMONY OF NAHELANI WEBSTER ON BEHALF OF
THE HAWAII ASSOCIATION FOR JUSTICE (HAJ) IN OPPOSITION TO
H.B. NO. 540 HD1**

DATE: Tuesday, February 17, 2021

TIME: 2:00 pm

To: Chair Nakashima and Members of the House Committee on Judiciary and
Hawaiian Affairs:

My name is Nahelani Webster and I am presenting this testimony on behalf of the Hawaii Association for Justice (HAJ) in OPPOSITION to H.B. 540 HD1, relating to Liability.

The purpose of this measure is to grant immunity of civil and criminal liability to a health care provider. While we greatly appreciate the work and efforts of our health care industry in response to any emergency including the current global pandemic, the language in this measure is overly broad and places our most vulnerable at risk.

It is during times of emergency when we need to protect our most vulnerable population. For example, our Kūpuna in senior nursing facilities impacted by the pandemic would not be able to protect their rights in court should this measure pass. Broad waivers of liability such as is being proposed in H.B. 540 creates a barrier to obtain redress when individuals are harmed or injured.

The term “Health care providers” is overly broad and it is unclear as to whom this includes in addition to our front line health care workers. The current language could also include health care providers practicing outside their scope of their license. For instance, a dentist working on the front lines would be cloaked with immunity

despite working outside the ordinary scope of their licensure. I do not believe it is the intent of the bill to grant all health care providers with a blanket immunity even when their acts are outside of what would be considered a direct response to emergency related pandemic care.

In addition, Hawaii law already sets the standard of care, it is flexible, and it allows for situations like emergencies. This bill would potentially upend established, and sound, Hawaii law. Here is Hawaii Jury Instruction 14.2:

“Standard of Care – It is the duty of a [physician/nurse/specialty] to have the knowledge and skill ordinarily possessed, and to exercise the care and skill ordinarily used, by a [physician/nurse/specialty] practicing in the same field under similar circumstances. A failure to perform any one of these duties is a breach of the standard of care.”

As a policy, the focus should be on protecting patients, trying to determine the causes of any medical errors and working to prevent any future harm from re-occurring. A state of emergency does not warrant the lessening of rights of patients in comparison to patients receiving care in non-emergency times. Understanding the need for heightened safety measures and providing support to health care providers so they may have the necessary protective measures in order to maintain a safe and reasonable standard of care would be a more beneficial approach than carving out an exception to holding them liable if their standards should fall short.

For these reasons, HAJ opposes this measure and urges the committee to look at alternative ways to provide additional support to our health care workers in times

of emergency rather than reducing the rights of patients in need of treatment and care. Thank you for the opportunity to testify on this measure.