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LEGISLATIVE INFORMATIONAL BRIEFING  
IMPACT OF UNLICENSED COMMUNITY CARE HOMES IN HAWAII

SENATOR ROSALYN H. BAKER, CHAIR  
COMMITTEE ON COMMERCE, CONSUMER PROTECTION, AND HEALTH

REPRESENTATIVE JOHN M. MIZUNO, CHAIR  
COMMITTEE ON HEALTH

REPRESENTATIVE JOY A. SAN BUENAVENTURA, CHAIR  
COMMITTEE ON HUMAN SERVICES AND HOMELESSNESS

Hearing Date: Tuesday, November 26, 2019      Room Number: 309

Relevant Terms and Definitions

Adult Residential Care Homes (ARCH):

Pursuant to HRS §321-15.1, a licensed facility providing (1) twenty-four-hour living accommodations, (2) for a fee, (3) to adults unrelated to the family, (4) who require at least minimal assistance in the activities of daily living, personal care services, protection, and health care services, (5) but who do not need the professional health services provided in an intermediate, skilled nursing, or acute care facility. An Expanded ARCH (E-ARCH) is the same as an ARCH except that the resident may need the professional health services provided in an intermediate or skilled nursing facility.

Community Care Foster Family Homes (CCFFH):

Pursuant to HRS §321-481, a certified facility providing (1) twenty-four-hour living accommodations, (2) for a fee, (3) to persons unrelated to the foster family, (4) include personal care and homemaker services, (5) for not more than two adults at any one time, at least one of whom shall be a Medicaid recipient, who are at the nursing facility level of care, and are receiving the services of a licensed home and community-based case management agency.

Case Management Agencies (CMA):

Pursuant to HRS §321-481, a person, agency, or organization licensed to provide, coordinate, and monitor comprehensive services to meet the needs of clients whom the agency services in a CCFFH or any Medicaid clients in an E-ARCH or an assisted living facility.

Assisted Living Facility (ALF):

Pursuant to HRS §321-15.1, a combination of housing, health care services, and personalized supportive services designed to respond to individual needs, to promote choice, responsibility, independence, privacy, dignity, and individuality.

Talking Points

- The information in this briefing material focuses on ARCHs.
- Act 148 (SLH 2018) was signed on July 6, 2018 and was codified as HRS §321-486. This culminated from HB 1911. The Act authorized the Department of Health to investigate care facilities reported to be operating without an appropriate certificate or license issued by the Department and it established penalties for violations and for knowingly referring or transferring patients to uncertified or unlicensed care facilities, with certain exceptions.
- Memorandum of Understanding (MOU) between DOH Office of Health Care Assurance (OHCA) and the Department of the Attorney General (AG) was executed and became effective on April 1, 2019. The MOU provides for the AG to conduct investigative services on complaints that arise from reports of unlicensed operations of care facilities and to prepare search warrant requests for court approval and to execute search warrants with DOH OHCA.
- Status of Complaints and Investigations on Unlicensed Care Homes:
  - o Total Complaints: 114.
  - o Closed Complaints: 40 (35%). Closed due to licensed facility, or license not required, or confirmed no activity with visit.
  - o Open Complaints: 74 (65%).
  - o Investigated Complaints: 69 (61%). Includes the 40 closed cases.
  - o Homes that still need an initial visit: 27 (24%).
  - o Number of denied entries: 17 (15%)
  - o Number of homes entered: 52 (46%). Includes homes where cases were closed.
  - o Notice of Violation and Order (NOVO) pending: 13 (11%) NOVOs for unlicensed homes are in process.
  - o NOVOs issued: 2 for unlicensed homes.
  - o Number of court orders/warrants issued: None to date; pending further investigation.
  - o Voluntary closure: none yet as a direct consequence of OHCA action.

Unable to attend informational briefing but submitted comments & materials to the committees.

CPH-HLT-HSH 11-26-19  
Conference Room 309, 10:00 a.m.

**Rep. John M. Mizuno, Chair**  
House Committee on Health

**Sen. Rosalyn H. Baker, Chair**  
Senate Committee on Commerce, Consumer Protection, and Health

**Rep. Joy A. San Buenaventura, Chair**  
House Committer on Human Services and Homelessness

**Rep. Scott K. Saiki**  
Speaker of the House

**Sen. Ronald D. Kouchi**  
President of the Senate

Issue: Growing number of unlicensed, illegal community care homes in the State.

*In 2018 HB1911 Authorizes the Department of Health to investigate care facilities reported to be operating without an appropriate certificate or license issued by the Department. Establishes penalties for violations and for knowingly referring or transferring patients to uncertified or unlicensed care facilities, with certain exceptions. Excludes landlords from licensure, under certain conditions. (HB1911 CD1)*

This issue has already been thoroughly discussed. Both sides had ample opportunity to state their positions. This bill passed both the House and Senate and was signed into law by Gov. David Ige on July 6, 2018, becoming **Act 148**. It is now up to the State to enforce this law.

The majority of our long-term care residents suffer from dementia and can have many other physical and mental impairments which make them very vulnerable. The State has always required that facilities caring for these people be licensed or certified. It's necessary and the right thing to do.

These facilities are monitored by the Department of Health's Office of Healthcare Assurance (OHCA). They have annual, now unannounced inspections. Inspection reports are required to be posted on the DOH website. There are staffing requirements, criminal background check requirements, building and fire code requirements, substitute caregiver requirements, Resident Rights requirements, knowledge of CPR requirements, TB clearance requirements, reading and speaking English requirements, housing design and self-preservation requirements, confidentiality and HIPAA requirements, medical records requirements, billing and financial record requirements, medication pass requirements (especially regarding the use of anti-

psychotic medications), the list goes on and on. And, not to be forgotten, there is the right of every resident to access the services of the Long-Term Care Ombudsman when the resident or responsible person needs an advocate and doesn't know where to turn.

The Legislature and the public agree these are good and essential regulations, NOT frivolous, because they protect our most vulnerable kupuna. The public doesn't understand **NONE of these consumer protections exist if someone chooses to move into an *Aging in Place Home*.** The resident is totally on his or her own, exchanging all those consumer protections for an *unenforceable promise* made by the AIPH to do a good job. Just "trust us."

In past testimony I have stated I also agree with the ARCHs and CCFFHs who claim the *Aging in Place Homes* are unfair competition. Why would a caregiver subject herself and her family to annual inspections, the Ombudsman dropping in unannounced, having to pay for all the requirements and costs of running a licensed business if they can drop out of the regulatory system, call herself or himself an *Aging in Place Home*, and get away with it? What message are we sending to all those caregivers following the rules? If the Legislature is unable to stop this trend, more licensed facilities will drop out and this will place more seniors at risk.

Act 148 is now law in Hawaii and it's time to enforce it. I'm not an attorney but if the law needs to be amended to plug up any loopholes, then just do it. Mahalo.

***John G. McDermott, LSW, ACSW, M.Div***

State Long-Term Care Ombudsman

Executive Office on Aging

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**HAWAII LONG-TERM CARE  
OMBUDSMAN**  
SOMEONE WHO CARES

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## **Nursing Home Residents Rights**

Residents of nursing homes have rights that are guaranteed by the federal Nursing Home Reform Law. The law requires nursing homes to “promote and protect the rights of each resident” and stresses individual dignity and self-determination. Many states also include residents’ rights in state law or regulation.

### **Right to a Dignified Existence**

- Be treated with consideration, respect, and dignity, recognizing each resident’s individuality
- Freedom from abuse, neglect, exploitation, and misappropriation of property
- Freedom from physical or chemical restraints
- Quality of life is maintained or improved
- Exercise rights without interference, coercion, discrimination, or reprisal
- A homelike environment, and use of personal belongings when possible
- Equal access to quality care
- Security of possessions

### **Right to Self-Determination**

- Choice of activities, schedules, health care, and providers, including attending physician
- Reasonable accommodation of needs and preferences
- Participate in developing and implementing a person-centered plan of care that incorporates personal and cultural preferences
- Choice about designating a representative to exercise his or her rights
- Organize and participate in resident and family groups
- Request, refuse, and/or discontinue treatment

### **Right to be Fully Informed of**

- The type of care to be provided, and risks and benefits of proposed treatments
- Changes to the plan of care, or in medical or health status
- Rules and regulations, including a written copy of residents’ rights
- Contact information for the long-term care ombudsman program and the state survey agency
- State survey reports and the nursing facility’s plan of correction
- Written notice before a change in room or roommate
- Notices and information in a language or manner he or she understands (Spanish, Braille, etc.)

## Right to Raise Grievances

- Present grievances without discrimination or retaliation, or the fear of it
- Prompt efforts by the facility to resolve grievances, and provide a written decision upon request
- To file a complaint with the long-term care ombudsman program or the state survey agency

## Right of Access to

- Individuals, services, community members, and activities inside and outside the facility
- Visitors of his or her choosing, at any time, and the right to refuse visitors
- Personal and medical records
- His or her personal physician and representatives from the state survey agency and long-term care ombudsman program
- Assistance if sensory impairments exist
- Participate in social, religious, and community activities

## Rights Regarding Financial Affairs

- Manage his or her financial affairs
- Information about available services and the charges for each service
- Personal funds of more than \$100 (\$50 for residents whose care is funded by Medicaid) deposited by the facility in a separate interest-bearing account, and financial statements quarterly or upon request
- Not be charged for services covered by Medicaid or Medicare

## Right to Privacy

- Regarding personal, financial, and medical affairs
- Private and unrestricted communication with any person of their choice
- During treatment and care of personal needs

## Rights During Discharge/Transfer

- Right to appeal the proposed transfer or discharge and not be discharged while an appeal is pending
- Receive 30-day written notice of discharge or transfer that includes: the reason; the effective date; the location going to; appeal rights and process for filing an appeal; and the name and contact information for the long-term care ombudsman
- Preparation and orientation to ensure safe and orderly transfer or discharge
- Notice of the right to return to the facility after hospitalization or therapeutic leave

### GET HELP



For more information about Residents' Rights, or questions or concerns, contact your Long-Term Care Ombudsman Program. The Long-Term Care Ombudsman Program promotes and protects the rights of residents in licensed long-term care facilities. Visit [www.theconsumervoic.org](http://www.theconsumervoic.org) for more information.



# KOKUA COUNCIL TESTIMONY

November 26, 2019 10 AM Room 309

## SENATE COMMITTEE ON COMMERCE, CONSUMER PROTECTION, AND HEALTH

## HOUSE COMMITTEE ON HEALTH AND COMMITTEE ON HUMAN SERVICES & HOMELESSNESS

Kokua Council, invited to participate in this Briefing, supports most of the priorities identified by the other groups invited to participate. Rather than repeat the same lists, we would like to highlight a few of the gaps or less developed issues we see in Hawaii's previous efforts. These include:

- 1. Consumer Protection in the Vertical Village.** Condo boards have real power, including taxation. Representatives of Pono Action, Condo 411, and Hui `Oia`i`o have urged legislative action regarding a broad range of condo issues including electoral fraud, the need for Board and owner education, and management accountability. Bills that could accomplish this are still alive. With so many seniors living in condos, their vulnerability – particularly financial – deserves more attention. The lens of consumer protection and condo law reform may be more direct strategies to address their issues. For a complementary proactive approach parallel to a regulatory one, Kokua Council urges the exploration of consumer driven Age Friendly Condo designations. Consumer protection also appears to be highly relevant for unlicensed or lightly regulated Aging in Place facilities.
- 2. Funding for County Elder Abuse Units.** With the anticipated new initiatives by prosecutors to strengthen penalties in elder abuse statutes, it is likely that the number of cases to be investigated and prosecuted with overwhelm county Elder Abuse Units. Kokua Council urges your committees to examine the potential need for appropriations to the counties to handle these workloads.
- 3. Annual Monitoring of Late Payments.** State law, which also applies to the counties, requires interest payments to vendors when government does not pay within 30 days. Senior support programs are delivered mostly through nonprofit vendors, who in the past have had to secure expensive lines of credit because of late payments. Kokua Council is not aware of any audits or studies to determine how often these delays impose financial stress. We suspect that a thorough study could lead to significant budgetary appropriations for past lax implementation of this law. Thus, it is unlikely such a study would be welcomed by B&F or your Committees on Finance and Ways and Means.



As an alternative, we suggest that going forward, each agency, including the counties, prepare annual reports on late payments to vendors, with particular attention to those providing services to Hawaii's most vulnerable populations. We suspect this requirement might tighten up compliance and alleviate financial stress on our vendors.

- 4. Medicare and Palliative Care.** In a previous legislative briefing on Medicare, it was noted that various services already covered by our Kupuna Care programs could be paid via Medicare dollars. We think this deserves serious exploration, with particular attention to amending our laws to include palliative care. Palliative care, which has a broad definition, should be specifically identified in our law to ensure all providers recognize its importance.
- 5. Defining Priority Caregiver Profiles.** The Kupuna Caregiver program continues to seek a clearer definition of its purpose and funding allocations. Kokua Council notes that program's purpose is NOT to add funds that overlap with Kupuna Care programs, but rather to focus on working caregivers, and to allow them to continue to stay in the workforce. If agencies set priorities based on the senior receiving the care, this amounts to a more bureaucratic set of hoops to jump through that you can avoid by just putting more funds into traditional Kupuna Care.

With limited funds, we suggest consideration of priority criteria for Caregivers, that would include but not be limited to the likelihood that the caregiver would NOT be looking at retirement in the next three years, the severity of the needs of the senior involved that would tend to drive the caregiver into retirement in any case – such as severe dementia that would require nearly 24 hour attention by the caregiver. In other words: Would a caregiver in her late-sixties (who might retire soon anyway) dealing with a mother with dementia be likely to change her decisions based on our program? On the other hand: Would a caregiver in her mid-fifties with a dad who needs day care and occasional hot meals perhaps be more likely to delay retirement?

- 6. Covering Early Onset Dementia.** In previous years, the legislature was able to expand the required list of benefits covered by Prepaid Health. We did this by amending the insurance laws – for mammograms, well baby checkups, etc. At this time, it appears that early onset dementia may not be recognized and covered as commonly as forms of dementia that has progressed to greater severity. We understand that there is discussion of this issue at the federal level. However, Hawaii does not need to wait. We can be more proactive. Coverage of this may also alleviate the financial burden on other programs.

Thank you for seriously considering these recommendations.

*Kokua Council is one of Hawaii's oldest Senior Advocacy Group. Kokua Council advocates, informs, and educates to improve laws, policies and practices impacting the well-being of seniors, their families and our community.*