

STAND. COM. REP. NO. |

Honolulu, Hawaii

OCT 29 2013

RE: S.B. No. 1

Honorable Donna Mercado Kim
President of the Senate
Twenty-Seventh State Legislature
Second Special Session of 2013
State of Hawaii

Madam:

Your Committee on Judiciary and Labor, to which was referred
S.B. No. 1, entitled:

"A BILL FOR AN ACT RELATING TO EQUAL RIGHTS,"

begs leave to report as follows:

The purpose and intent of this measure is to recognize
marriages between individuals of the same gender in Hawaii, apply
state marriage laws equally to same-gender couples and opposite-
gender couples, and, in doing so, recognize and protect religious
freedom. Specifically, this measure:

- (1) Ensures the continuity of rights, benefits, protections,
and responsibilities of couples in a civil union or
reciprocal beneficiary relationship who seek to marry
each other by:
 - (A) Allowing a couple to apply for a marriage license
and marry each other without first terminating the
couple's civil union or reciprocal beneficiary
relationship if the couple is otherwise eligible to
marry under state law;
 - (B) Establishing that a couple's civil union or
reciprocal beneficiary relationship shall continue
uninterrupted until the solemnization of the
couple's marriage, which automatically terminates
the couple's civil union or reciprocal beneficiary
relationship;



- (C) Clarifying that the act of seeking a marriage license does not diminish any of the rights, benefits, protections, and responsibilities that existed under a couple's previous status as civil union partners or reciprocal beneficiaries;
 - (D) Clarifying that any rights, benefits, protections, and responsibilities created under a couple's previous status as civil union partners or reciprocal beneficiaries shall be deemed to have accrued as of the first date these rights and benefits existed under the couple's civil union or reciprocal beneficiary relationship;
 - (E) Establishing that any rights, benefits, protections, and responsibilities created by the solemnization of a couple's marriage that were not included in the couple's reciprocal beneficiary relationship shall be recognized as of the date of the couple's marriage solemnization; and
 - (F) Applying the law that establishes, under certain conditions, that ownership as tenants by the entirety shall be continuous when a couple who holds property as tenants by the entirety enters into a different relationship with each other that also allows the couple to hold property as tenants by the entirety;
- (2) Establishes that any gender-specific terminology used to implement any rights, benefits, protections, and responsibilities of married couples under state law shall be construed in a gender-neutral manner;
 - (3) Requires that all parentage rights, benefits, protections, and responsibilities based on marriages be the same for all married spouses regardless of gender;
 - (4) Ensures that all marriages receive equal treatment by clarifying that any state law that refers to, adopts, or relies upon federal law shall apply to all marriages in this State as if federal law recognized these marriages in the same manner as state law;



- (5) Exempts an individual who is clergy or an officer of a religious denomination or society and authorized to solemnize marriages from liability for failing or refusing to solemnize any marriage for any reason;
- (6) Recognizes freedom of religion by:
 - (A) Exempting a religious organization from liability for refusing to make its facilities or grounds available for solemnization of any marriage celebration if the religious organization does not make its facilities or grounds available to the public for solemnization of any marriage celebration for a profit; and
 - (B) Specifying examples of the types of religious organization activities that do not constitute "for a profit";
- (7) Makes various conforming amendments to chapter 572, Hawaii Revised Statutes, to apply gender-specific terms in a gender-neutral manner;
- (8) Allows a married couple to submit a notarized affidavit to the Department of Health that attests to the fact that they are married if the person who solemnized the couple's marriage fails to report the couple's marriage ceremony to the Department;
- (9) Makes various conforming amendments to the civil union and reciprocal beneficiary laws to properly reflect the amendments made to the marriage laws;
- (10) Extends jurisdiction in this State for an action for annulment, divorce, or separation where neither party to the marriage meets the domicile or physical presence requirements if the marriage was solemnized in this State and both parties are domiciled in a jurisdiction that does not recognize their marriage; and
- (11) Authorizes the Department of Health to make any changes to its internal procedures or forms it deems necessary to implement this measure.



Prior to the hearing on this measure, your Committee posted a hearing notice with a copy of this measure attached providing a six-day advanced notice of the hearing, which is more than the required seventy-two-hour advanced notice pursuant to Senate Rule 21. The public was provided an opportunity to submit testimony online, via electronic mail or facsimile, or in-person up to twenty-four hours prior to the start of the hearing. The testimony listed in this Committee Report represents the written testimony received by your Committee as of Sunday, October 27, 2013, at 10:30 a.m.

Your Committee received written testimony in support of this measure from United States Senator Brian Schatz; United States Representative Colleen Hanabusa; Governor; Department of the Attorney General; Department of Taxation; Department of Human Resources Development; Hawaii Civil Rights Commission; Hawaii State Commission on the Status of Women; American Civil Liberties Union of Hawaii; League of Women Voters of Hawaii; Life Foundation; Planned Parenthood of Hawaii; Democratic Party of Hawaii; Democratic Party of Hawaii, Oahu County; Hawaii United for Marriage; Honpa Hongwanji Mission of Hawaii; International Sisterhood of Witches and Amalgamated Magicks; Pacific Alliance to Stop Slavery; IMUAlliance; Honolulu Pride; National Association of Social Workers, Hawaii Chapter; First Unitarian Church of Honolulu; Gay, Lesbian, Bisexual, and Transgender Caucus of the Democratic Party of Hawaii; Equality Hawaii; Progressive Democrats of Hawaii; Young Democrats at the University of Hawaii at Manoa; Pride Alliance; United Public Workers, AFSCME, Local 646, AFL-CIO; Labor Caucus of the Democratic Party of Hawaii; Episcopal Diocese of Hawaii; Screen Actors Guild American and Federation of Television and Radio Artists Hawaii Local; Hawaii Peace and Justice; Musicians' Association of Hawaii; Pride at Work Hawaii; Women's Caucus of the Democratic Party of Hawaii; Young Democrats of Hawaii; Americans for Democratic Action, Hawaii Chapter; Interfaith Alliance Hawaii; Unity Church of Hawaii; UNITE HERE Local 5; and over one thousand three hundred individuals.

Your Committee received written testimony in opposition to this measure from the Hawaii Catholic Conference, Alter Society of Our Lady of Sorrows Church, New Hope Leeward, Cedar Assembly of God, Hawaii Family Advocates, Poamoho Bible Church, Inspire Church, Windward Missionary Church, North Shore Farms, Our Lady of Sorrow Wahiawa, Jesus Christ Gathering His People Ministry, Prayer Center of the Pacific, Pro-Family Hawaii, It's More Than Just Numbers, and over two thousand individuals.



Your Committee received written comments on this measure from the Department of Health and over forty individuals.

The issue of marriage equality has been before the people of Hawaii for over twenty years. The recent decision of the United States Supreme Court in United States v. Windsor, 133 S. Ct. 2675 (2013), serves as an impetus to recognize same-gender marriage in Hawaii and your Committee finds that it is appropriate to recommend to the full Senate the passage of marriage equality in Hawaii. This measure applies state marriage laws equally to same-gender couples and opposite-gender couples while balancing the interests of the members of the clergy to decide whether to solemnize any marriage according to the tenets of their faith, as enshrined in the First Amendment of the United States Constitution, and preservation of the core principles of Hawaii's longstanding public accommodations law.

HISTORY OF MARRIAGE EQUALITY IN HAWAII

Given the significance of this issue and the volume of testimony received, your Committee believes that Hawaii's long history of debate on this issue merits further discussion.

In 1991, three same-gender couples sued the Director of Health. This lawsuit ultimately became a catalyst for much of the national debate on same-gender marriage. In Baehr v. Lewin, 74 Haw. 530, 852 P.2d 44, (1993), the Hawaii Supreme Court issued a plurality opinion holding that by restricting marriage to a male and a female, Hawaii's marriage statute created a gender-based classification that was presumed to be unconstitutional.

Under Act 217, Session Laws of Hawaii 1994, the Legislature amended the marriage statutes under chapter 572, Hawaii Revised Statutes, to clarify that marriage is limited to opposite-gender couples. Act 217 was the first of several legislative actions taken in response to Baehr, including the enactment of the reciprocal beneficiary relationships law in 1997 that provides limited benefits to same-gender couples. These legislative actions culminated in 1998 with the passage and voter ratification of an amendment to the Hawaii Constitution that empowered the Legislature to reserve marriage to opposite-gender couples.



H.B. No. 117 (Regular Session of 1997) proposed an amendment to the Hawaii State Constitution. Section 1 of H.B. No. 117 states:

"[t]he legislature further finds that the question of whether or not the State should issue marriage licenses to couples of the same sex is a fundamental policy issue to be decided by the elected representatives of the people. This constitutional measure is thus designed to confirm that the legislature has the power to reserve marriage to opposite-sex couples and to ensure that the legislature will remain open to the petitions of those who seek a change in the marriage laws, and that such petitioners can be considered on an equal basis with those who oppose a change in our current marriage statutes." Emphasis added.

Therefore, Article I, Section 23, of the Hawaii State Constitution confers on the Legislature the power to allow same-gender couples to marry. Under Opinion No. 13-1, the Attorney General explains that the Legislature has the constitutional authority to enact marriage equality legislation. In discussing Article 1, Section 23, of the Hawaii State Constitution, the Attorney General states "[b]y its plain language, this provision does not require that marriages be limited to opposite-sex couples. Instead the section provides that the Legislature possesses the authority to limit marriages to opposite-sex couples by statute, should it choose to do so."

In 2009, the Legislature began the legislative process and deliberation to enact civil unions on introduced H.B. No. 444 (Regular Session of 2009). This measure proposed to extend the same rights, benefits, protections, and responsibilities of spouses in a marriage under state law to partners in a civil union. On April 29, 2010, the Legislature passed the measure, and the measure was enrolled to the Governor. However, the Governor vetoed the measure and the Legislature did not override the veto. Subsequently in 2011, the Legislature introduced and passed S.B. No. 232 (Regular Session of 2011) that was substantively similar to H.B. No. 444 (Regular Session of 2009). The Governor signed this measure into law in February 2011, making civil unions available to same-gender and opposite-gender couples in Hawaii starting on January 1, 2012.



MARRIAGE EQUALITY ON THE FEDERAL LEVEL

The Baehr case served as an impetus for a number of groups in Hawaii as well as across the nation to mobilize opposition to same-gender marriage. As a result, many states enacted legislation and constitutional amendments to define marriage as between one man and one woman. The federal Defense of Marriage Act (DOMA) functioned as a barrier to same-gender couples from qualifying for over one thousand federal rights, responsibilities, and protections that come with marriage.

On June 26, 2013, the United States Supreme Court held that Section 3 of DOMA was unconstitutional. Specifically, the Court held that as applied to same-gender couples in lawful marriages under state law, Section 3 "violate[d] basic due process and equal protection principles applicable to the Federal Government" through the Fifth Amendment. United States v. Windsor, 133 S. Ct. 2675, 2693 (2013). As a consequence, same-gender couples who are married in states that recognize same-gender marriage are now entitled to the 1,138 federal benefits. However, couples who are in a civil union partnership are not entitled to claim any of these federal benefits. This is the primary distinction between a civil union and a marriage as a result of the Windsor decision.

SAME-GENDER MARRIAGES IN HAWAII

During the hearing on this measure, your Committee engaged in lengthy question and answer exchanges as to whether a couple who is legally married in another state and resides in Hawaii is entitled to the 1,138 federal benefits that are afforded to opposite-gender married couples. Subsequent to the hearing on this measure, the Department of the Attorney General submitted a memorandum to your Committee discussing numerous federal benefits that may or may not be conferred to a same-gender couple residing in Hawaii, but legally married in another state. According to this memorandum, some but not all benefits would be available to a same-gender couple such as federal income tax, military spousal benefits, and federal employee benefits. However, there are numerous federal benefits for which the law remains unclear as to whether these benefits will be available to same-gender couples legally married in another state, including but not limited to the federal Family Medical Leave Act (FMLA), Temporary Assistance for Needy Families (TANF), Medicare, Medicaid, bankruptcy benefits, Free Application for Federal Student Aid (FAFSA), Social Security benefits, and veterans' benefits.



Your Committee finds that given the uncertainty with respect to the availability of certain federal benefits to same-gender couples, in the absence of marriage equality in this State, Hawaii same-gender couples who travel to another state to marry each other legally will face uncertainty with respect to estate, tax, and succession planning, wealth transfer, and inheritance benefits. Your Committee finds that requiring same-gender couples to travel to another state to legally marry is inequitable from a policy perspective.

SECOND SPECIAL SESSION OF 2013

Your Committee recognizes the opinions and arguments on both sides of this divisive issue as demonstrated by advocates and concerned entities and individuals over the last twenty years. These arguments include issues regarding civil rights, religion, equal protection, and education, and a primary question of how our society should function.

Your Committee notes that its members, legislators, and the public have been given nearly ten weeks to review and comment upon proposed versions of the bill, the first of which was released by the Governor on August 22, 2013. Subsequently, legislators have received and reviewed numerous comments and drafts of the measure in support of and opposition to same-gender marriage, and sought the input and assistance from various state and public entities. This measure represents a thoughtful culmination of these discussions.

EXEMPTION FOR RELIGIOUS ORGANIZATIONS

The issue that has generated the most public debate, media attention, comments, and testimony is the scope of the religious exemption in this measure.

Since the Governor released draft measures on August 22, 2013, and September 9, 2013, your Committee notes that there has been genuine confusion about the protections for clergy and religious organizations and their facilities. Your Committee is committed to ensuring religious liberty and freedom as protected under the federal and state constitutions and believes that religious protections can coexist with marriage equality. As such, the language under this measure amends the previously



released draft measures by the Governor pertaining to the religious organization exemption in the following ways:

- (1) Adds language to the purpose section to state that it is the intent of the Legislature to protect religious freedom;
- (2) Amends the language relating to the refusal to solemnize to include rabbis and clergy to protect all clergy; and
- (3) Amends the language relating to the exemption for religious organizations facilities to:
 - (A) Resolve questions regarding the terms "members", "use", and "profit";
 - (B) Establish that religious organizations are not required to make their facilities or grounds available for solemnization of any marriage celebration unless these facilities or grounds are made available to the public for a profit; and
 - (C) Specify the types of religious organization activities that do not constitute "for a profit".

In its testimony in support of S.B. No. 1, the Hawaii Civil Rights Commission raised two concerns regarding the exemption for religious organizations. First, the Commission testified that marriage equity legislation should not be a vehicle or excuse to weaken or diminish protections against discrimination under the State's public accommodations law.

Your Committee believes that a religious organization that solemnizes marriage celebrations and charges no more than a nominal fee, such as a small honorarium for an individual to officiate the ceremony, is engaged in a religious activity that is entitled to constitutional protection. However, a religious organization that places itself in the stream of commerce by opening its facilities or grounds to the general public for marriage celebrations for more than a nominal fee, such as for a fee that results in a profit for the religious organization that is above the religious organization's nominal costs, is subject to the public accommodations law and prohibited from discriminating on all protected classes including sexual orientation. This activity could be deemed as fundraising. However, your Committee



recognizes that a bright line does not exist between a religious activity and commercial activity and such determinations should be made on a case-by-case basis that takes into account all of the facts involved.

Second, the Commission also urged the clarification of the scope of the exemption language to narrow its focus and avoid claims of broad applicability that may impact the protections against discrimination in public accommodations pursuant to state law. Accordingly, the Commission stated in its testimony that the terms "religious organization" and "for a profit" should be defined in order to avoid misinterpretation.

Your Committee believes that these terms have common meanings and it is your Committee's intent that these terms in this measure be applied according to their common meaning. Your Committee also notes that state and federal case law and regulations align with these common meanings. Furthermore, with respect to the term "religious organization", your Committee requested the Commission to submit language that defines "religious organizations". Your Committee notes that the proposed definition that the Commission later submitted instead focused on the definition of "religious facilities". As such, your Committee believes that the common meaning for "religious organization" is sufficient.

Therefore, your Committee finds that this measure strikes the appropriate balance in protecting religious liberty while maintaining the underlying policies and considerations reflected in our longstanding public accommodations law.

FURTHER POINTS OF CLARIFICATION

During the hearing, a testifier raised a concern regarding the language that authorizes the Department of Health to make any changes to its internal procedures or forms it deems necessary to implement this measure. The testifier was concerned that this language would affect the health education programs of the Department. However, your Committee clarified that this language is directed to Department staff, specifically staff who deal with marriage licensing in accordance to the state marriage laws.

Additionally, a testifier was concerned that this measure would have an impact on the curriculum for the Department of Education schools. However, your Committee emphasized that this measure is not intended to change or add to the educational



curriculum in public schools and does not impact the Department of Education's authority to maintain its curriculum.

CONCLUSION

Hawaii's existing system, which denies gay and lesbian residents and visitors the dignity and equality of marriage, is not consistent with the Aloha spirit and the diversity that defines our State. The time has come to take this historic step in our unending journey toward equality, fairness, and justice.

As affirmed by the record of votes of the members of your Committee on Judiciary and Labor that is attached to this report, your Committee is in accord with the intent and purpose of S.B. No. 1, and recommends that it pass Second Reading and be placed on the calendar for Third Reading.

Respectfully submitted on
behalf of the members of the
Committee on Judiciary and
Labor,



Clayton Hee, Chair



