

# **EQUALITY OF RIGHTS Statutory Compliance**

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## FOREWORD

In 1977, the State House of Representatives adopted a resolution which requested the Hawaii State Commission on the Status of Women and the Legislative Reference Bureau to conduct a study and review of the Hawaii Revised Statutes to determine the compliance of statute law with the equality of rights amendment to the State Constitution enacted in 1972 and the proposed equal rights amendment to the federal constitution ratified by the Hawaii Legislature the same year. This report is the result of a two-year study conducted pursuant to the House Resolution. The initial steps of the study entailed identification of statutes which made reference to a classification or distinction on the basis of sex. Each such statute was then analyzed to determine if it either facially or in its application, in fact, had a disproportionately adverse effect on members of one sex. If it was concluded that the statute apparently discriminated on the basis of sex, research was conducted to determine whether the discrimination was constitutionally permissible. An analysis, based on the research, is presented in this report to assist the reader in determining if the identified sections require amendment.

The Bureau and the Commission particularly acknowledge the contributions of Christine Mukai who began this study and guided it through its initial stages prior to her unfortunate and untimely death. Appreciation is extended to Nelson Goo, Linda Woolcott, and William Baxa, who as summer law clerks, undertook the time consuming chore of identifying sections of the Hawaii Revised Statutes which appeared not to be in compliance with mandates of equal rights legislation. The contribution of Patricia Putman through her advice and as liaison with the Commission on the Status of Women is gratefully acknowledged.

This study will hopefully impact positively on the status of women and is currently being reviewed for appropriate legislation by the Commission.

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# Chapter 1

## INTRODUCTION

In 1972 the Hawaii State Legislature proposed the addition of Article I, Section 21,<sup>1</sup> Equality of Rights, to the State Constitution, which was ratified by the voters. At the same time, the legislature voted for Hawaii's ratification of the Equal Rights Amendment to the United States Constitution. Both of these amendments guarantee equality of rights under the law by prohibiting discrimination by the State on the basis of sex. The legislature is given power under Hawaii's amendment to enforce this principle through appropriate legislation. In order for a statute to be violative of the amendment it must be shown that discrimination is, in fact, on the basis of sex and not an underlying justifiable policy decision, or any other, even though discriminatory, valid criterion.

At its 1977 legislative session the state house of representatives adopted a resolution that the "Office of the Legislative Reference Bureau and the State Commission on the Status of Women be requested to conduct a review and study of the Hawaii Revised Statutes with a view towards securing statutory compliance with equality between the sexes guaranteed by the State Constitution and consistent with the proposed Equal Rights Amendment to the United States Constitution".<sup>2</sup> This is a report of the study conducted pursuant to that resolution.

For the purposes of this study, statutes were identified and determined to be discriminatory which:

- (1) Are facially discriminatory on the basis of sex;
- (2) Are facially neutral but in application have a disproportionately adverse effect on members of one sex; and
- (3) Use sex specific terms which reflect archaic attitudes or practices which discriminate on the basis of sex.

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Discussion of the identified statutes considers why they discriminate or under what circumstances they might result in impermissible sex discrimination. Recommendations are made in most cases for revisions which would eliminate the offending language and bring the statute into compliance with equal rights legislation.

## Chapter 2

### CLEARLY DISCRIMINATORY STATUTES

Several statutes use terms relating to a specific sex. Such usage can be reasonably interpreted to exclude application of the statute to the other sex,<sup>1</sup> since an altogether different term would have been used if there was legislative intent for the statute to apply equally to both sexes. For example, instead of using "young men" or "male inhabitants" the terms "young adults" or "inhabitants" could have been used. These instances are distinguishable from those using "he" or "him" instead of "he/she" or "him/her" for the purpose of avoiding cumbersome reading. Compliance with equality of rights appears to mandate revision of the following statutes which are facially discriminatory.

A. Police Departments. Specific duties. Sec. 52-37(5), HRS.

Statutes in chapter 52 starting with section 52-31 and following, establish the police departments of Hawaii, Kauai, and Maui counties and set forth the powers and duties thereof. Section 52-37(5) provides that in emergencies the chief of police or any of his duly authorized subordinates may command the aid of "male inhabitants" of the county. Use of the adjective "male" clearly excludes females. If there were an intent to include males and females, the term "inhabitant" would simply have been used as in section 52-67(2) which refers to the police powers in Honolulu county where power to command the aid of "inhabitants" is given. Police forces now consist of women and there appears to be no justification in excluding them from serving in times of emergency. Therefore, the language of section 52-37(5) appears to be in violation of the guaranty of equality of rights. Recommended revision is as follows:

Sec. 52-37 Specific duties. The chief of police or any [of his] duly authorized subordinates [thereunto duly authorized] shall:

\* \* \*

- (5) In an emergency requiring the same, command the aid of as many [male] inhabitants of the county as [he]

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may [think] be necessary in the execution of [his]  
police duties;

\* \* \*

### B. Militia; National Guard. Government employees. Sec. 121-3, HRS.

Statutes provide for the establishment of a state militia consisting of every able-bodied citizen of the United States of at least seventeen and less than forty-six years of age who is or has declared an intent to become a Hawaii resident. There is no provision that the militia be limited to only males or only females. Nevertheless, the statutes provide that in the case of a state of war or similar circumstance, the governor may call upon qualified "male" employees of the State and its political subdivisions. The apparent limitation of the governor's authority results in discrimination on account of sex. There are able-bodied female state employees and there are able-bodied female members of the military.<sup>2</sup> The limitation of the statute bears no rational relationship to any compelling state interest to limit the situation to males.<sup>3</sup> It is recommended that this section be revised as follows:

Sec. 121-3 Government employees. In case of a state of war, insurrection, rebellion, or of resistance to the execution of the laws of the United States, or of the State, proclaimed by the President or by the governor as appropriate, all [male] employees of the State and political subdivisions thereof who are not physically disabled and who are not members of the national guard, naval militia, or state guard shall, upon the order of the governor, report for duty with organizations designated by [him.] the governor.

### C. Hawaii State Guard. Authority; name. Sec. 122-1, HRS.

The Hawaii Revised Statutes provides for the creation of a military group titled Hawaii State Guard when any part of the national guard of Hawaii is in active federal service or upon the consent of Congress. The statutes provide that the forces shall be composed of commissioned or assigned officers and able-bodied "male" citizens of the State of Hawaii. Such language precludes females from becoming members of the Hawaii State Guard unless they are commissioned or assigned officers. There appears to be no justifiable rationale for this



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limitation since females are allowed to join the federal military without requiring that they first be commissioned or assigned officers. Women also serve in several state military organizations. The statute may be rewritten as follows:

Sec. 122-1 Authority; name. Whenever any part of the national guard of the State is in active federal service or when Congress consents thereto, the governor may organize and maintain within the State during this period, under such regulations as the secretary of the army of the United States may prescribe for discipline in training, such military forces as the governor may deem necessary to defend this State. The forces shall be composed of officers commissioned or assigned, and such able-bodied [male] citizens of the State as may volunteer for service, supplemented, if necessary, by [men] members of the unorganized militia enrolled by draft or otherwise as provided by law. The forces shall be additional to and distinct from the national guard and shall be known as the "Hawaii State Guard." These forces shall be uniformed.

- D. Public Lands. Continuation of rights under existing homestead leases, certificates of occupation, right of purchase leases, and cash freehold agreements. Sec. 171-99(e), HRS.

Certain lands in the State of Hawaii have been classified as "public lands". Generally, this term refers to land acquired or reserved by, or otherwise classified as belonging to, the State. The exact definitions and exceptions thereto are set out in detail in the statutes.<sup>4</sup> Under certain conditions the State allows persons to obtain limited leasehold or ownership rights in public lands. These rights are embodied in a "certificate of occupation" or a "homestead lease". These interests in public lands may pass by descent upon the death of the owner of the interest. The statutes set out twelve priorities for the line of descent by which these public land interests must pass. The fifth and sixth priorities are the ones which concern this study. Priority five gives the interest to the father only, when there are no surviving grandchildren. Priority six gives the interest to the mother if there is no surviving father. The father's rights are preferred over those of the mother and results in discrimination on the basis of sex.

The language of the statute evidences an intent to discriminate as can be seen by reading the other priorities of descent. Priority one states that the interest shall first descend to the "widow or widower". Priority seven gives the

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interest to the "brothers and sisters". Priority nine gives the interest to the "nephews and nieces". Nowhere else in the statute is one sex given preference over the other except in reference to parents by prioritizing the father's rights over the mother's. The mandatory preference given to members of one sex appears to be arbitrary legislation forbidden by equal rights concepts.<sup>5</sup> Provision of dissimilar treatment for men and women similarly situated is also contrary to the guarantees of equal protection.<sup>6</sup>

The current effect of the descent priorities of section 171-99(e) are also subject to question when the Hawaii Uniform Probate Code provisions concerning intestate succession are considered.<sup>7</sup> Section 171-99(e) and the Probate Code provisions are similar in that they provide for passing of a decedent's property outside of a will. Unlike section 171-99(e), however, the Probate Code makes no preference based on sex to persons of equal relation to the decedent. Prior to the adoption of the Probate Code provisions<sup>8</sup> on intestacy, the Hawaii Revised Statutes on descent of property provided that all of a decedent's property passed under the rules of intestate succession with the exception of public lands held under existing certificates of occupation or lease which would pass pursuant to section 171-99(e).<sup>9</sup> With the adoption of the Probate Code, the exception was repealed,<sup>10</sup> as to decedents dying after June 30, 1977. It appears unclear, therefore, whether the repeal means that the legislature intended that the intestate succession provisions of the Probate Code currently control the descent of public lands or that public lands remain subject to the control of section 171-99(e) outside of the Probate Code.

Because the proper effect of section 171-99(e) is unclear, this report offers two alternative suggestions for revisions, both of which comply with the mandates of equal rights:

Sec. 171-99 Continuation of rights under existing homestead leases, certificates of occupation, right of purchase leases and cash freehold agreements.

\* \* \*

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(e) Interests, descent; certificate of occupation or homestead lease. In case of the death of any occupier or lessee under an existing certificate of occupation or existing homestead lease, all the interest of the occupier or lessee, any conveyance, devise, or bequest to the contrary notwithstanding, in land held by the decedent by virtue of such certificate of occupation or homestead lease shall [vest in the relations of the decedent as follows:

- (1) In the widow or widower;
- (2) If there is no widow or widower, then in the children;
- (3) If there are no children, then in the widows or widowers of the children;
- (4) If there are no such widows or widowers, then in the grandchildren;
- (5) If there are no grandchildren, then in the father;
- (6) If there is no father, then in the mother;
- (7) If there is no mother, then in the brothers and sisters;
- (8) If there are no brothers and sisters, then in the widows or widowers of the brothers and sisters;
- (9) If there are no such widows or widowers, then in the nephews and nieces;
- (10) If there are no nephews or nieces, then in the widows or widowers of the nephews and nieces;
- (11) If there are no such widows or widowers, then in the grandchildren of the brothers and sisters;
- (12) If there are no grandchildren of any brother or sister, then in the State.]

vest and pass in accordance with the line of succession set forth in sections 560:2-102 and 560:2-103.

All the successors, except the State, shall be subject to the performance of the unperformed conditions of the certificate of occupation, or the homestead lease, in like manner as the decedent would have been subject to the performance if [he] the decedent had continued alive; provided[, ] that if a widow or widower in whom the interest shall have vested, shall thereafter marry again and de cease leaving a widower or widow and a child or children of the first marriage surviving, the interest of the deceased shall vest in such child or children; and provided further[, ] that in case two or more persons succeed together to the interest of any occupier or lessee,

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according to the foregoing provisions, they shall hold the same by joint tenancy so long as two or more shall survive, but upon the death of the last survivor, the estate shall descend as provided above.

The provisions of this subsection shall not apply to matters relating to persons who died, and rights accrued prior to July 1, 1977.

OR

Sec. 171-99 Continuation of rights under existing homestead leases, certificates of occupation, right of purchase leases and cash freehold agreements.

\* \* \*

(e) Interests, descent; certificate of occupation or homestead lease. In case of the death of any occupier or lessee under an existing certificate of occupation or existing homestead lease, all the interest of the occupier or lessee, any conveyance, devise, or bequest to the contrary notwithstanding, in land held by the decedent by virtue of such certificate of occupation or homestead lease shall vest in the relations of the decedent as follows:

\* \* \*

- (5) If there are no grandchildren, then in the [father;] parents;
- [(6) If there is no father, then in the mother;
- (7)] (6) If there [is] are no [mother,] parents, then in the brothers and sisters;
- [(8)] (7) If there are no brothers and sisters, then in the widows or widowers of the brothers and sisters;
- [(9)] (8) If there are no such widows or widowers, then in the nephews and nieces;
- [(10)] (9) If there no nephews or nieces, then in the widows or widowers of the nephews and nieces;
- [(11)] (10) If there are no such widows or widowers, then in the grandchildren of the brothers and sisters;
- [(12)] (11) If there are no grandchildren of any brother or sister, then in the State.

\* \* \*

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- E. Forest Reservations, Water Development, Zoning. Police powers. Sec. 183-3(a)(1), HRS.

Statutes were written to reflect the State of Hawaii's interest in preservation of its forest resources. To further such preservation the board of land and natural resources of the State is given statutory power to appoint a state forester to supervise matters relating to forestry. The requirements for the position of state forester are training and education in forestry and "if such a man is available, one who has had practical training and experience in connection with forestry in a tropical country;...." (Our emphasis). Interpretation of the statute necessarily results in the conclusion that the position is available only to a man. This precludes qualified women from filling the position.<sup>11</sup> This limitation appears contrary to the State's equality of rights statute and needs to be amended. A suggested amendment is as follows:

Sec. 183-3 Police powers. (a) The board of land and natural resources shall:

- (1) Appoint a superintendent of forestry, to be known as the state forester, who shall have charge, direction, and control (subject to the direction and control of the board) of all matters relating to forestry, mentioned in or coming within the scope of chapters 183 to 185 and 187 to 192, and such other matters as the board may from time to time direct. The state forester shall be a trained and educated forester, who shall have made the subject of forestry a special study, and if such a [man] person is available, one who has had practical training and experience in connection with forestry in a tropical country;

\* \* \*

- F. The Hawaii Insurance Law. Power to contract. Sec. 431-412(c), HRS.

The sale and purchase of insurance is regulated by statute in Hawaii, including power to make contracts related to insurance of minors. The section with which this study is concerned is life or disability insurance on the life of the minor with the premiums on the policies paid by a person other than the minor. In such circumstances, unless the policy provisions dictate otherwise,

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the power to contract upon that insurance policy such as assignments, surrenders, borrowing against, is given to the father. The mother is given this power only if the father is deceased or they are divorced and the mother has been awarded custody of the minor. This preference given to the father over the mother does not appear justified by any compelling state interest and appears discriminatory on the basis of sex. The statute should be amended to give either or both parents equal power to contract upon the minor's policy. Suggested language revision follows:

Sec. 431-412 Power to contract.

\* \* \*

(c) Where any form of life or disability insurance is issued at any time upon the life or body of a minor, unless the policy shall otherwise provide, or unless all of the premiums on the policy shall be paid by the minor, then until such minor shall have reached the age of eighteen years, [the father] either or both parents of the minor, or in the event of the [death of the father or the] divorce of the parents and the custody of the minor being awarded to [the mother,] one parent, then [the mother] that custodial parent of the minor shall be authorized to surrender, make loans upon or assign such insurance and to give a valid discharge for any benefit accruing or for money payable under the contract, and to exercise any of the rights or privileges reserved to the insured in and by any such policy of insurance without the order or intervention of any court, or the appointment of a legal guardian, and no insurer shall have any responsibility for or be required to see to the application of the proceeds paid in accordance herewith.

\* \* \*

G. Conservation Employment Programs. Corps of civilian workers; forestry conservation program. Sec. 193-1, HRS.

In addition to the State's interest in preserving its natural forest resources, it has an interest in keeping the unemployment figure low, as is reflected in the statutory creation of the corps of civilian workers. This program provides for employment in forest conservation upon the State's unemployment rate reaching a level more particularly set out in section 193-1, HRS. The statute authorizes the department of land and natural resources to hire "men" from the islands to do the conservation work. The limitation of the

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employment program to "men" appears to be contrary to the State's guarantee that no person will be denied equal rights on account of the person's sex. It is, therefore, recommended that section 193-1 be amended as follows:

Sec. 193-1 Corps of civilian workers; forestry conservation program. There is established a corps of civilian workers to engage in a special program of forestry conservation whenever the level of unemployment in an island of the State reaches six per cent of the total labor force of the island, and remains at that level or higher for a period of three continuous months, as certified by the state department of labor and industrial relations. The program shall be administered by the department of land and natural resources. The department, upon activation of the program, shall hire [men] persons from the islands in which such unemployment exists to do conservation work in the forests of the State. The program shall be terminated when the level of unemployment remains below four per cent for a period of three continuous months, but shall not terminate sooner than one year after its inception.

The provisions of chapters 76 to 80, 85, and 88, except the requirements for loyalty oath as contained in section 85-32, shall not apply to persons employed under this part.

### H. Conservation Employment Programs. Youth conservation corps. Authorization. Sec. 193-11, HRS.

This section authorizes the governor to take advantage of federal laws, existing or to be enacted, related to employment of youths in areas of conservation. As an example of such a federal law, the Hawaii statute quotes proposed federal bill H.R. 5131 of the First Session of the Eighty-Eighth Congress (1963) which authorizes employment of "young men" in areas of conservation. H.R. 5131 was never enacted. In 1970, however, a pilot federal program for a Youth Conservation Corps<sup>12</sup> was enacted which stated that the corps "shall consist of young men and women". The Act has always, and in its present form, continues to provide for equal employment opportunity for "both sexes".<sup>13</sup> The language limiting employment to "young men" was never a part of the federal statutory language. As presently written, the Hawaii statute might appear to limit participation in such programs to young men since it quotes from a proposed bill using the language of limitation and refers to laws of "similar purport". In application, however, there is no discrimination practiced in employing youth for the conservation corps.<sup>14</sup> It is suggested, therefore,

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this section be revised to bring it into compliance with the actual federal legislation upon which the statute relies and to eliminate the reference to "young men". A suggested revision follows:

Sec. 193-11 Authorization. The governor is authorized to avail the State of the benefits of any law or laws of the United States, now existing or to be enacted, [such as Title I, entitled Youth Conservation Corps, of the law proposed for enactment by H.R. 5131 of the First Session of the Eighty-Eighth Congress, being a bill to "authorize the establishment of a Youth Conservation Corps to provide healthful outdoor training and employment for young men and to advance the conservation, development, and management of natural resources and recreational areas; and to authorize State and community youth employment programs", or any other law or laws of similar purport.] wherein America's youth representing all segments of society benefit by gainful employment in the healthful outdoor atmosphere of the national park system, the national forest system, and other public land and water areas of the United States and by their employment develop, enhance, and maintain the national resources of the United States.

It appears that neither section 193-1, discussed in "G" above nor section 193-11 are currently in use by the department of land and natural resources. Section 193-1 was utilized only once and did little to lower the unemployment rate due to insufficient funding by the State.<sup>15</sup> A youth conservation corps (YCC) currently functions through the department as a summer work-study program and is basically a federal program administered by the division of forestry of the department of land and natural resources. The program is not operated by the department under the authority of section 193-11. It is suggested, therefore, that as an alternative to the recommended amendments to these sections discussed above, that the legislature consider repeal of sections 193-1 through 193-13 relating to both programs and their implementation.

- I. Conservation Employment Programs. Youth employment program. Authorization. Sec. 193-21, HRS.

Section 193-21 refers to the creation of state and community youth employment programs with specific reference to Title II of H.R. 5131 (see discussion in paragraph H above). As in section 193-11, section 193-21 quotes from a federal bill which was never enacted. Contrary to the language quoted,



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however, proposed Title II, H.R. 5131, never limited the youth employment programs to young men, but specifically provided for enrollment in the programs to young men and women.<sup>16</sup> Title II was not limited to conservation programs, as was Title I, but extended to state and local welfare, educational, recreational, conservation, or other programs useful to the community. It is recommended, therefore, that section 193-21 be amended to delete specific reference to H.R. 5131. A suggested revision is as follows:

"Sec 193-21 Authorization. The governor is authorized to avail the State of the benefits of any law or laws of the United States, now existing or to be enacted, [such as Title II, entitled State and Community Youth Employment Program, of the law proposed for enactment by H.R. 5131 of the First Session of the Eighty-Eighth Congress, being a bill to "authorize the establishment of a Youth Conservation Corps to provide healthful outdoor training and employment for young men and to advance the conservation, development, and management of natural resources and recreational areas; and to authorize State and community youth employment programs", or any other law or laws of similar purport.] which will enable young persons to work for state, local, and private non-profit agencies in programs related to the public interest such as hospital, educational, or welfare activities as well as state conservation projects."

J. Community Property. Property subject to obligations. Sec. 510-8(h), HRS.

Current laws governing marital property in Hawaii follow the common law principle of separate property.<sup>17</sup> From 1945-1949, however, laws of community property existed in this State.<sup>18</sup> Chapter 510 is retained to govern vested interests in community property acquired or situated within the State.<sup>19</sup> Section 510-8 details property subject to the obligations of the community and limits the duty to support to the husband.

In 1978, section 573-7 requiring husbands to maintain, provide for, and support their wives, was amended to provide a reciprocal duty of support on both spouses to a marriage.<sup>20</sup> The purpose of the amendment was that the prior law did not appear to meet the constitutional standards of the equal rights amendment as, by imposing a duty on only the husband, it discriminated on the basis of sex.<sup>21</sup> It appears that the identical reasons for the amendment to section 573-7 requires amendment to section 510-8(h).

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It is recommended, therefore, that in order to comply with the mandate of the equal rights amendment, section 510-8(h) be amended to read as follows:

(h) Nothing in this section shall affect or modify the obligation of [the husband] both spouses to support [his wife] one another and their family and to discharge all debts contracted by the [wife] other for necessities for [herself] themselves and their family during marriage; provided[, ] that if and whenever there is community property available for such purpose [the husband is] both spouses are entitled to resort to the community property rather than to [his] their respective separate property.

K. Community Property. Control of community property. Sec. 510-5, HRS.

Section 510-5 gives each spouse management and control over community property in their respective names, and the husband management and control over all other community property. Since "all other community property" would include property held jointly by spouses, and many spouses do hold property in such a manner, the current law does not treat the spouses equally. The statute appears to be facially discriminatory on the basis of sex and it is recommended that it be amended to provide for equal management and control of both spouses.

Inasmuch as the community property laws apply to marital property acquired during the limited time period from 1945-1949, it may be subject to question whether it is proper to amend a law which applies to something in the nature of a vested interest. One can look to California law for guidance.

Prior to January 1, 1975, California's law,<sup>22</sup> with certain exceptions, gave management and control of community property to the husband. The law was amended,<sup>23</sup> to be operative January 1, 1975, to give both spouses equal management and control of community property. The law, as amended, was made applicable to property acquired either before, on, or after the operative date of the amendment<sup>24</sup> with a proviso that no prior transaction was to be affected by the amended law.<sup>25</sup> It is recommended that a similar proviso be included in the amendment to section 510-5.

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It is also recommended that the language pertaining to the right of a wife to sue and be sued by her husband in her own name and without the interposition of a next friend be omitted. The provision appears to be surplus verbiage in light of the constitutional guarantees of due process of law and equal protection. A suggested revision is as follows:

Sec. 510-5 Control of community property. [The wife,] (a) Either spouse, as agent for the owners of the community property has the same right as though it were [her] that spouse's separate property to receive, manage, control, dispose of, and otherwise deal with all community property [which stands in her name. The husband, as agent for the owners of the community property has the same right as though it were his separate property to receive, manage, control, dispose of, and otherwise deal with all other community property and all community property which stands in his name]. The rights given to [the husband and to the wife] either spouse to manage, control, dispose of, and otherwise deal with community property, as provided in this section, shall be exercised in good faith for the benefit of the owners of the community property and their legal representatives, but no person shall be liable or accountable with respect to any conveyance, transfer, or other disposition of, or with respect to the management of, control of, or dealing with such community property, except the spouse by whom the same has been so conveyed, transferred, or otherwise disposed of, managed, controlled, or otherwise dealt with. In case of any violation by [the husband or the wife] either spouse of any duty owed to the other or their legal representatives, the person aggrieved and the legal representatives of such person are entitled to appropriate relief[, and for such purpose the wife in her own name and without the interposition of a next friend, and her legal representatives, may - sue or be sued by her husband and his legal representatives].

(b) Nothing in subsection (a) shall be construed to alter or modify or to otherwise affect the legal effect of any act or transaction which occurred prior to the effective date of this subsection.

### L. Community Property. Chapter 510, HRS.

Chapter 510 is titled "Community Property" and all sections contained within that chapter deal with disposition or control of community property with the exception of section 510-1. Section 510-1 provides for the rebuttable presumption that all property whenever acquired, is the separate property of the person acquiring the property. The substance of this section was last amended in 1949.<sup>26</sup> That amendment repealed the prior section which provided

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that most property acquired during a marriage was community property. When the history of this section is considered it is understandable why it is contained in the chapter on community property. Nevertheless, since the State of Hawaii now operates on a separate property system, it is recommended that section 510-1 be transferred from chapter 510 and placed in a chapter on the rights of married persons. It is suggested that chapter 572 titled "Marriage" is the appropriate place for section 510-1. A more detailed discussion of the recommended change is contained in the discussion on "married women" in chapter 4 of this report.

### M. Uniform Desertion and Nonsupport Act (Modified). Chapter 575, HRS.

Chapter 575, the Uniform Desertion and Nonsupport Act (Modified), provides, in relevant part, that the absence of a husband from his wife for a continuous period of six months or longer is prima facie evidence of desertion and neglect. The chapter provides a remedy for obtaining funds from the deserting party for the support of the spouse.

Prior to 1978, a husband was obligated under section 573-7 to maintain, provide for, and support his wife during marriage. In 1978,<sup>27</sup> the legislature amended this section to place a reciprocal duty of maintenance, provision, and support on both spouses during marriage. It appears that a provision to establish a finding of neglect or desertion on the part of either spouse is necessary to make the chapter consistent with the obligation imposed on both spouses by section 573-7 and in order to ensure equality of rights and remedies under the law. Such an amendment would be similar to changes made in California law. Prior to 1974, in California, if a husband neglected to make adequate provision for support of his wife, a third party could provide such support and recover the reasonable value thereof from the husband.<sup>28</sup> California amended its laws to provide for reciprocal support<sup>29</sup> of spouses and, thereafter, repealed the statute which provided for third party recovery of support from the husband. In accord with such a line of thinking a recommended revision of chapter 575 is as follows:

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Sec. 575-2 Prima facie evidence; sequestration of money [belonging to husband or parent] for support of [wife] spouse or children. [The absence for a continuous period of six months or over of a husband from his wife or of any parent from his or her child or children under the age of sixteen years without first making suitable provision for the support and maintenance of the wife or child or children, shall be deemed prima facie evidence of desertion and wilful neglect on the part of the husband or parent. In such case, and where it is known that some person has money belonging to the husband or parent,] The absence for a continuous period of six months or more of any person from one's spouse or child or children under the age of sixteen without first making suitable provision for the support and maintenance of such spouse, child, or children shall be prima facie evidence of desertion and wilful neglect. In such case, and where it is known that such person has money in the possession of a third party, the complaint, made under section 575-3, shall allege such continuous absence on the part of [the husband or parent] such person and the name of the [person] third party holding the money. The court in which the complaint is filed shall issue an order to the [person] third party holding the money to appear before it to show cause why the money shall not be applied to the maintenance and support of the [wife] spouse or the child or children.

If, after a hearing for that purpose, the court is satisfied that there has been a continuous absence on the part of the [husband or parent] person as aforesaid and a failure on the part of the [husband or parent] person to make suitable provision for maintenance and support, and that there is money in the hands of the [person] third party cited before it belonging to the [husband or parent,] person, it shall make an order upon such [person] third party to apply the money in such sum or sums in such manner and at such time or times as it may determine for the support and maintenance of the [wife] spouse or the child or children; provided[, ] that no such order to so apply the money shall be made unless a copy of the order to show cause is served upon the [husband or parent] person prior to the hearing; provided[, ] further[, ] that if the [husband or parent] person cannot be found, the order to show cause shall be published in such newspaper of general circulation and for such time as shall by the order of the court be designated.

Sec. 575-3 Complaint. Proceedings under this chapter may be instituted upon complaint made under oath or affirmation by the [wife] spouse or child or children, or either of them, or by any other person or persons, or organization, against any person guilty of either of the above named offenses.

Sec. 575-4 Evidence; marriage, paternity, etc. No other or greater evidence shall be required to prove the marriage of the [husband and wife,] spouses, or that the defendant is the [father or mother] parent of the child or children, than is required to prove such facts in a civil action. In no prosecution under this chapter shall any statute or rule of law prohibiting the disclosure of

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confidential communications between [husband and wife] spouses apply, and both [husband and wife] spouses shall be competent and compellable witnesses to testify against each other to any and all relevant matters, including the fact of such marriage and the parentage of such child or children; provided that neither spouse shall be compelled to give self-incriminating evidence [incriminating himself or herself]. Proof of the desertion of the [wife,] spouse, child, or children in destitute or necessitous circumstances, or of neglect or refusal to provide for the support and maintenance of the [wife,] spouse, child, or children, shall be prima facie evidence that the desertion, neglect, or refusal is wilful.

N. Names. Legitimate children. Sec. 574-2, HRS.

Section 574-2 requires all children born in wedlock to take their father's name as a surname. The application of the statute is modified by an unofficial opinion of the attorney general<sup>30</sup> which permits the registration of a surname which is a hyphenated combination of the surnames of both legal parents. Neither the statute nor the opinion of the attorney general permits registration in the mother's surname alone. Unless there is a compelling state interest for the use of such a facially discriminatory statute, it appears to be in violation of the equal rights amendment to the state constitution.

A recent Hawaii case, Jech, et al. v. Burch, et al.,<sup>31</sup> challenged section 574-2 on the grounds that it was unconstitutional because it deprived plaintiffs of their constitutional rights. The plaintiffs, Alena Jech and Adolf Befurt, husband and wife, wanted to give their child the surname of Jebef, a combination of both parents' names. The state department of health refused to register the name alleging that it was not permitted by the law. The State argued that it had a compelling interest for upholding the statute in order to properly trace relationships for the purpose of determining devolution of property and title to land. Judge Samuel P. King, United States District Court for the District of Hawaii, stated the reason was "ludicrous",<sup>32</sup> found no reasonable relation between the purpose and the statute, and declared that plaintiffs had a constitutional right guaranteed by the Fourteenth Amendment to the United States Constitution to give their child any name they wished. He pointed out that the registrar of births did not make clear why there could not be a cross-reference from a given surname to the father's surname if

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administrative convenience dictated the continuation of a male-oriented indexing system. The judge also pointed out the illogicality of the mandate of registration in father's surnames in light of the relatively simple name-change law.<sup>33</sup>

Although the plaintiffs in Jech did not challenge the case on the basis of discrimination on account of sex, it can be assumed that if such a challenge were made, the State would set forth the identical interest in enforcing such a statute inasmuch as the purpose behind a statute is determined at the time of its enactment or reaffirmation and should not change depending on why it is being challenged. A statute which permits registration of legitimate children's names in only the name of the father or a hyphenated combination of the father and mother appears to be discriminatory against mothers and, thus, against females. Because the State's interest in upholding section 574-2 has been declared not to be overriding, it is recommended that the statute should not be permitted to stand as presently written and that it be amended to conform with the Jech decision and the dictates of the equal rights amendment.

It should also be noted that the second sentence of this section provides that otherwise legitimated children may have either their father's or mother's name. While this provision is not discriminatory on account of sex, it appears the rationale behind the Jech decision is applicable. It is suggested, therefore, that the legislature consider an amendment to the entire section to conform with Judge King's conclusions in Jech. A recommended revision as follows:

Sec. 574-2 Legitimate children. All children whether born in wedlock or legitimated as provided in section 338-21 shall have [their father's name as] a family name[.] chosen by the legal parents. They shall, besides, have a given name. [All children legitimated, as provided in section 338-21, shall have either their father's name or their mother's name as a family name. They shall, besides, have a given name.]

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- O. Children. Female dancing partners, male patrons, age limit. Sec. 577-22, HRS.

Section 577-22 makes it unlawful for unmarried minors to patronize dance halls where females dance with male patrons for remuneration or compensation. This statute appears to be discriminatory on its face as it does not make it unlawful for unmarried minors to frequent dance halls where males are dancers. Application of the statute, therefore, could result in male dancers being able to profit from the business of minors, while this same opportunity would not be afforded to females. Since the purpose of the statute is to protect both male and female children from a potentially injurious atmosphere,<sup>34</sup> it is logical to assume that children should not be permitted to go into such establishments regardless of the sex of the dancers or their patrons. Although it does not appear that there is a current problem with male dancers in dance halls,<sup>35</sup> there also appears to be no valid reason why this statute should not be amended at this time to prevent a potential problem as well as to bring it into conformity with the equal rights amendment. The situation may be analogous to prostitution discussed in chapter 3. The language used in the anti-prostitution statutes are neutral in gender and applicable to both female and male prostitutes.

A recommended revision of section 577-22 is as follows:

Sec. 577-22 [Female dancing] Dancing partners, [male] patrons, age limit. It shall be unlawful for any unmarried minor to frequent, be, or remain upon, in, or around the premises of any dance hall where [female] persons receive any remuneration or compensation, either directly or indirectly, for acting as dancing partners to the [male] patrons of the dance hall. The acceptance or receipt of any of the proceeds of the sale of any article to any [male] patron of the dance hall by any such [female] person under eighteen, or by anyone acting on [her] such person's behalf, constitutes the receiving [or] of remuneration or compensation within the meaning of this section. Any minor violating this section is subject to adjudication under section 571-11(1).



P. Marriage. Requisites of valid marriage contract. Annulment. Grounds for annulment. Sec. 572-1(4). Sec. 580-21(5), HRS.

Section 572-1(4) lists as one of the requisites of a valid marriage, that "[n]either of the parties is impotent or physically incapable of entering into the marriage state". Section 580-21(5) enumerates as a grounds for annulment that "one of the parties was impotent or physically incapable of entering into the marriage state". These statutes, on their faces, make a discrimination against men since, by definition, women cannot be impotent.<sup>36</sup> In certain circumstances it is permissible to treat males and females differently based on a classification related to characteristics exclusive to one sex. For example, the United States Supreme Court in Geduldig v. Aiello<sup>37</sup> and General Electric v. Gilbert, et al.<sup>38</sup> ruled that it is constitutionally permissible for employers to exclude pregnancy from coverage under employee disability insurance plans despite the fact that only females can become pregnant. The court stated that employers were not denying pregnant women a benefit otherwise provided to all employees, but simply excluding pregnancy from coverage. The court in Geduldig stated that the state had an interest in not being required to sacrifice the self-supporting nature of the disability insurance program, reduce the benefits payable for covered disabilities, or increase the maximum employee contribution in order to provide protection for an additional disability. In Gilbert the court found that absent a showing that distinctions based on pregnancy are pretexts designed for the purpose of invidious discrimination, lawmakers are free to include or exclude pregnancy from coverage on any reasonable basis. It needs to be determined, therefore, whether the restrictions of sections 572-1(4) and 580-21(5) reflect a compelling state interest in prohibiting impotent men from marrying, or whether there is a reasonable basis for the restriction.

Although it is not possible to determine the purpose of such a restriction since the legislative intent behind the restriction is unknown,<sup>39</sup> it is not illogical to assume two possibilities. Inasmuch as an impotent male is unable to either consummate a marriage by sexual intercourse or father children, the State's interest may lie in these areas. If the State's policy is to encourage sexual intercourse and the bearing of children in a marriage, it appears that the equal rights doctrine mandates that females bear a similar restriction on their

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rights to marry. The validity of either purpose, however, appears to be, at best, questionable. Requiring that sexual intercourse is necessary to a valid marriage appears to be a value judgment which fails to take into account portions of the population which may be physically handicapped, elderly, or have temporary physical limitations, but who are otherwise perfectly capable of entering into a marital relationship. It may also be that some persons prefer means of expressing physical affection other than by sexual intercourse. Mandating the ability of the partners to have sexual intercourse in marriage might be a violation of the right to privacy guaranteed by the state constitution.<sup>40</sup> It seems questionable that the State should have an interest in the sexual performance of spouses as a requisite to marriage when it has no interest in the sexual conduct between consenting adults when performed in private.<sup>41</sup> The Penal Code, for example, reflects a policy that the government should only have an interest in a person's sexual behavior if it involves forcible compulsion, imposition on a youth or other person incapable of giving consent, or offensive conduct.<sup>42</sup> Impotence hardly seems to fall within any of these categories.

The other possible purpose of the restriction on impotency as being insurance that one may have children may also be invalid. The decision whether or not to have children is a fundamental right of privacy.<sup>43</sup> There appears to be a trend for many couples not to have children which may be a result of women's movement away from traditional values or possibly inflation necessitating both spouses to work with little or no time or money for raising a family or a commitment to the concept of population control.

Aside from the fact that, arguably, the purposes of the statute may no longer be valid, in application, the restriction on impotency is neither enforced by the department of health in issuing marriage licenses, nor used by it to invalidate marriages from their inception.<sup>44</sup> Considering the questionable constitutional validity of the impotency restriction, it is recommended that it be eliminated. The elimination would not appear to prevent spouses from suing for annulment on grounds that the other refused or was unable to engage in sexual intercourse or father children. Section 580-21 includes "fraud" as a ground for an annulment. Arguably, therefore, a spouse could bring an action alleging

that the spouse was deceived into believing sexual intercourse and children would be part of the marital relationship when, in fact, such was not the case.

Q. Discrimination in Real Property Transactions. Restrictive covenants and conditions, Sec. 515-6; Religious institutions, Sec. 515-8, HRS.

Section 515-6(b) prohibits any discrimination based on sex, race, color, religion, ancestry, or physical handicap in real property transactions. An express exclusion is made to permit religious institutions to discriminate on the basis of sex in limitations made on real property used for religious purposes. Section 515-8 permits religious institutions to base discriminations on sex in all real property transactions without limitation as to purpose. It may be subject to question whether or not such express statutory condonation of sex discrimination granted to religious institutions violates the equal rights amendment<sup>45</sup> to the state constitution.

The state constitution supports a principle of separation of church and state by providing that no law shall be enacted respecting an establishment of religion or prohibiting the free exercise thereof.<sup>46</sup> Such a provision has been interpreted by courts to mean that the freedom to believe is absolute, but the freedom to act depends on the needs of society and the rights of others.<sup>47</sup> Delicate balancing is required in circumstances where religious beliefs conflict with important societal interests and there is no assurance that individual rights will prevail.<sup>48</sup>

It is not clear what constitutes a sufficiently important societal interest. Some court decisions hold public interest supreme to religious freedom and some decide vice versa in what appear to be similar situations. For example, in a challenge to the applicability of the Fair Labor Standards Act<sup>49</sup> to religious institutions, courts have found that the Act did not inhibit the free exercise of religion by requiring the church to pay minimum wage and overtime pay to its employees who worked at preparing religious materials distributed in interstate commerce.<sup>50</sup> There has also been a determination that a state has an overriding interest as parens patrie to order medical treatment of a child in certain circumstances over the parents' objections which are based on their religious

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beliefs.<sup>51</sup> Many cases challenging zoning restrictions on use of property by religious institutions result in a finding that the State has an overriding interest in regulation.<sup>52</sup> Upholding the right of religious freedom, however, are decisions which find that the denial of unemployment compensation to a member of the Seventh-Day Adventists who was discharged for her refusal to work on the Sabbath (Saturday) violated her right to free exercise of religion;<sup>53</sup> and have upheld the right of Amish parents to practice their religious belief of not sending their children to school after the eighth grade contrary to legal requirements.<sup>54</sup> Although it seems that acts which are not acts of worship are not necessarily protected by the constitutional guarantee of freedom of religion,<sup>55</sup> identification of such acts does not appear to be without problems.

In addition to the problem of identifying acts which constitute the exercise of religious freedom, it needs to be determined whether or not there is a strong state policy to promote equality between the sexes which, in this case, would permit regulation of the activities of religious institutions to the extent of prohibiting a practice of sex discrimination in certain activities related to real property. Section 515-6(b) permits limitations on the basis of sex in the use of real property when the property is used for religious purposes (our emphasis). With this limitation persons discriminated against may likely be members of the particular religious institution which practices sex discrimination and may, therefore, have beliefs which are in accord with such discrimination. In such a situation, the State may have little or no interest in promoting sexual equality and because of the doctrine of separation of church and state, no amendment would be necessary. There may be, however, an instance of a female clergy who is prohibited by a church from residing in a residence used by other clergy and required to reside with the nuns in a place with poorer facilities than that offered male clergy and in a less convenient location. The legislature needs to determine whether there should be a state policy to prohibit such discrimination, and, if so, adopt appropriate legislation.

Section 515-8 does not limit permissible sex discrimination by religious institutions to transactions which are for religious purposes. It follows, therefore, that private citizens could be discriminated against on account of sex

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under this section. For example, in a sale of property from a church to a private citizen, under section 515-8, the church would be permitted to favor one sex such as affording to its members more liberal financing arrangements than to the members of the opposite sex, even when the transaction is totally unrelated to church purposes. In such situations, it seems difficult to justify why religious institutions should not be held to the same standard as secular institutions or private citizens. It is recommended that this section be amended to limit its application to religious purposes.

## Chapter 3

### DISCRIMINATION IN APPLICATION OF A STATUTE

Certain statutes are not facially discriminatory but may be unconstitutionally discriminatory because of historical facts or ongoing policies or practices affecting their application. Facially neutral statutes which have disproportionately adverse impacts on a class of persons, such as males, females, Blacks, or Whites, have been repeatedly challenged on the basis of violation of the equal protection clause to the United States Constitution.<sup>1</sup> Although there is no equal rights amendment to the federal constitution, the principles established in challenges to sex discrimination under the equal protection clause may be applicable to similar challenges to an equal rights amendment. In analyzing the arguably sex discriminatory Hawaii statutes in this chapter, the principles established in challenges under the equal protection clause are adopted. The reader should also consider whether different analyses or conclusions might be reached in Hawaii which has an equal rights amendment as well as an equal protection amendment.

A. Civil Service Law. Purpose of this chapter; statement of policy. Sec. 76-1(1), HRS.

The purpose of the Civil Service Law is to develop a personnel administration system based on principles of merit and scientific methods which will govern placement, movement, and separation of government employees. One of the merit principles established by the statutes is that there shall be equal opportunity for all "regardless of race, sex, age, religion, color, ancestry, or politics". A guarantee that a person will not be discriminated against on the basis of "marital status" is absent from this section. Such an exclusion could result in discrimination against women. As an example, some positions in government service may demand many hours of a person's time or require traveling. Given society's traditional female-homemaker/male-breadwinner roles, it will most likely be the female who suffers if marital status is allowed to be used to discriminate against applicants for jobs. Hiring personnel may make a presumption that a woman who is married or who has children would be unable

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to make a commitment to a demanding job or would be unable to travel away from home base for any extended period of time. There may also be an assumption made that a married woman without children will someday have children, resulting in a lessening of her commitment to her job. If an individual's personal commitments interfere with job performance to a degree unacceptable to the employer, the individual should not be maintained in that position. Since, however, some individuals are better equipped than others to handle conflicting commitments, there should be no discrimination at the hiring stage based on sex-role stereotyping. The basis for criticizing an employee's unsatisfactory performance should not be the fact that the person is married, but that the person cannot perform at an acceptable level. After all, there may be married women with several children who can perform adequately and there may be single men with no family commitments who fail to perform satisfactorily. There is a fine line of demarcation between discrimination based on the fact of marital status and discrimination based on circumstances resulting from a person's marriage.

It is recommended that "marital status" be included as a prohibited ground of discrimination in the civil service law. A suggested revision may read as follows:

Sec. 76-1 Purpose of this chapter; statement of policy. It is the purpose of this chapter to establish in the State and each of the counties a system of personnel administration based on merit principles and scientific methods governing the classification of positions and the employment, conduct, movement, and separation of public officers and employees. It is also the purpose of this chapter to build a career service in government which will attract, select, and retain the best of our citizens on merit, free from coercive political influences, with incentives in the form of genuine opportunities for promotions in the service, which will eliminate unnecessary and inefficient employees, and which will provide technically competent and loyal personnel to render impartial service to the public at all times, and to render such service according to the dictates of ethics and morality. In order to achieve these purposes it is the declared policy of the State that the personnel system hereby established be applied and administered in accordance with the following merit principles:

- (1) Equal opportunity for all regardless of race, sex, age, marital status, religion, color, ancestry, or politics. No person shall be discriminated against

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in any case because of any physical handicap, in examination, appointment, reinstatement, reemployment, promotion, transfer, demotion, or removal, with respect to any position the duties of which, in the opinion of the director of personnel services may be efficiently performed by a person with such a physical handicap; provided that the employment will not be hazardous to the appointee or endanger the health or safety of [his] the appointee's fellow employees or others.

\* \* \*

### B. Discriminations In Real Property. Discriminatory financial practices. Sec. 515-5, HRS.

Pursuant to section 515-5 applicants for financial assistance with respect to real property may not be discriminated against on the basis of "race, sex, color, religion, ancestry, or a physical handicap". This section of the Hawaii Revised Statutes does not prohibit discrimination based on "marital status". Protection against discrimination based on marital status is especially crucial to females who historically were subject to whatever credit rating was assigned to their husbands. The Hawaii Fair Credit Extension Act of 1975, Chapter 477E,<sup>2</sup> however, clearly prohibits any creditor from discriminating against any applicant on the basis of marital status, although it does not prohibit an inquiry as to marital status or a request for the signature of both spouses to a marriage in order to legalize transactions. The requirements of the fair credit law appear to be applicable to situations controlled by section 515-5. Therefore, it is recommended that section 515-5 be amended to make it consistent with chapter 477E, as follows:

Sec. 515-5 Discriminatory financial practices. It is a discriminatory practice for a person to whom application is made for financial assistance in connection with a real estate transaction or for the construction, rehabilitation, repair, maintenance, or improvement of real property, or a representative of such a person:

- (1) To discriminate against the applicant because of race, sex, marital status, color, religion, ancestry, or a physical handicap;



- (2) To use a form of application for financial assistance or to make or keep a record or inquiry in connection with applications for financial assistance which indicates, directly or indirectly, an intent to make a limitation, specification, or discrimination as to race, sex, marital status, color, religion, ancestry, or a physical handicap[.], except that practices permitted by section 477E-3(b) and (c) shall not be prohibited by this section.

C. The Hawaii Insurance Law. Ch. 431, HRS.

The sale of insurance in Hawaii is regulated by the Hawaii Insurance Law, chapter 431. Because of state regulation involved in the sale of insurance any unconstitutional discrimination on the basis of sex in this area is arguably sufficient state action to bring any such discrimination within the scope of the equality of rights doctrine.

Studies which have been done on discriminatory practices<sup>3</sup> by insurance companies against females pinpoint the problem areas as the setting of rates of life, health, and disability insurance, and the availability and extent of coverage of health and disability insurance. The Hawaii statutes were recently revised<sup>4</sup> to provide that the rates for life insurance for females may be calculated according to an age not more than six years younger than her actual age.<sup>5</sup> The earlier statute limited the calculation set-back period to three years, a period which had been subject to criticism as being discriminatory since women outlive men by more than three years.<sup>6</sup>

It is also claimed that disability insurance is not as easily available to females as it is to males,<sup>7</sup> that the scope of coverage is more limited in the case of females,<sup>8</sup> and that higher rates for disability coverage are charged to females than to males with identical risk factors.<sup>9</sup>

It is not within the scope of this project to conduct extensive research on the various insurers in Hawaii to determine to what extent, if any, their practices discriminate against females with respect to disability insurance. It is recommended that the insurance laws, especially those related to disability

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insurance, be reviewed by the appropriate agency and amended to mandate insurers to comply with the equal rights amendment to the Hawaii State Constitution.

✓ D. Public Lands. Covenants against discrimination. Sec. 171-64, HRS.

As discussed in chapter 2 of this report, the State allows qualified individuals to obtain limited leasehold or ownership rights in public lands. The board of land and natural resources is granted the authority to manage, administer, and exercise control over the public lands.<sup>10</sup> Section 171-64 provides that the board may not dispose of any public lands to any individual who practices discrimination based upon "race, creed, color, national origin, or a physical handicap" and that the board must include covenants against such discrimination in documents pertaining to the use of public lands.

Section 171-64, however, does not include a covenant against discrimination based upon sex and as presently written, therefore, the right to acquire an interest in public land could be denied by the department of land and natural resources to an individual on account of sex. Such discriminatory state action would be in violation of the state constitution's equal rights amendment. In addition to the guarantee of the equal rights amendment that an individual's rights under the law shall not be denied or abridged by the State on account of sex, individual rights are safeguarded by the Constitution's Bill of Rights<sup>11</sup> which prohibits denial of "equal protection of the laws" because of a person's "race, religion, sex or ancestry" applicable to states by virtue of the Fourteenth Amendment. The covenants against discrimination in section 171-64 appear to prohibit discrimination against an individual in all the areas recited in the Bill of Rights, specifically, race, creed (religion), color or national origin (ancestry), with the exception of "sex". It seems that by the very existence of the language of the constitution there was clearly an intent by the State to prohibit discrimination on account of sex. In actual practice, the department of land and natural resources does not allow a transfer of public lands to anyone who practices sex discrimination.<sup>12</sup> Therefore, to make section 171-64 consistent with the mandates of the state constitution and the actual practice of the department of land and natural resources, it is recommended that the section be revised as follows:

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Sec. 171-64 Covenants against discrimination. The board of land and natural resources shall provide in every patent, deed, lease, agreement, license, or permit that the use and enjoyment of the premises being granted shall not be in support of any policy which discriminates against anyone based upon race, creed, color, national origin, sex, or a physical handicap. The board shall not dispose of any public land to any person who practices discrimination based upon race, creed, color, national origin, sex, or a physical handicap. As used in this section "physical handicap" means a physical impairment which substantially limits one or more of a person's major life activities.

✓ E. Civil Service Law. Examinations, general character. Sec. 76-18, HRS.

The State of Hawaii, and its counties, as employers, fill many of their positions through competitive civil service examinations. It is the purpose of the civil service law to "establish...a system of personnel administration based on merit principles...governing the classification of positions and the employment, conduct, movement, and separation of public officers and employees".<sup>13</sup> One such principle is "[e]qual opportunity for all regardless of race, sex, age, religion, color, ancestry, or politics".<sup>14</sup> Seemingly contrary to the above principle, however, section 76-18, concerning the general character of civil service examinations, permits the director of personnel services to make limitations on the availability of an examination based on an applicant's "health, physical condition, age, sex, education, training, experience, habits, and character" (our emphasis) when it appears necessary and proper for the class for which the examination is to be given.

The federal Civil Rights Act of 1964,<sup>15</sup> applicable to state governments, declares it an unlawful employment practice for an employer to discriminate against any individual with respect to privileges of employment or to limit, segregate, or classify applicants for employment in any way which would deprive or tend to deprive an individual of employment opportunities because of sex. Court cases<sup>16</sup> indicate that with respect to employment practices, state and local laws cannot stand if they impede, burden, or frustrate purposes of the employment provisions of the Civil Rights Act.

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An exception to the non-discrimination provision of the Civil Rights Act is the "bonafide occupational qualification",<sup>17</sup> which permits discrimination on the basis of sex, religion or national origin when such criterion is reasonably necessary to the normal operation of that particular business or enterprise. This exception has been construed extremely narrowly and applied in only limited circumstances.<sup>18</sup> Although the Civil Rights Act does not cite examples of permissible bonafide occupational qualifications, at least one court states, with respect to the "sex" exception, that sexual characteristics of an individual, rather than characteristics that might to one degree or another correlate with a particular sex, must be the basis for the application of the sex exception when it is used as a bonafide occupational qualification.<sup>19</sup>

Hawaii has adopted statutes enumerating unlawful employment practices<sup>20</sup> which are of similar purport to the federal Civil Rights Act of 1964 and applicable to state and local governments. The Hawaii statutes also declare it to be an unlawful employment practice or unlawful discrimination for an employer to refuse to hire or bar from employment any individual because of sex. Like the federal statutes, there is a provision for a bonafide occupational qualification exception although unlike the federal statute, the areas of sex, religion, or national origin are not specifically enumerated.<sup>21</sup>

The equal rights amendment clearly prohibits the denial of "equality of rights under the law" by the State on account of sex. Section 76-18 just as clearly guarantees that "[a]ll examinations shall be public and, except as otherwise provided by law, free and open to all citizens of the State..." (our emphasis). To deny an individual the privilege of competing for a civil service position because he or she happens to be of a particular sex appears to be contrary to the equal rights amendment and other non-discrimination mandates of both state and federal laws. Any permissible discrimination on the basis of sex appears to be covered by the bonafide occupational qualification exemptions whenever they are justifiable.

While under the language of the federal provision for the bonafide occupational qualification exemption, it appears that a person's sex may be used to discriminate against that person in certain circumstances,<sup>22</sup> for two reasons,

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it does not appear that the use of the term "sex" in section 76-18 is descriptive of a bonafide occupational qualification. First, the federal Civil Rights Act permits discrimination as to sex, religion, or national origin under the bonafide occupational qualification exception. Section 76-18, however, only makes reference to "sex". It would not be unreasonable to conclude that if the limitation as to "sex" in section 76-18 were for the purpose of delineating a bonafide occupational qualification exception, religion and national origin would have also been included. Second, nowhere in either the Hawaii House of Representatives or Senate Standing or Conference Committee Reports<sup>23</sup> pertaining to the enactment of section 76-18 is there any evidence that the use of the term "sex" was for the purpose of defining a bonafide occupational qualification exception.

To bring section 76-18 into compliance with the equal rights amendment, it is recommended that "sex" be eliminated as an enumerated criterion of limitation in taking civil service examinations since when, and if, it is permitted may be determined on a case-by-case basis under the bonafide occupational qualification exception. A suggested amendment reads as follows:

Sec. 76-18 Examinations, general character. There shall be competitive examinations for testing of the relative fitness of applicants for positions in civil service. The examinations shall be practical in their character and shall provide for ascertaining the physical and educational qualifications, experience, knowledge, and skill of applicants and their relative capacity and fitness for the proper performance of the characteristic duties of the class of positions in which they seek to be employed; except that in the case of a promotional examination, the examination shall be limited, at the request of the department head, to the characteristic duties of the class and nothing else. All examinations shall be public and, except as otherwise provided by law, free and open to all citizens of the State but with such limitations as to health, physical condition, age, [sex,] education, training, experience, habits, and character as the director of personnel services may deem necessary and proper for the class for which the examination is to be given. Disabled veterans or physically handicapped persons shall not be disqualified for reason of such physical handicap or disability if they possess the physical capacities to perform the duties of the class. Examinations may be oral or written or partly oral and partly written, or tests of manual skill and physical strength, or evaluations of training and experience backgrounds. Except when clearly required by the nature of the service to be performed, written examinations shall not be required of applicants for unskilled labor

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classes. All examinations shall be under the control of the director or such suitable person or persons as [he] the director may designate to conduct them. All persons who have passed the examination shall be required to take such physical examinations as required by the director or, in case of the counties, by the civil service commission. The reports of the physical examinations shall be filed with the director.

The director may, for purposes of expediting the examination process, require the applicants to take the written examinations prior to the filing of their formal applications. Upon the successful completion of the written examinations, the applicants shall then file their formal applications.

### F. Civil Service Law-Veteran's Preference. Sec. 76-103, HRS.

The veteran's preference system<sup>24</sup> in Hawaii civil service is authorized by section 76-103 to be promulgated by rules and regulations. Section 76-23 details the procedure regarding the application of points to examination scores and the certification of eligibles. Prior to May 10, 1978, section 76-23 provided that the names of those examinees with the top five scores after addition of any applicable veteran's preference points be certified as eligible and forwarded to the hiring agency. Because that system resulted in qualified applicants being eliminated from consideration for a position by virtue of the fact that they were non-veterans, the procedure was amended effective May 10, 1978.<sup>25</sup> Under current law, the five top-scoring examinees without application of veteran's preference points are certified as eligible to be hired and in addition those veterans whose scores with the addition of preference points equal or exceed the score of the fifth certified eligible are also certified. The hiring agency receives the names of the examinees in the numerical order in which they scored but the actual score is not given. The law was amended to make it consistent with equal employment opportunity objectives in providing fair treatment to all applicants, specifically females and non-veterans.<sup>26</sup> It was also felt that this method would not deny the veteran his or her rights.<sup>27</sup> Although this certification aspect of the Hawaii system appears not to eliminate high scoring non-veterans from consideration for civil service positions, there are other aspects of veteran's preference systems in general, Hawaii included, which raise questions of the validity of the system in light of the movement towards equal opportunity and rights for all regardless of sex.

## DISCRIMINATION IN APPLICATION OF A STATUTE

Veteran's preference systems, which virtually all jurisdictions have in one form or another,<sup>28</sup> have been the subject of repeated challenges in the courts,<sup>29</sup> the most recent one being Massachusetts v. Feeney,<sup>30</sup> in which it was alleged that the Massachusetts "absolute preference" system<sup>31</sup> discriminated against women in violation of the Equal Protection Clause of the Fourteenth Amendment. The "absolute preference" mandates that all veterans who qualify for state civil service positions must be considered for appointment ahead of any qualifying non-veteran. Feeney alleged that such a statute although facially neutral, was inherently non-neutral because, in application, it had a disproportionately adverse effect on a class from which women have been traditionally excluded.<sup>32</sup> The United States Supreme Court declared the statute constitutional holding that in spite of foreseeable adverse consequences on females too obvious not to have been unintended, the statute was not enacted or reaffirmed "because of" its adverse effects on females. The courts held that, therefore, there was no invidious intent.

Although a United States Supreme Court ruling becomes law of the land until a contrary decision is issued, nothing in Feeney prohibits any state from making a determination that its own veteran's preference rules should apply to effect a less negative consequence on females. The following discussion analyzes Hawaii's veteran's preference system in light of its justifications with a view towards assisting the reader in reassessing the present law, evaluating its effect on females, and determining if there is a need to amend it.

The justifications for the veterans hiring preference are:<sup>33</sup>

- (1) To reward veterans for the sacrifice of military service.
- (2) To ease the transition from military to civilian life.
- (3) To encourage patriotic service.
- (4) To attract loyal and well-disciplined people to civil service occupations.

If a purpose of preference is to ease the transition from military to civilian life, the permanent availability of the preference may be overinclusive.

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A survey of the applications of persons hired after May 10, 1978,<sup>34</sup> for the state civil service positions of paramedical assistant, adult corrections officer, carpenter, security officer I, and security guard<sup>35</sup> revealed that of the veterans utilizing their preferences the majority of the hirees had discharge dates prior to 1975.<sup>36</sup> In light of such statistics it seems that many of those who are currently exercising the preference are not doing so for the purpose of adjustment to civilian life.

The justification that the preference encourages military service should be considered along with the fact that although the preference system was implemented in 1955,<sup>37</sup> it is applied retroactively to veterans of World Wars I, II, and the Korean war. It thus appears illogical that a person could have been encouraged to patriotic service by a benefit non-existent at the commencement of their service. The incentive justification is also not supported by the fact that many persons did not volunteer to enter the military service, but were drafted.

Attracting loyal and disciplined personnel to civil service positions may be laudable but is there evidence that non-veterans are less loyal or disciplined? Furthermore, loyalty and discipline are not traits exclusively desired by civil service, but no doubt sought after by employers in the private sector as well.

In light of the acknowledged fact that the application of veteran's preference in employment has a disproportionately adverse effect on females, and statistics which appear to indicate that the Hawaii preference system in its present form is not entirely supported by the justifications for preference systems, it is recommended that the system be amended in at least two respects. One is that the application of the preference should be limited to a specific period of time. For example, one may consider that after discharge from the military service, a person may attend college and/or graduate school to qualify for certain positions. Perhaps a varying period of time based on the requirements of each class of positions is more reasonable than overall lifetime period. Another alternative is to select a standard period of time, such as two years. This would allow for a reasonable time in which a veteran could search for a job. In the case of jobs requiring additional education and/or training,



## DISCRIMINATION IN APPLICATION OF A STATUTE

the veteran would be able to utilize the GI Bill for such training as the "benefit". Furthermore, it is a plausible argument for the standard time period that the more educated veterans need the assistance of the preference points less than the lesser educated veterans.<sup>38</sup>

A second suggested change is that the application of the preference not be retroactive prior to 1955, the date of its implementation. In all fairness to those veterans who feel that a "vested" benefit may be taken away from them, however, a transition period may be provided. All potential users of the preference may be notified that after the transition period, those who served prior to 1955 will no longer be able to utilize their preference.

Although the Hawaii preference system is far fairer to non-veterans of which females make up a large portion, than those of certain other jurisdictions, it is recommended that the legislature consider further amendments such as those discussed above, which will comport with the spirit of "equality of rights under the law regardless of sex" to greatest extent possible.

### G. Offenses Against Public Health and Morals. Prostitution. Sec. 712-1200, HRS.

Section 712-1200 is a facially neutral statute providing equal penalties for both males and females engaging in prostitution. Although statistics indicate many more females than males are arrested for the crime of prostitution,<sup>39</sup> Hawaii statutes do not penalize the act of patronizing a prostitute. In application, therefore, the anti-prostitution statute appears to result in an unequal treatment of females from males for an activity in which they, in most cases, engage together. In determining the constitutionality of a facially neutral statute which in application has such a disproportionately adverse effect on females, it becomes necessary to determine whether there was a discriminatory legislative intent behind the creation of the statute.<sup>40</sup> If so, and there is no state interest compelling discrimination, the statute may be unconstitutional and contrary to the equal rights amendment.

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Hawaii made major revisions to its Penal Code in 1972<sup>41</sup> after an in-depth review<sup>42</sup> of the American Law Institute's Model Penal Code.<sup>43</sup> The model code contained a section penalizing the act of patronizing a prostitute.<sup>44</sup> Hawaii failed to adopt this section and no reason was given for such failure, although the senate standing committee report recommended study.<sup>45</sup> Because the intent behind the decision not to adopt a statute which would penalize the patron was not stated, it is only possible to analyze the matter hypothetically to determine the circumstances under which the statute might require amendment to provide equal rights under the law.

### Purpose of the Statute

A hypothetical analysis of the stated purposes of the anti-prostitution statutes may provide insight to reasons why Hawaii chose not to penalize the patron and to furnish some answers to the question: "Is the present application of the statute fulfilling the purposes for which it was enacted?"

The commentary to the Hawaii statute states that numerous reasons have been advanced for the suppression of prostitution:<sup>46</sup>

- (1) Prevention of disease;
- (2) Protection of innocent girls from exploitation;
- (3) Danger that more sinister activities may be financed by the gains from prostitution.

It is argued, by the commentary, however, that:

These reasons are not convincing. Venereal disease is not prevented by laws attempting to suppress prostitution. If exploitation were a significant factor, the offense could be dealt with solely in terms of coercion. Legalizing prostitution would decrease the prostitute's dependence upon and connection with the criminal underworld and might decrease the danger that "organized crime" might be financed in part by criminally controlled prostitution.

There is agreement among public health officials that the major cause of the increase in venereal disease among young adults and adolescents is not

prostitution but changing sexual patterns.<sup>47</sup> In the case of prostitutes, public education might serve to inform them about prevention and cure of disease, and encourage them to seek medical assistance and advice. If prostitution were legalized, however, and the state regulated the activity so as to mandate periodic health examinations, venereal disease might be contained at least as well or better than through the imposition of criminal sanctions without health examinations.

The protection of innocent girls from exploitation appears to be a worthwhile effort, but query whether it is furthered by arresting only prostitutes and not patrons? The San Francisco Committee on Crime in its report on non-victim crime in San Francisco stated:<sup>48</sup>

No employment agency can match the offer that the pimp holds out to the poor, young, uneducated girl. Then too, the pimp offers many girls a promise of caring. Once a girl is in the pimp's stable, his tactics may change considerably. The girl discovers that her promised cut shrinks to only a modest share. And she discovers that it is, after all, a very tough game. The penalty for holding back on the pimp's cut is likely to be a beating or a cutting, and the same may be true if she wants to leave the stable. It is no accident that law enforcement officials have enormous problems in getting convictions for pimps. The girls are afraid they will be killed.

The pimps also have a large amount of economic leverage, and most of this is supplied by the criminal justice system itself. The pimp allows his girls enough money so that they can keep themselves looking good but not enough so that they can keep themselves out of jail. The girls need the pimp to pay bail and to hire a lawyer. Thus a direct consequence of our current law enforcement practices is that they provide the pimp with economic power over his girls. (Emphasis in original)

Thus, it could be argued that the key to curtailing the exploitation is the pimp and not the prostitute. The Hawaii statutes presently penalize activities of the pimp. Would there be an effect on the pimps by changing the statutes to penalize patrons of prostitutes? The result may be that far fewer prospective customers would avail themselves of a prostitute's services in exchange for a night in jail, a criminal record, or both, not to mention the accompanying humiliation and possible effect on the careers of those who would rather such activities on their part remain unknown to their families, friends, and business

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associates. It is likely that such possibilities would create a smaller market for prostitution resulting in less business for the pimp. With diminishing demand, the pimp's profits from prostitution would be substantially reduced resulting in fewer of them in business to exploit innocent girls.

A third stated purpose for criminalizing prostitution is to curb the flow of more sinister activities which naturally arise out of a prostitution trade. What are the sinister activities to which the commentary refers? "Organized crime" and the "prostitute's dependence upon the connection with the criminal underworld" are mentioned. However, the President's Crime Commission reported in 1967<sup>49</sup> that prostitution plays "...a small and declining role in organized crime's operations." The San Francisco Committee states that "[n]o doubt organized crime could not gain a foothold in prostitution if there were no prostitution. It is also probable that if prostitution were not a crime, it would not be organized."<sup>50</sup> The San Francisco Committee suggests another alternative, and not one contrary to the equal rights argument -- that is, to legalize prostitution. If this were done, both patron and prostitute would be treated equally.

### Legislative Intent

If the statute in penalizing only the prostitute does not serve the purpose for which it was supposedly enacted, it may be that the true intent is not what is stated in the commentary. Although the commentary is not meant to be construed as legislative intent,<sup>51</sup> it appears that the commentary is the reasoning for the statutory language recommended by the Judicial Council, a recommendation which, in this instance, was adopted by the State with no different reasoning stated.<sup>52</sup> Possible alternative intents should be considered to determine whether or not they may be discriminatory on account of sex.

The nature of the act of prostitution should be first considered. By statutory definition prostitution is the engaging in, offering to, or agreeing to engage in sexual conduct in return for a fee. What is the socially undesired element of this crime? The actual or potential sexual conduct? The fee? When Hawaii modified its penal laws in 1972, the prohibitions against fornication<sup>53</sup> and

adultery<sup>54</sup> were eliminated. This action was in accord with the recognition that the social harm, if any, from consensual sexual activity between adults is not significant enough to warrant a penal sanction.<sup>55</sup> If the act of fornication between consenting adults is not prohibited, it may be logically argued that the offensive element of prostitution is the "fee". If it is the exchange of money which is objectionable, then why should both parties to the exchange, the one who pays and the one who accepts the fee, not be equally criminally culpable?

An analogy may be made between the prostitution and drug offense statutes. The Hawaii Penal Code punishes those who promote, distribute, or possess dangerous, harmful, or detrimental drugs.<sup>56</sup> The sanctions are less severe for those who possess small amounts rather than those who possess large amounts. The reasoning behind this policy is to hit hardest at the illegal trafficker and those who possess the largest amounts and subject them to the highest penalties because the "amounts indicate the defendant is a main source of supply.... [m]iddle amounts indicate that he is intermediary....the smallest amounts indicate...a user or consumer...."<sup>57</sup> The anti-prostitution statute likewise appears to be based on a policy decision to hit harder at the "supplier" than at the "user". Is the intent behind such a policy that traffickers injure others to whom they sell, while consumers only injure themselves? Or is it because members of a respectable middle class have become users<sup>58</sup> and that the categorizing of offenses is a means of self-preservation?

In applying these possible intents to anti-prostitution statutes, it must be asked whether prostitutes injure their patrons by collecting a fee for engaging in sex? Such injury appears to be highly unlikely inasmuch as patrons are willing participants in this victimless crime.<sup>59</sup> Furthermore, the product of sex has not been declared as harmful, detrimental, or dangerous as evidenced by its decriminalization between consenting adults. Is, then, the intent of the statute self-preservation? In other words, would too many patrons of the middle class be "caught" if patronizing a prostitute were criminalized? This is certainly a possibility considering statistics which indicate that many patrons of prostitutes are members of the middle class.<sup>60</sup> Furthermore, if one considers the results of a study on reasons men seek out prostitutes, the self-preservation theory may not be unreasonable.<sup>61</sup>

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1. They need variety in order to satisfy their normal sex urges.
2. They are too shy or insecure emotionally, too handicapped mentally or physically, or too old to compete with other males in winning female sex partners on the basis of mutual enjoyment. The availability of prostitutes is for such men a real blessing.
3. Many men have deviated sex urges of sadomasochistic or fetishistic nature that can only be satisfied in purchased sex relations. Frustration in this respect may be dangerous to society. Other men desire socially tabooed forms of sex relations that only paid-for sex service can provide for them. Others again have an active libido but are impotent, and could not satisfy a wife or sweetheart. To the prostitute their disability is immaterial.
4. A large number of men want to avoid obligations, are afraid of impregnating a girl, or want to avoid emotional entanglements. Others do not have the time to court a girl until she may agree to sex relations on a non-marital basis or they do not have the money for extended courtships. Still others do not want to take a chance of having their libido aroused by love-making and then perhaps be left frustrated by the girl's refusal to have intercourse. A visit to a prostitute may be, for all of them, simpler, safer, and even cheaper.
5. Some men merely want to relax in female company with ordinary conventions removed.

If the true intent behind anti-prostitution statutes is self-preservation it appears that decriminalization of prostitution would serve the same purpose. However, there is a public demand based on a moral judgment, that this crime be penalized.<sup>62</sup> Since lawmakers must be sensitive to their constituencies, it seems that they must heed this public demand. Therefore, there may be a legislative<sup>63</sup> intent to penalize prostitutes to be responsive to public sentiment regardless of the inequality in the procedure. If such is the intent to make the prostitute pay the price, criminally and morally, then there appears to be discrimination based on sex in the present anti-prostitution statute.

The objective of equal rights means equal freedom to do as one pleases and also equal treatment in punitive sanctions for engaging in similar activities. If one views the act of prostitution as an arms-length contract,<sup>64</sup> i.e., a willing

patron offers to buy, and a willing prostitute offers to sell, sex; both parties get what they bargained for and both are necessary to the transaction. The fee may be construed as an exchange with both parties deriving a benefit from the exchange. The patron is utilizing a privilege granted, by the absence of a penalizing criminal statute, to purchase sex. Penalizing the prostitute who likewise participates in the exchange appears to violate the mandate of equal rights under the law.

Based on the foregoing hypotheticals if the fee transaction is viewed as an equal exchange, then both parties to the transaction should be treated equally by either punishing both or<sup>65</sup> decriminalizing<sup>66</sup> the act. If the intent behind the statute is to penalize conduct judged to be immoral by public sentiment at the expense of the prostitute only, the statute appears to violate the guarantee of equality under the law and appears to require amendment to equally penalize the patron for participation in the act.

## Chapter 4

### STATUTES REFLECTING DISCRIMINATORY ATTITUDES OR PRACTICES

✓ A. Married Women.

The Bill of Rights to the Constitution of the State of Hawaii provides that no person shall be deprived of life, liberty, or property without due process of law, be denied equal protection of the laws, or be discriminated in the exercise of the laws because of sex.<sup>1</sup> The equal rights amendment prohibits the denial of equal rights under the law on account of sex.<sup>2</sup> Numerous sections of the Hawaii Revised Statutes pertaining to married women reflect views which are outdated or certain language which is superfluous in light of these constitutional guaranties or of other statutes either effecting identical purposes or containing no contrary provisions. Because such statutes no longer serve their original purposes which, for the most part, were effecting individual rights for women after marriage,<sup>3</sup> their existence serves only as reminders of the historical common law fiction of unity of husband and wife.<sup>4</sup> It is recommended that such sections be amended or repealed as the case may be. The sections which appear to fall into this category and their recommended changes are as follows:

1. Trust Companies

Sec. 406-5 Powers of trust companies. Every trust company shall have power, in addition to the general powers conferred by law upon corporations and joint-stock companies:

- (1) To take, receive, and hold, and repay, reconvey, and dispose of, any effects and property, both real and personal, which may be granted, devised, bequeathed, committed, transferred, or conveyed to it, upon any trust or trusts, at any time or times by any person or persons, including [married women and] minors, body or bodies corporate, or by any state, territorial, federal, or foreign court or judge, and to administer, fulfill, and discharge the duties of



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the trust or trusts for such remuneration as may be agreed upon or provided by law;

\* \* \*

The term "person or persons" is inclusive of "married women" and, is therefore, repetitive.

### 2. The Hawaii Insurance Law

Sec. 431-442 Spouses' rights in life insurance policy. (a) Every life insurance policy made payable to or for the benefit of the spouse of the insured, and every life insurance policy heretofore or hereafter assigned, transferred, or in any way made payable to a spouse or to a trustee for the benefit of a spouse, regardless of how the assignment or transfer is procured, shall, unless contrary to the terms of the policy, inure to the separate use and benefit of such spouse.

[(b) A married woman may, without the consent of her husband, contract, pay for, take out, and hold a policy on the life or health of her husband or children, or against loss by his or their disablement by accident. The premiums paid on the policy shall be held to have been her separate estate, and the policy shall inure to her separate use and benefit and that of her children, free from any claim of her husband or others.]

(b) Without the consent of one's spouse, a married person may contract, pay for, take out, and hold a policy on the life or health of one's spouse or children, or against loss by such spouse or children due to disablement by accident. Premiums paid on the policy by a married person shall be held to have been that person's separate estate, and the policy shall inure to the use and benefit of that person and that person's children, free from any claim by the spouse or others.

Section 431-442(b) gives a married woman a right to buy life, health, or disability insurance on her husband or children without the husband's consent, and regardless of from what source the wife pays the premiums, it appears that the premiums and the benefits of the policy become her separate property. This follows the practice of insurance companies looking to whom they contracted with as the owners of policies and/or proceeds.<sup>5</sup> The statute does not give married men a similar right. This omission seems to reflect the traditional view of the husband as the breadwinner and the wife as a homemaker with no employment outside of the home and no funds of her own. Statistics show that in 1970, 48.1

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per cent of married women in Hawaii were in the labor force.<sup>6</sup> Such statistics coupled with the current movement in women's rights, indicate that the homemaker stereotype is fading.

If a husband is unemployed and purchases a policy on his wife's life and pays the premiums out of her income, do the premiums and proceeds become his separate property? The present statute does not accord him such a right. It appears that the equal rights amendment mandates such a result. It is, therefore, recommended that the language of the section be amended to apply to both spouses.

Alternatively, it is arguable that this section may be eliminated as being unnecessary inasmuch as section 431-412 gives any "person of competent legal capacity" the right to contract for insurance. Under the constitutional prohibitions against discrimination on the basis of sex, it certainly seems married women would fall within the definition of persons of competent legal capacity. Furthermore, section 431-416 permits a spouse to effectuate life and disability insurance upon the other spouse. It should be noted, however, that section 431-442(b) refers to the children of the wife as persons the wife may contract to insure and as beneficiaries of such policies. It is also noted that there may be tax consequences arising from the total elimination of the statute such as in the case of when the source of the payment of the premiums are from other than already separate property of the wife. Without conducting a separate study of the effect of eliminating this statute on the children and taxes, it appears to be premature to recommend that the section be repealed.

### 3. Marriage

[Sec. 572-4 Effect of marriage on woman's domicile. The domicile of any woman whose domicile at the time of marriage was in the State shall not be held to be changed by reason of marriage to a man whose domicile is in some foreign state, district, territory, or country, unless the woman after marriage assumes the actual domicile of her husband.]

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This section addresses itself to a right not otherwise eliminated by other sections pertaining to residency, i.e., elections<sup>7</sup> and taxation.<sup>8</sup> Therefore, it appears to be surplusage.

### 4. Annulment, Divorce, Separation

[Sec. 580-72 Wife may bring action in own name. Whenever any married woman has the right to sue for separate maintenance, she may bring the action therefor in her own name.]

[Sec. 580-75 Status of wife during separation. Whenever a decree of separation is granted, the decree shall have the effect, during the separation, to reinstate the wife, whether the wrongdoer or not, in the right to sue or be sued, to alienate and convey property, to make contracts, and to do all other acts as if she were a feme sole.]

### 5. Bail; Bond to Keep Peace

Sec. 804-12 Bond for minor [or married woman]. When the person admitted to bail is a minor [or married woman], the engagement shall, notwithstanding, be valid.

These sections, as they refer to married women, appear to be unnecessary as they only reiterate individual liberties guaranteed by the due process and equal protection clauses of the constitution.

### 6. Married Women

[Sec. 573-1 Separate property. The real and personal property of a woman shall, upon her marriage, remain her separate property, free from the management, control, debts, and obligations of her husband; and a married woman may receive, receipt for, hold, manage, and dispose of property, real and personal, in the same manner as if she were sole.]

In the discussion on community property in chapter 2, it was recommended that section 510-1 providing for a presumption of separate property during marriage be transferred from that chapter and moved to a chapter concerning the rights of married persons where it will be more

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consistent with the subject matter of the balance of the chapter. Since the identical effect of section 573-1 results from application of section 510-1, and the language of section 510-1 is more desirable from an equal rights point of view in that it applies to both spouses, it is recommended that section 573-1 be repealed.

Sec. 573-2 Contracts. [A married woman may make contracts, oral and written, sealed and unsealed, with persons other than her husband, in the same manner as if she were sole. A married woman and her husband] Spouses may contract with each other, as follows:

- (1) By deed or assignment to or in favor of the other;
- (2) By agreement settling their respective rights in property owned by them, or either of them, when the agreement is made in contemplation of divorce or judicial separation;
- (3) By agreement providing for periodic payments for the support and maintenance of one spouse by the other, or for the support, maintenance, and education of children of the parties, when the agreement is made in contemplation of divorce or judicial separation; provided that the agreement shall be subject to approval by the court in any subsequent proceeding for divorce or judicial separation and that future payments under an approved agreement shall nevertheless be subject to increase, decrease, or termination from time to time upon application and a showing of circumstances justifying a modification thereof;
- (4) By partnership agreements for business purposes;
- (5) As provided in section 560:2-204.

Other sections of the Hawaii Revised Statutes pertaining to contracts do not indicate that married women are excluded from the provisions of such statutes so it appears that the first sentence of this section is unnecessary.

[Sec. 573-3 May be personal representative, guardian, trustee or other fiduciary. A married woman may be a personal representative, guardian, trustee, custodian, or other fiduciary and may bind herself and the estate she represents without any act or assent on the part of her husband.]

## DISCRIMINATORY ATTITUDES OR PRACTICES

Pursuant to section 560:1-201, married women are not excluded from the definition of "persons" qualified to be personal representatives, guardians, trustees, or fiduciaries. Therefore, this section appears unnecessary.

[Sec. 573-4 Women as sureties. All women, upon attaining their majority, and having the necessary property qualifications as by law required, may act, serve, and be sureties on all bonds and undertakings required under the laws of the State.]

There is no other section of the Hawaii Revised Statutes which prohibits married women from serving as sureties or in any way excludes them from the definition of sureties. Therefore, it appears that this section is unnecessary.

[Sec. 573-5 Suits by and against. A married woman may sue and be sued in the same manner as if she were sole; but this section shall not be construed to authorize suits between husband and wife.]

Although the last part of this section appears to be a neutral statement stating that it is not authority for suits between husband and wife, there is no other statute affirmatively authorizing or prohibiting such actions. Interspousal immunity is derived from the common law fiction of legal unity of husband and wife and that, therefore, one cannot sue oneself.<sup>9</sup> Section 573-5 has been construed as Hawaii's statutory authority for upholding the immunity.<sup>10</sup>

While it appears that the due process and equal protection amendments to the federal and state constitutions guarantee the provisions of the first part of section 573-5, that a married woman may sue and be sued as if she were sole, it is not as clear whether or not the amendments, or any other authority, guarantees that spouses may sue each other. There is substantial contemporary case law, however, supporting such an interpretation and holds that the common law interspousal immunity is abrogated by constitutional amendments guaranteeing due process and equal protection of the law<sup>11</sup> as well as an abandonment of the fiction of legal unity.<sup>12</sup> It is recommended, therefore, that this section be repealed.

7. If the recommendations of this report concerning chapter 573 titled "Married Women" are followed, there will be only three sections remaining in the

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chapter. These sections deal with spousal contracts (sec. 573-2), debts (sec. 573-6), and liabilities (sec. 573-7). In order to appropriately combine all statutes concerning marriage, it is recommended that these three remaining sections be included in chapter 572 titled "Marriage". Chapter 572 may then be divided into two parts, the first titled "Requisites, procedures" which would include the sections presently contained within that chapter and a second part which would include the three remaining sections from chapter 573. It is further recommended that section 510-1 dealing with the presumption of separate property, discussed in the section on community property, also be included in this second part and the part be titled "Property, contracts, debts, and liabilities".

### ✓ B. Use of Words of a Sex-specific Gender.

Although section 1-17, Hawaii Revised Statutes, states that words in the masculine gender shall include the feminine gender, the contrary is not stated. Therefore, it may not be illogical to conclude that use of a feminine gender may exclude applicability of the statute to males. A plausible alternative explanation might be that use of the feminine gender applies to males and that use of the feminine gender was a matter of semantics following usage of a masculine noun. For example, "he and his widow" instead of "he and his widower" as the latter is improper in most situations. There may be no intent to discriminate and all that is necessary is a revision of the language in subsequent statute amendments. Section 1-15 states that the reason and spirit of the law and the cause which induced its enactment must be examined to clarify ambiguity. This is in accord with the United States Supreme Court's requirement of a finding of "invidious" intent. Although certain statutes clearly use feminine words such as "widow" and "ladies auxiliary", because of the subject matter of the statutes in question, it would appear blatantly unconstitutional if they did not apply to males. In certain circumstances it should be assumed that choice of language was guided by societal practices at the time of the writing rather than a purposeful intent to practice invidious sex discrimination. For example, the term "ladies auxiliaries" may have been used because those were the only types of auxiliaries at the time. Writers may not have had the foresight to realize that some day the male spouses of female members of a group might want to organize into an

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auxiliary. On the other hand certain statutes use masculine terminology which, although this terminology does not make the statute clearly discriminatory facially or in application, are questionably discriminatory because of an archaic attitude relected by such usage. These sections are noted and it is suggested that they be neutralized now or upon subsequent amendment. Sections affected and recommended amendments are as follows:

### 1. Public Employees' Health Fund

Sec. 87-27 Supplemental plan to federal medicare. Any other provision of this chapter notwithstanding, the board of trustees shall establish, effective July 1, 1966, a health benefit plan which takes into account benefits available to an employee-beneficiary and [his] spouse under the federal medicare plan, subject to the following conditions:

\* \* \*

- (2) The contribution for voluntary medical insurance coverage under federal medicare may be paid by the fund, in such manner as the board shall specify, in the case of an employee-beneficiary who is a retired employee, and [his] spouse while [he] the employee-beneficiary is living, including members of the old pension system and after [his] death [his] the employee-beneficiary's spouse provided [she] the spouse qualifies as an employee-beneficiary; provided that the counties, through their respective departments of finance, shall reimburse the fund for any contributions made for county employee-beneficiaries under this paragraph.

\* \* \*

### 2. Pension Fund

Sec. 88-41 Limitation of other statutes. No other provision in any other statute which provides wholly or partly at the expense of the State or any county for pensions or retirement benefits for employees of the State or of any county, their [widows] surviving spouses or other dependents shall apply to members, retirants, or beneficiaries of the system established by this part, their [widows] surviving spouses or other dependents, except such benefits as may be provided under Title II of the Social Security Act.

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### 3. Partnerships

Sec. 425-125 Nature of a partner's right in specific partnership property. (1) A partner is co-owner with [his] the partners of specific partnership property holding as a tenant in partnership.

(2) The incidents of this tenancy are such that:

\* \* \*

(e) A partner's right in specific partnership property is not subject to dower, curtesy, or allowances to [widows,] surviving spouses, heirs, or next of kin.

### 4. Benefit Societies

Sec. 433-1 Definitions; exemption. Any corporation, unincorporated association, society, or entity:

(1) Organized and carried on for the primary benefit of its members and their beneficiaries and not for profit, and making provision for the payment of benefits in case of sickness, disability, or death of its members or disability or death of its members' [wives] spouses or children, or making provision for the payment of any other benefits to or for its members, whether or not the amount of the benefits is fixed or rests in the discretion of the society, its officers, or any other person or persons, the fund from which the payment of the benefits shall be made and the fund from which the expenses of the society shall be defrayed being derived from assessments or dues collected from its members, and the payment of death benefits being made to the families, heirs, blood relatives, or persons named by its members as their beneficiaries; or

\* \* \*

### 5. Insurance Exemptions

Sec. 434-43 Exemption of certain societies. Nothing in this chapter shall be so construed as to affect or apply to:

\* \* \*



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- (2) Orders, societies, or associations which admit to membership only persons engaged in one or more crafts or hazardous occupations, in the same or similar lines of business, and the [ladies] societies to such orders, societies, or associations;

\* \* \*

### 6. Savings and Loan Associations

Sec. 407-1 Application of chapter. This chapter does not include or apply to insurance companies, or lodges or other [fraternal] organizations which maintain funds derived from periodical payments by members thereof for the purpose of paying sick or death benefits to the members or their heirs or representatives, or corporations lawfully carrying on business in the State as banks, trust, or investment companies under any other law of the State whose shares are not subject to withdrawal or retirement as contemplated by sections 407-74 and 407-76.

### 7. Banks and Financial Institutions Bank Examiner

Sec. 401-7 Special examinations; extra services; payment of cost. [Whenever, in the judgment of the bank examiner, the condition of any bank, trust company, building and loan association, fiduciary company, industrial loan and investment company, or licensee under chapter 409 renders it necessary or expedient to make an extra examination or to devote any extraordinary attention to its or his affairs, the bank examiner may make any and all extra or necessary examinations and devote any necessary extra attention to the conduct of its or his affairs, and the bank, company, association, or licensee shall pay for all extra services rendered by the bank examiner at the actual per diem cost and expenses of each man who may be engaged in the special service at the direction of the bank examiner.] Whenever the bank examiner determines that it is necessary or expedient to make an extra examination or to devote any extraordinary attention to the affairs of the condition of any bank, trust company, building and loan association, fiduciary company, industrial loan and investment company, or licensee under chapter 409, the bank examiner may make any and all extra or necessary examinations and devote such necessary extra attention, and such services shall be paid for by the bank, company, association, or licensee being examined or serviced at the actual per diem cost plus expenses of each person who may be engaged in the special service at the direction of the bank examiner.

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Sec. 401-15 Additional examinations, costs of. Whenever the bank examiner has reason to believe that any person, firm, association, corporation, copartnership, society, or company is so conducting its or such a business as to make the same subject to this chapter, or subject to any law requiring inspection of its or [his] the person's records or affairs or supervision or regulation of its or [his] the person's business by the bank examiner, then the bank examiner, [his] deputy, or any examiner appointed by [him] the bank examiner may make an examination in accordance with this chapter, of the books, records, and accounts of any such person, firm, association, corporation, copartnership, society, or company.

The bank examiner, [his] deputy, or any examiner [by him] appointed by the bank examiner when making the examinations may examine any such person or the members or employees of the firm, association, copartnership, or society or the officers or employees of the corporation or the agents of the person, firm, association, corporation, copartnership, society, or company on oath, and for such purpose may administer oaths, and may order and cause to be produced any of the persons, members, officers, employees, or by agents so examined, all books of accounts, papers, documents, and securities under [his] the person's or their possession or control.

If the bank examiner finds that the person, firm, association, corporation, copartnership, society, or company is conducting its or such a business as to make the same subject to the inspection of the bank examiner, the actual per diem cost and expenses of each [man] person who may be engaged in such examination shall be paid by the person, firm, association, corporation, copartnership, society, or company examined.

In addition to the existence of sex-specific terminology discussed above, the entire Hawaii Revised Statutes contain masculine terminology such as "he" and "his". It appears that, in most instances, such statutes are applicable to members of both sexes. Nevertheless, in the spirit of complete compliance with the equal rights legislation and following the direction of the Constitutional Convention of 1978, it is recommended that in all bills or acts amending the Hawaii Revised Statutes, all references to gender be neutral or neutralized in drafting wherever possible, except where the statute clearly is intended to properly apply only to persons of one sex. Following is a proposed amendment to section 23G-15 authorizing the revisor of statutes to modify the language of statutes and amendments to statutes when they have not been enacted in gender-neutral terms.

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Sec. 23G-15 Supplements and replacement volumes; extent of revision; prima facie the law. In preparing the supplements and replacement volumes, the revisor of statutes may:

- (1) Number and renumber chapters, sections, and parts of sections;
  - (2) Rearrange sections;
  - (3) Change reference numbers to agree with renumbered chapters, parts or sections;
  - (4) Substitute the proper section or chapter numbers for the terms "the preceding section", "this act", and like terms;
  - (5) Strike out figures where they are merely a repetition of written words;
  - (6) Change capitalization for the purpose of uniformity;
  - (7) Correct manifest clerical or typographical errors; [and]
  - (8) Change all references to the male or female gender to terms which are neutral in gender when it is clear that the statute is not applicable only to members of one sex; and
- [ (8) ] (9) Make such other changes in any act incorporated in the supplements and replacement volumes as shall be necessary to conform the style thereof as near as may be with that of the last revision of the laws of Hawaii; provided that in making the revision, he shall not alter the sense, meaning, or effect of any act.

The matter set forth in the supplements and replacement volumes shall be prima facie evidence of the law.

Although section 1-17 signifies an intent that statutes using masculine terms be applicable to members of both sexes and, therefore, is not discriminatory, the language of section 1-17 reflects an archaic attitude which selects the masculine terms as the ones which are all-encompassing. Since most statutes using a gender reference, in fact use a masculine reference, i.e., "he", the recommendations of this report are to eventually eliminate all such references. Until such task can be accomplished, a neutrally written general provision statute may be preferable. The following amendment is recommended:

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Sec. 1-17 Number and gender. Words [in the masculine gender signify both the masculine and feminine gender, those] of a sex-specific gender are inclusive of both sexes unless the subject or context of the statute clearly dictate otherwise. Words in the singular or plural number signify both the singular and plural number, and words importing adults include youths or children.

### C. Fraternal Benefit Societies.

Numerous sections of the Hawaii Revised Statutes refer to fraternal benefit societies. Section 235-9(a)(2) exempts fraternal benefit societies from income tax obligations; section 237-23(a)(5) and (b)(3) exempts such organizations from the payment of excise tax; section 407-1 excludes them from the application of statutes concerning savings and loan associations; section 521-7 excludes members of fraternal organizations under certain circumstances from the Landlord-Tenant Code; and chapter 434 relates to insurance by such organizations.

The term "fraternal" in common usage refers to a relation of brothers or societies of men.<sup>13</sup> The term may refer, however, to "men's or sometimes women's clubs or associations usu. having secret rites, restricted membership, and religious, social, charitable, or professional purposes".<sup>14</sup> Given this second definition of "fraternal", there does not appear to be a problem with the applicability of statutes concerning fraternal benefit societies equally to males and females. The Hawaii Revised Statutes defines "fraternal benefit society" in neutral terms.<sup>15</sup> Since, however, the term "fraternal" in common usage is considered in a masculine sense and most fraternal benefit organizations are traditionally male-oriented, i.e., Elks, Knights of Columbus, Knights of Pythias, and Masons, it may appear to readers of the Hawaii Revised Statutes that male organizations are being granted special treatment not accorded to female organizations of a similar nature.

It is suggested that although the statutes may not in their application discriminate on the basis of sex,<sup>16</sup> that the legislature consider the appropriateness of using a sex-neutral term, such as "affinitive benefit

societies", in referring to societies whose organizational structures are defined as being fraternal benefit societies, whether they be composed of males, females, or both.

It should be noted here also that the title of chapter 433 is Mutual and Fraternal Benefit Societies despite the fact that the chapter concerns itself exclusively with mutual benefit societies. Looking to the legislative history of this chapter, one can see that the act implementing chapter 433<sup>17</sup> appointed a commission to investigate and recommend legislation necessary to regulate mutual and fraternal benefit societies. When the act was codified,<sup>18</sup> however, it dealt solely with mutual benefit societies but the title remained Mutual and Fraternal Benefit Societies. Subsequent additions to the chapter also concerned only mutual benefit societies. It is recommended, therefore, that since chapter 433 is not related to fraternal benefit societies and in order to avoid confusing and misleading a reader, the title be amended to read Mutual Benefit Societies.

D. Status of Women. Chapter 367, HRS.

Chapter 367 of the Hawaii Revised Statutes is titled Status of Women and provides for state and county commissions on the status of women concerning themselves with opportunities, needs, problems, and contributions of women in Hawaii in the areas of education, homemaking, civil and legal rights, labor and employment, and expanded community horizons. There may be those that choose to argue that the existence of such statutory provisions are discriminatory against men inasmuch as there is no chapter establishing a parallel commission on the status of men.

The existence of such affirmative action programs, however, are justified. The United States Supreme Court has ruled that remedial programs may be implemented for the benefit of previously disadvantaged groups.<sup>19</sup> Such programs are constitutional if they do not result in a denial of benefits to others. The purpose of enacting chapter 367 was recognition of the shifting role of women in a complex society.<sup>20</sup> The commission established by this chapter will submit annual reports and recommendations to the governor and

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legislature. Chapter 367 is not focused on the status of women in the statutes alone. It is concerned with factors which will assist women in attaining a status at which the potential threats of discrimination would have little effect. The desired end result appears to be to assist women in overcoming the effects of historical discrimination against them, with no denial to men of rights or protection accorded to them by law. The existence of chapter 367, therefore, does not appear at this time to violate the equal rights amendment.

# FOOTNOTES

## Chapter 1

1. Renumbered as Article I, section 3, by Constitutional Convention of 1978 and election November 7, 1978.
2. House Resolution 19, "House Resolution Requesting a Review and Study of Hawaii Statutes to Determine Compliance With the Equal Rights Amendment", Ninth Legislature, 1977, State of Hawaii.

## Chapter 2

1. Section 1-17, *Hawaii Revised Statutes*, provides that words in the masculine gender signify both the masculine and feminine gender. Discussion in this part is limited to those sections which do not appear to fall into the category of statutes to which section 1-17 is applicable. Section 1-17 is discussed in chapter 4 of this report.
2. See note 16, discussion of chapter 76, *Hawaii Revised Statutes*, for statistics on women in the United States armed forces. Women are represented in Hawaii military organizations as follows:

Organization	Women	Men	Date
Hawaii Air National Guard	102 = 6.73%	1,414 = 93.27%	June 30, 1977
Hawaii Army National Guard	142 = 5%	2,694 = 95%	June 30, 1977
Hawaii Naval Reserve	33 = 9.43%	317 = 90.57%	August, 1977

[Hawaii National Guard information provided by Sgt. Darryl Ho, Supervisory Military Personnel Technician. Hawaii Army National Guard information provided by Captain Gail Warok, Acting Public Affairs Officer. Hawaii Naval Reserve information provided by Commander Williams.]

3. Note, "The Equal Rights Amendment and the Military," 82 *Yale L. J.* 1533, 1537 (1973). The applicability of the Equal Rights Amendment to military service was noted:

(T)here was sufficient discussion to warrant the conclusion that Congress intended the amendment to be fully applied to the military.... The legislative history of the amendment reveals that Congress struggled with the problem of requiring military service, particularly combat duty, for women. For example, when Senator Ervin attempted to guarantee that passage of the amendment would not affect Congress' right to bar women from compulsory conscription or from service in combat units, his amendments were soundly defeated. See 118 *Cong. Rec.* S.4395, S.4408 (daily ed., March 21, 1972).

See also, Barbara Allen Babcock and others, *Sex Discrimination and the Law, Causes and Remedies* (Boston: Little, Brown and Company, 1975), pp. 163-178.

4. *Hawaii Rev. Stat.*, sec. 171-2.
5. *Reed v. Reed*, 404 U.S. 71 (1971).
6. *Royster Guano Co. v. Virginia*, 253 U.S. 412 (1920).

7. *Hawaii Rev. Stat.*, secs. 560:2-101 et seq.
8. 1976 Haw. Sess. Laws, Act 200.
9. *Hawaii Rev. Stat.*, sec. 532-2.
10. 1976 Haw. Sess. Laws, Act 200.
11. The availability of appropriately educated and trained women is documented, as in 1974, women received 107 bachelor's, 35 master's, and 1 doctorate degree in forestry from United States institutions of higher education. *Statistical Abstract of the U.S.: 97th Annual Edition, 1976* (Washington: U.S. Bureau of the Census, Department of Commerce), table 247.
12. Pub. L. No. 378, 91st Cong., 2nd Sess., sec. 1 (Aug. 31, 1970).
13. 16 U.S.C.A. sec. 1702(b) (1974).
14. The Youth Conservation Corps presently is composed of 50 per cent female and 50 per cent male. Data supplied by Karen K. Oda, Personnel Technician, Personnel Office, Department of Land and Natural Resources, State of Hawaii. Telephone interview July 11, 1979.
15. Telephone interview with Andrew Y. Seki, Departmental Personnel Officer, Department of Land and Natural Resources, July 11, 1979.
16. *Congressional Quarterly Almanac*, Vol. XIX, 1963, Congressional Quarterly Service (Washington, D.C.: 1963), pages 514-519.
17. *Hawaii Rev. Stat.*, sec. 510-1.
18. 1945 Haw. Sess. Laws, Act 273, enacted chapter 301A, Revised Laws of Hawaii 1945, under which it was a rebuttable presumption that most property acquired during marriage, after the effective date of the Act, or whichever was later, was community property. This law was repealed by 1949 Haw. Sess. Laws, Act 242, which reinstated the principle of separate property.
19. See *Hawaii Rev. Stat.*, ch. 510, historical note.
20. 1978 Haw. Sess. Laws, Act 77.
21. Senate Standing Committee Report 720-78 and House Standing Committee Report 309-78 on House Bill 2095-78, Ninth Legislature, 1978, State of Hawaii.
22. *Calif. Civil Code*, secs. 5125, 5127.
23. *Calif. Amended Stats.* 1973, ch. 987, sec. 14.
24. *Calif. Stats.* 1974, ch. 1206, sec. 4.
25. *Calif. Stats.* 1974, ch. 1206, as amended by *Calif. Stats.* 1977, ch. 692, sec. 2.
26. 1949 Haw. Sess. Laws, Act 242.
27. 1978 Haw. Sess. Laws, Act 77.
28. *Calif. Civ. Code*, sec. 5130.

29. *Calif. Civ. Code*, sec. 5132.
30. Unpublished Atty. Gen. Op. to Richard K. C. Lee, M.D., President, Board of Health (April 16, 1958), see appendix A.
31. 466 F. Supp. 714 (D.C.H. 1979).
32. *Ibid.*, 720.
33. *Hawaii Rev. Stat.*, sec. 574-5.
34. House Standing Committee Report 431 on House Bill 516, Eighth Legislature, 1975, State of Hawaii.
35. Information was supplied by Lt. Souza, Juvenile Enforcement Division, Honolulu Police Department to the effect that he was unaware of any dance halls with male dancers, or any homosexual dance halls. Telephone interview August 7, 1979.
36. The term *impotence* is defined as "a physical or psychological abnormal state usu. of a male characterized by inability to copulate". *Webster's Third New International Dictionary*, 1966.
37. 417 U.S. 484 (1974)
38. 429 U.S. 125 (1976)
39. At the time the restriction on impotency was added, 1935 Haw. Sess. Laws, Act 185, neither House Standing Committee Report 143 nor Senate Standing Committee Report 255 on House Bill 81, Eighteenth Legislature, Territory of Hawaii, stated the purpose of the restriction. When "impotency" was made a ground for annulment in 1903, Senate Bill 72, Second Legislature, Territory of Hawaii, did not include a statement of purpose for the inclusion.
40. *Hawaii Const.* art. I, sec. 6.
41. *Hawaii Rev. Stat.*, ch. 707, part V., Introduction commentary.
42. *Ibid.*
43. *Roe v. Wade*, 410 U.S. 113, (1973); *Steinberg v. Brown*, 321 F. Supp. 741 (D.C. Ohio, 1970).
44. Telephone interview with Thomas A. Burch, M.D., Chief, Research and Statistics Office, Department of Health, August 7, 1979.
45. *Hawaii Const.* art. I, sec. 3.
46. *Hawaii Const.* art. I, sec. 4.
47. See *Mohammad v. Summers*, 238 F. Supp. 806 (D.C. Mich., 1964); *McMillan v. State*, 265 A.2d 453, 258 Md. 147 (1970); *People v. Woodruff*, 26 A.D. 2d 236, 272 N.Y.S. 2d. 786, affd. 288 N.Y.S. 2d 1004, 21 N.Y. 2d 848, 236 N.E. 2d 159 (1966); *In re Currence*, 248 N.Y.S. 2d 251, 47 Misc. 2d 418 (1963).
48. *International Society for Krishna Consciousness, Inc., et al. v. Evans*, 440 F. Supp. 414 (D.C. Ohio, 1977).
49. 29 U.S.C.S. secs. 201 et seq.
50. *Mitchell v. Pilgrim Holiness Church Corp.*, 210 F.2d 879 (C.A. Ind. 1954), cert. den., 347 U.S. 1013.
51. 30 A.L.R. 2d Infant-Compulsory Medical Care, sec. 1138 (1953).
52. 74 A.L.R. 2d *Zoning Regulations-Churches*, sec. 409 (1960).
53. *Sherbert v. Verner*, 374 U.S. 398 (1963).
54. *Wisconsin v. Yoder*, 406 U.S. 205 (1972).
55. *In re Elwell*, 284 N.Y.S. 2d 924, 55 Misc. 2d 252 (1967).

## Chapter 3

1. See, *Washington v. Davis*, 426 U.S. 229 (USCA, 1976).
2. It is in accord with the federal Equal Credit Opportunity Act Amendments of 1976, 15 U.S.C. sec. 1691.
3. "Sex Discrimination in Insurance," Naomi Naierman and Ruth Brannon, Women's Equity Action League (Washington: 1977).  
  
"Sex Discrimination in Insurance -- a Continuing Problem", Marcia D. Greenberger and Lois J. Schiffer, Women's Rights Project, Center for Law and Social Policy (Washington: June 6, 1977).
4. 1979 Haw. Sess. Laws, Act 32.
5. *Hawaii Rev. Stat.*, sec. 431-269(b)(2)(A).
6. Hawaii, Department of Planning and Economic Development, *State of Hawaii Data Book 1978: A Statistical Abstract* (Honolulu: 1978), Table 39, indicating that in 1975 Hawaii women outlived men by 3.93 years, and that nationally from 1969-71 females outlived males by an average of 5.77 years.
7. Michigan, Department of Commerce, "Women's Task Force Report to the Michigan Commission on Sex Discrimination in Insurance," June 2, 1975, p. 23.
8. Iowa, Commission on the Status of Women, "A Study of Insurance Practices that Affect Women," 1975, p. 37.
9. Information obtained from testimony on S. 995, United States Senate Committee on Human Resources by Patricia K. Putman, Associate Dean for Legal and Legislative Affairs, John A. Burns School of Medicine, University of Hawaii, April 29, 1977.

The following chart contains the average rates charged by six insurance companies that write the majority (over eighty per cent) of temporary disability insurance in Hawaii under the TDI law. Because different rates are charged to different employers, a composite rate of each insurer, and when available separately for men and women employees, was calculated by dividing the total contributions paid by employers and by employees by (taxable wages + 100).



	1970	1971	1972	1973	1974	1975
First Insurance	\$ .99	\$ .91	\$ .79	\$ .73	\$ .71	\$ .61
Men			.81	.73	.73	.55
Women			.76	.70	.69	.68
Hawaiian Insurance & Guaranty	.73	.78	.64	.56	.57	.57
Men			.64	.56	.55	.55
Women			.64	.56	.60	.59
Industrial Indemnity	.92	.88	.72	.54	.55	.74
Men			.72	.52	.54	.71
Women			.73	.58	.57	.77
Pacific Guardian	.67	.73	.63	.60	.61	.60
Men			.62	.59	.61	.59
Women			.64	.62	.61	.61
Pacific Insurance	1.32	1.77	1.90	1.42	.95	.64
Men			1.53	1.22	.94	.61
Women			2.43	1.71	.96	.67
Travelers Insurance	.85	.82	.72	.69	.62	.59
Men			.67	.65	.61	.56
Women			.78	.76	.65	.65

What was not expected but is revealed in the data compiled from employers' and insurance carriers' annual reports to the Department of Labor and Industrial Relations for the last full reported year, 1975, the average duration of disability periods for men exceeded that of women. Other related data are included in the following chart:

Average Total Benefit Paid to Employees	\$345.97
Men	465.14
Women	279.22
Average Weekly Benefit Paid to Employees	\$ 70.75
Men	90.00
Women	63.28
Average Duration (weeks)	Employees 4.9
Men	5.1
Women	4.4

The average duration figure is based on disability due to accident and sickness, as well as pregnancy.

10. *Hawaii Rev. Stat.*, sec. 171-3.
11. *Hawaii Const.* art. I, sec. 5.
12. Despite the failure to include a prohibition against sex discrimination in the statute, James J. Deter, Land Management Administrator, Department of Land and Natural Resources, stated that there is a policy of prohibiting transfers of property to those who discriminate on the basis of sex and that prospective transferees are questioned about their policy in this area. Telephone interview with James J. Deter, Land Management Administrator, July 2, 1979.
13. *Hawaii Rev. Stat.*, sec. 76-1.
14. *Ibid.*
15. 42 U.S.C.A. sec. 2000e *et seq.* (1964).
16. *Stryker v. Register Pub. Co.*, 423 F. Supp. 476 (D.C. Conn., 1976); *Lindsay v. City of Seattle*, Wash., 86 Wash. 698, 548 P.2d 320 (1976), cert. den., 429 U.S. 886.
17. 42 U.S.C.A. sec. 2000e-2(e) (1964).
18. *Dothard v. Rawlinson*, 433 U.S. 321 (1977); *Fesel v. Masonic Home of Delaware, Inc.*, 447 F. Supp. 1346 (D.C. Del., 1978); *MacLennan v. American Airlines Inc.*, 440 F. Supp. 466 (D.C. Va., 1977); *Mitchell v. Bd. of Trustees of Pickers County School Dist. "A"*, 415 F. Supp. 512 (D.C.S.C., 1976).
19. *Rosenfeld v. Southern Pac. Co.*, 444 F. 2d 1219 (C.A. Cal., 1971).
20. *Hawaii Rev. Stat.*, ch. 378.
21. *Hawaii Rev. Stat.*, sec. 378-9.
22. *Burnett v. State of Hawaii*, U.S.D.C. Hawaii, Civil No. 77-0393 is a pending class action suit by a female who alleges she was discriminated against because she was a female and denied a position as a guard in an all male prison in favor of less-qualified males. On April 27, 1978, the plaintiff was granted a summary judgment with respect to her charges of discrimination in violation of the Civil Rights Act of 1964 and deprivation of earnings. On August 28, 1978, the court granted the State of Hawaii a Motion to Reconsider. Subsequent discovery proceedings were conducted and the case is presently pending.
23. House Standing Committee Report 442, Senate Standing Committee Report 444, House Conference Committee Report 8, Senate Conference Report 9, all on House Bill 105, Twenty-Ninth Legislature, Territory of Hawaii (1957).
24. This discussion is limited to the veteran's preference applicable to civil service hiring. It is noted that the *Hawaii Revised Statutes* provides preferences to veterans in many other areas, i.e., ownership rights to public lands (sec. 171-69, HRS), real property tax (sec. 246-29, HRS), vehicle taxation (sec. 249-6, HRS), teacher's seniority and salary (sec. 297-35, HRS), adult education (sec. 301-4, HRS), health (sec. 338-14, HRS), parole and pardon (sec. 353-70, HRS), state housing projects (sec. 359-1, et seq., HRS), insurance licenses (sec. 431-400, HRS), social services (sec. 363-1, et seq., HRS), and loans (sec. 364-1, et seq., HRS). Of these preferences, the one most similar to the civil service preference and bears mention is that given in drawing for farm lots (sec. 171-69). Among those qualified under section 171-68 to apply for a farm lot veterans are given an absolute preference. This preference does not eliminate all other qualified applicants, however, inasmuch as a similar absolute preference is given to those owning farm premises within the preceding five years which were taken for a public purpose or became unusable for farm purposes for certain stated reasons.
25. 1978 Haw. Sess. Laws, Act 62.
26. Senate Standing Committee Report 430-78 on Senate Bill 1654-78, Ninth Legislature, 1978, State of Hawaii.
27. House Standing Committee Report 858-78 on Senate Bill 1654-78, Ninth Legislature, 1978, State of Hawaii.
28. State Veterans' Law, Digest of State Laws Regarding Rights, Benefits and Privileges of Veterans and Their Dependents, House Committee on Veterans' Affairs, 91st Cong., 1st Sess. (1969).
29. For example see *Ballow v. State Department of Civil Service*, 75 N.J. 365, 382, F.2d. 1118 (1978); *Feinerman v. Jones*, 356 F. Supp 252 (MD

- Pa. 1973); *Branch v. Du Bois*, 418 F. Supp. 1128 (N.D. Ill. 1976); *Wisconsin Nat'l. Organization for Women v. Wisconsin*, 417 F. Supp. 978.
30. 47 U.S.L.W. 4650 (June 5, 1979).
  31. *Mass. Gen. Laws*, ch. 31, sec. 26.
  32. *Massachusetts v. Feeney*, 47 U.S.L.W. 4650, 4654 n. 21 (June 5, 1979).
  33. *Koelfgen v. Jackson*, 355 F. Supp. 243 (Minn. 1972), summarily aff'd. 410 U.S. 976; *August v. Bronstein* 369 F. Supp 190 (SDNY 1974), summarily aff'd 417 U.S. 901; *Rios v. Dillman*, 499 F 2d 329 (CA5 1974). For a collection of early cases, see *Annot. Veterans' Preference Laws*, 161 A.L.R. 494 (1946).
  34. May 10, 1978 was the effective date of the current law on certification of veterans for civil service position, see fn. 25.
  35. These positions were selected upon the advice of Martin Luke, Chief, Recruitment Branch, Department of Personnel Services, State of Hawaii, as being positions for which there are a large number of applicants. It was felt that the statistics obtained from positions without a significant number of applicants might be subject to incorrect interpretations.
  36. The survey conducted by Nelson Goo, a summer 1979 law clerk for the Legislative Reference Bureau, revealed the following statistics:
- |                           | Date of Discharge | Number of Post May 10, 1978 Hires Utilizing Preference |
|---------------------------|-------------------|--|
| Adult Corrections Officer | 1975-1979         | 11   |
|                           | 1970-1974         | 7  |
|                           | 1965-1969         | 5  |
|                           | 1960-1964         | 0  |
|                           | Prior to 1960     | 1  |
| Security Guard            | 1975-1979         | 1  |
|                           | 1970-1974         | 1  |
|                           | Prior to 1960     | 1  |
| Security Officer          | 1975-1979         | 2  |
|                           | 1970-1974         | 2  |
|                           | 1965-1969         | 1  |
| Carpenter                 | 1965-1969         | 2  |
| Paramedic                 | 1975-1979         | 9  |
|                           | 1970-1974         | 2  |
|                           | 1965-1969         | 2  |
|                           | 1960-1964         | 2  |
|                           | Prior to 1960     | 1  |
37. 1955 Haw. Sess. Laws, Act 274.
  38. It is noted that none of the positions included in the survey in fn. 36 require a college degree.
  39. In 1978 the Honolulu Police Department made 419 arrests of adults for prostitution-related offenses of which 61 were males and 358 were females. These statistics were obtained from Nathan Matsuoka, Honolulu Police Department, Department of Research and Development, pursuant to preliminary print-out sheets for the Honolulu Police Department's Annual Statistical Report. Telephone interview July 5, 1979.
  40. *Massachusetts v. Feeney*, 47 U.S.L.W. 4650 (June 5, 1979).
  41. 1972 Haw. Sess. Laws, Act 9.
  42. Judicial Council of Hawaii Penal Law Division Project, *Hawaii Penal Code (Proposed Draft)* (Hawaii: 1970).
  43. American Law Institute, *Uniform Laws Annotated, Uniform Rules of Criminal Procedure, Model Penal Code* (St. Paul, Minn.: West Publishing Co., 1974).
  44. Model Penal Code, sec. 251.2(5).
  45. Senate Standing Committee Report 599 on House Bill 20, Sixth Legislature, 1972, State of Hawaii.
  46. Commentary to *Hawaii Rev. Stat.*, sec. 712-1200.
  47. The San Francisco Committee on Crime, *A Report on Non-Victim Crime in San Francisco* (San Francisco: 1971), p. 33; American Medical Association, *Venereal Disease* (Chicago: 1972).
  48. *A Report on Non-Victim Crime in San Francisco*, p. 35.
  49. President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society* (Washington: U.S. Government Printing Office, 1967), p. 189.
  50. *A Report on Non-Victim Crime in San Francisco*, p. 32.
  51. *Hawaii Rev. Stat.*, sec. 701-105.
  52. There is no language on the subject in either the Senate or House of Representatives committee reports on House Bill No. 20 titled A Bill for an Act Relating to the Hawaii Penal Code, 1972 Haw. Sess. Laws, Act 9.
  53. *Hawaii Rev. Stat.*, sec. 768-17 (1968).
  54. *Hawaii Rev. Stat.*, secs. 768-13, 768-14 (1968).
  55. Commentary by The Judicial Council to *Hawaii Rev. Stat.*, sec. 707-730 et seq.
  56. *Hawaii Rev. Stat.*, sec. 712-1240 et seq.
  57. Commentary by The Judicial Council to *Hawaii Rev. Stat.*, secs. 712-1241 to 712-1250.
  58. Barthel, Christopher E. III, *Drug Use Among Family Court Youth in Hawaii* (Honolulu: May 1969); Hawaii State Advisory Commission on Drug Abuse and Controlled Substances, *State Drug Abuse Prevention Plan* (Honolulu: 1973).
  59. *A Report on Non-Victim Crime in San Francisco*, p. 13.
  60. James & Burstin, *Prostitution in Seattle*, 25 Wash. St. B. News 5, 28, n. 30 (1971), "Prostitutes in Seattle report their customers' occupations as follows: 35% businessmen, 10.6% salesmen, 11.4% lawyers-accounts, 13.8% Boeing employees, 3.3% Merchant Marine, 4.1% Armed Services."
  61. Yale Legislative Services, *Consensual Crime in Connecticut* (New Haven, Conn: 1973), p. 4.
  62. Commentary on *Hawaii Rev. Stat.*, sec. 712-1200.

63. The 1979-1980 Hawaii State Legislature is composed of 22 males and 3 females in the Senate, and 44 males and 7 females in the House of Representatives.
64. *A Report on Non-victim Crime in San Francisco*, p. 13.
65. Thirty-nine states have statutes which penalize the patron of a prostitute while only eleven states plus the District of Columbia do not.
66. See Appendix B.
20. House Standing Committee Report 634-70, House Conference Committee Report 25, Senate Standing Committee Report 758-70, and Senate Conference Committee Report 26-70 on Senate Bill 174, Fifth Legislature, 1970, State of Hawaii.

## Chapter 4

1. *Hawaii Const.* art. I, sec. 5.
2. *Hawaii Const.* art. I, sec. 3.
3. 1888 Haw. Sess. Laws, Act 11.
4. See, *Hawaii Rev. Stat.*, sec. 573-1, case notes.
5. Telephone interview with Clifford Miyoi, Administrator, Insurance Division, Department of Regulatory Agencies, July 1979.
6. Hawaii, Department of Planning and Economic Development, *The State of Hawaii Data Book 1978, A Statistical Abstract* (Honolulu: 1978), table 189, Labor Force Characteristics by County: 1970.
7. *Hawaii Rev. Stat.*, sec. 11-13.
8. *Hawaii Rev. Stat.*, sec. 235-1.
9. 1 *Blackstone*, Commentaries 442; 2 *Blackstone*, Commentaries 433; *Wendauer v. O'Connor*, 485 P.2d 1157, 107 Ariz. 267 (1971).
10. *Tugaeff v. Tugaeff*, 42 Haw. 455 (1958).
11. *Alexander v. Alexander*, 140 F. Supp. 925 (W.D.S.C. 1956).
12. *Self v. Self*, 376 P.2d 65, 26 Cal. Rptr. 97, 50 C.2d 683 (1962).
13. *The Random House Dictionary of the English Language*, College Edition (New York: 1969).
14. *Websters Third New International Dictionary*, Unabridged (Springfield: 1966).
15. *Hawaii Rev. Stat.*, sec. 434-2.
16. Although sec. 237-23(a)(5) *Hawaii Rev. Stat.* uses the adjective "fraternal" Marshall Dimond, Income Tax Specialist, Department of Taxation, State of Hawaii, stated that the exemption would be applicable to female organizations of a like nature.
17. 1919 Haw. Sess. Laws, Act 101.
18. *Rev. Laws of Hawaii*, sec. 3478 (1925).
19. *Lau v. Nichols*, 414 U.S. 563 (1974); *United Jewish Organizations v. Carey*, 430 U.S. 144 (1977).

## Appendix A

APR 18 1958

*Registration*

U.S. HAWAII

U.S. HAWAII



RECEIVED  
OFFICE OF PRESIDENT  
BOARD OF HEALTH

TERRITORY OF HAWAII  
DEPARTMENT OF THE ATTORNEY GENERAL  
HONOLULU

April 16, 1958

1958 APR 17 AM 9 02

BY

Richard K. C. Lee, M.D.  
President, Board of Health  
Territory of Hawaii  
Honolulu, Hawaii

Dear Sir:

This is in reference to the request of SFC Rafael Cruz-Gomez who seeks to register his child's surname of Cruz-Quinones, the hyphenated surname of both legal parents.

The request should be allowed. We are satisfied that SFC Cruz-Gomez is following our statute by using his name of "Cruz." The use of the child's mother's name with the father's name should not prevent its registration when we know that our statute on registering the parents' name is for the purpose of identifying the child and his parentage. (Secs. 327-2 & 327-3).

Very truly yours,

*Peter A. Aduja*

PETER A. ADUJA  
Deputy Attorney General

C  
O  
P  
Y

March 25, 1958

Mr. Herbert Y. C. Choy  
Attorney General  
Territory of Hawaii  
Honolulu, T. H.

Dear Mr. Choy:

According to Section 327-2 Revised Laws of Hawaii, all children born in wedlock shall have their father's name as a family name. In conformity with this provision of the law, it has been our practice in registering births to have the surname of the child match that of his father.

Recently, we have received a letter from SFC Rafael Cruz-Gomez, an enlisted man from the Commonwealth of Puerto Rico, who is stationed with the United States Army on Oahu, requesting that the surname of his new born child be registered on the birth certificate as MARGIE CRUZ-QUINONES, instead of MARGIE CRUZ-GOMEZ. His wife's maiden name was Margarita Quinones-Colon. His request is based on the fact that in Puerto Rico, as a rule, children take as their surname the first half of the hyphenated surname of both parents.

A legal opinion is requested as to whether we may register the child under the surname of Cruz-Quinones.

Sincerely yours,

RICHARD K. C. LEE, M.D.  
President, Board of Health

## Appendix B

### Nevada Revised Statutes

#### 201.300 CRIMES AGAINST DECENCY, MORALS

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or ensign, which are public or private property, shall be deemed guilty of a misdemeanor.

2. This section shall not apply to flags or ensigns the property of or used in the service of the United States or of this state, upon which inscriptions, names of actions, words, marks or symbols are placed pursuant to law or authorized regulations.

[1911 C&P § 338; A 1919, 438; 1919 RL § 6603; NCL § 10286]

#### PANDERING, PROSTITUTION AND DISORDERLY HOUSES

##### 201.300 Pandering: Definition; punishment; exception.

1. Any person who:

(a) Induces, persuades, encourages, inveigles, entices or compels a person to become a prostitute or to continue to engage in prostitution;

(b) By threats, violence or by any device or scheme, causes, induces, persuades, encourages, takes, places, harbors, inveigles or entices a person to become an inmate of a house of prostitution or assignation place, or any place where prostitution is practiced, encouraged or allowed;

(c) By threats, violence, or by any device or scheme, by fraud or artifice, or by duress of person or goods, or by abuse of any position of confidence or authority, or having legal charge, takes, places, harbors, inveigles, entices, persuades, encourages or procures a person to enter any place within this state in which prostitution is practiced, encouraged or allowed, for the purpose of prostitution;

(d) By promises, threats, violence, or by any device or scheme, by fraud or artifice, by duress of person or goods, or abuse of any position of confidence or authority or having legal charge, takes, places, harbors, inveigles, entices, persuades, encourages or procures a person of previous chaste character to enter any place within this state in which prostitution is practiced, encouraged or allowed for the purpose of sexual intercourse;

(e) Takes or detains a person with the intent to compel such person by force, threats, menace or duress to marry him or any other person; or

(f) Receives, gives or agrees to receive or give any money or thing of value for procuring or attempting to procure any person to become a prostitute or to come into this state or leave this state for the purpose of prostitution,

is guilty of pandering.

2. Any person who is guilty of pandering shall be punished:

(a) Where physical force or the immediate threat of such force is used upon the person, by imprisonment in the state prison for not less than 1 year nor more than 10 years.

(b) Where no physical force or immediate threat of such force is used, by imprisonment in the state prison for not less than 1 year nor more than 6 years, or by a fine of not more than \$5,000, or by both fine and imprisonment.

3. This section does not apply to the patron of a prostitute.

[1:233:1913; 1919 RL p. 3379; NCL § 10537]—(NRS A 1959, 7; 1967, 477; 1977, 1054)

(1977)

**201.310   Placing wife in brothel; pandering.**

1. Any person who by force, fraud, intimidation or threats, places, or procures any other person or persons to place, his wife in a house of prostitution or lead a life of prostitution shall be guilty of pandering and upon conviction thereof shall be punished:

(a) Where physical force or the immediate threat of such force is used upon the wife, by imprisonment in the state prison for not less than 1 year nor more than 10 years.

(b) Where no physical force or immediate threat of such force is used, by imprisonment in the state prison for not less than 1 year nor more than 6 years, or by a fine of not more than \$5,000, or by both fine and imprisonment.

2. Upon the trial of any offense mentioned in this section, a wife shall be a competent witness for or against her husband, with or without his consent, and may be compelled so to testify.

[2:233:1913; 1919 RL p. 3380; NCL § 10538]—(NRS A 1967, 478)

**201.320   Living from earnings of prostitute.**

1. Any person who shall knowingly accept, receive, levy or appropriate any money or other valuable thing, without consideration, from the proceeds of any women engaged in prostitution, shall be punished by imprisonment in the state prison for not less than 1 year nor more than 6 years, or by a fine of not more than \$5,000, or by fine and imprisonment.

2. Any such acceptance, receipt, levy or appropriation of such money or valuable thing shall, upon any proceedings or trial for violation of this section, be presumptive evidence of lack of consideration.

[3:233:1913; 1919 RL p. 3380; NCL § 10539]—(NRS A 1967, 478)

**201.330   Detaining female in brothel because of debt; pandering.**  
Any person or persons who attempt to detain any female person in a disorderly house or house of prostitution because of any debt or debts she has contracted, or is said to have contracted, while living in the house, shall be guilty of pandering and upon conviction thereof shall be punished:

1. Where physical force or the immediate threat of such force is used upon the female person, by imprisonment in the state prison for not less than 1 year nor more than 10 years.

2. Where no physical force or immediate threat of such force is used, by imprisonment in the state prison for not less than 1 year nor more than 6 years, or by a fine of not more than \$5,000, or by both fine and imprisonment.

[4:233:1913; 1919 RL p. 3380; NCL § 10540]—(NRS A 1967, 479)

**201.340   Furnishing transportation; pandering.**

1. Any person who knowingly transports or causes to be transported, by any means of conveyance, into, through or across this state, or who aids or assists in obtaining such transportation for any person with the

## **201.350 CRIMES AGAINST DECENCY, MORALS**

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intent and purpose to induce, persuade, encourage, inveigle, entice or compel such person to become a prostitute or to continue to engage in prostitution is guilty of pandering, and upon conviction thereof shall be punished:

(a) Where physical force or the immediate threat of such force is used upon the person, by imprisonment in the state prison for not less than 1 year nor more than 10 years.

(b) Where no physical force or immediate threat of such force is used, by imprisonment in the state prison for not less than 1 year nor more than 6 years, or by a fine of not more than \$5,000, or by both fine and imprisonment.

2. Any person who commits the crime mentioned in this section may be prosecuted, indicted, tried and convicted in any county or city in or through which he transports or attempts to transport the person.

[5:233:1913; 1919 RL p. 3380; NCL § 10541]—(NRS A 1967, 479; 1977, 1055)

**201.350 Venue for trial of offenses constituting pandering.** It shall not be a defense to a prosecution for any of the acts prohibited in NRS 201.300 to 201.340, inclusive, that any part of such act or acts shall have been committed outside this state, and the offense shall in such case be deemed and alleged to have been committed, and the offender tried and punished, in any county in which the prostitution was consummated, or any overt act in furtherance of the offense shall have been committed.

[6:233:1913; 1919 RL p. 3381; NCL § 10542]

### **201.360 Placing female in house of prostitution: Penalty.**

1. Every person who:

(a) Shall place a female in the charge or custody of another person for immoral purposes, or in a house of prostitution, with intent that she shall live a life of prostitution, or who shall compel any female to reside with him or with any other person for immoral purposes, or for the purposes of prostitution, or shall compel any such female to reside in a house of prostitution or to live a life of prostitution; or

(b) Shall ask or receive any compensation, gratuity or reward, or promise thereof, for or on account of placing in a house of prostitution or elsewhere any female for the purpose of causing her to cohabit with any male person or persons not her husband; or

(c) Shall give, offer, or promise any compensation, gratuity or reward, to procure any female for the purpose of placing her for immoral purposes in any house of prostitution, or elsewhere, against her will; or

(d) Being the husband of any woman, or the parent, guardian or other person having legal charge of the person of a female under the age of 18 years, shall connive at, consent to, or permit her being or remaining in any house of prostitution or leading a life of prostitution; or

(e) Shall live with or accept any earnings of a common prostitute, or

(1977)



entice or solicit any person to go to a house of prostitution for any immoral purposes, or to have sexual intercourse with a common prostitute; or

(f) Shall decoy, entice, procure or in any manner or way induce any female to become a prostitute or to become an inmate of a house of ill fame or prostitution, for purposes of prostitution, or for purposes of employment, or for any purpose whatever, when she does not know that the house is one of prostitution; or

(g) Shall decoy, entice, procure or in any manner or way induce any person, under the age of 21 years, to go into or visit, upon any pretext or for any purpose whatever, any house of ill fame or prostitution, or any room or place inhabited or frequented by any prostitute, or used for purposes of prostitution, is guilty of a felony.

2. Any person who violates the provisions of subsection 1 shall be punished:

(a) Where physical force or the immediate threat of such force is used upon the female person, by imprisonment in the state prison for not less than 1 year nor more than 10 years.

(b) Where no physical force or immediate threat of such force is used, by imprisonment in the state prison for not less than 1 year nor more than 6 years, or by a fine of not more than \$5,000, or by both fine and imprisonment.

[1911 C&P § 180; RL § 6445; NCL § 10127]—(NRS A 1967, 479)

**201.370 Male person habitually resorting in house of prostitution.** Every male person who shall habitually resort in any house of prostitution shall be guilty of a misdemeanor.

[Part 1911 C&P § 195; A 1921, 112; NCL § 10142]—(NRS A 1967, 480)

**201.380 Location of houses of ill fame.**

1. It shall be unlawful for any owner, or agent of any owner, or any other person to keep any house of ill fame, or to let or rent to any person whatever, for any length of time whatever, to be kept or used as a house of ill fame, or resort for the purposes of prostitution, any house, room or structure situated within 400 yards of any schoolhouse or schoolroom used by any public or common school in the State of Nevada, or within 400 yards of any church, edifice, building or structure erected for and used for devotional services or religious worship in this state.

2. Any person violating the provisions of subsection 1 shall be punished by a fine of not more than \$500.

[419:63:1947; 1943 NCL § 6084.429] + [420:63:1947; 1943 NCL § 6084.430] + [1911 C&P § 245; RL § 6510; NCL § 10193] + [1911 C&P § 247; RL § 6512; NCL § 10195]—(NRS A 1967, 480)

**201.390 Property on principal business streets not to be rented for purposes of prostitution, hurdy houses.**

1. It shall be unlawful for any owner or agent of any owner or any

(1973)

## 201.400 CRIMES AGAINST DECENCY, MORALS

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other person to keep, let or rent for any length of time, or at all, any house fronting on the principal business street or thoroughfare of any of the towns of this state, for the purpose of prostitution or for the purpose of keeping any dance house or house commonly called a hurdy house, or house where wine, beer or spirituous liquors are sold or served by females or female waiters or attendants, or where females are used or employed to attract or solicit customers, nor shall any entrance or exit way to any house referred to in this subsection be made or used from the principal business street or thoroughfare of any of the towns of this state.

2. Any person violating the provisions of subsection 1 shall be punished by a fine of not more than \$500.

[1911 C&P § 246; RL § 6511; NCL § 10194] + [1911 C&P § 247; RL § 6512; NCL § 10195]—(NRS A 1967, 481)

**201.400 General reputation competent evidence.** In the trial of all cases arising under the provisions of NRS 201.380 and 201.390, evidence of general reputation shall be deemed competent evidence as to the question of the ill fame of any house alleged to be so kept, and to the question of the ill fame of such woman.

[1911 C&P § 248; RL § 6513; NCL § 10196]

**201.410 Duties of sheriff and district attorney.** The district attorney and sheriff of each county in this state shall see that the provisions of NRS 201.380 are strictly enforced and carried into effect, and upon neglect so to do, they, or either of them, shall be deemed guilty of a misdemeanor in office and may be proceeded against by accusation as provided in chapter 283 of NRS.

[421:63:1947; 1943 NCL § 6084.431]

**201.420 Keeping disorderly house.** Any person who shall keep any disorderly house, or any house of public resort, by which the peace, comfort or decency of the immediate neighborhood, or of any family thereof, is habitually disturbed, or who shall keep any inn in a disorderly manner, is guilty of a misdemeanor.

[1911 C&P § 219; RL § 6484; NCL § 10166]—(NRS A 1967, 481)

**201.430 Unlawful advertising of illicit resorts.**

1. It shall be unlawful for any person or persons, company, association or corporation doing business in this state to advertise, in any public theater, or on the public streets of any city or town, or on the public highway, any resort where females congregate for the purpose of illicit intercourse.

2. Any person or persons, company, association or corporation violating the provisions of this section shall be punished:

(a) For the first offense, by a fine of not more than \$500.

(b) For any subsequent offense, for a misdemeanor.

[1:109:1913; 1919 RL p. 3379; NCL § 10535]—(NRS A 1967, 481)

**CRIMES AGAINST DECENCY, MORALS      201.440**

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**201.440    Unlawful to permit illegal advertising of illicit resorts.** Any person or persons, company, association or corporation doing business in this state who shall knowingly aid, abet, solicit, encourage, permit or allow any person or persons, company, association or corporation to advertise in their place of business, by any device, any roadhouse, or resort where females congregate for the purpose of illicit intercourse, shall be punished:

1. For the first offense, by a fine of not more than \$500.
  2. For any subsequent offense, for a misdemeanor.
- [2:109:1913; 1919 RL p. 3379; NCL § 10536]—(NRS A 1967, 481)

(1973)

**244.345 Licensing of places of amusement, entertainment, recreation: County license board; licensing houses of prostitution prohibited in certain counties.**

1. Every person, firm, association of persons or corporation wishing to engage in the business of conducting a billiard or pool hall, dancing hall, bowling alley, theater, soft-drink establishment, gambling game or device permitted by law, or other place of amusement, entertainment or recreation, outside of an incorporated city or incorporated town, shall:

(a) Make application by petition to the license board, as provided in subsection 2, of the county in which any such business is to be engaged in, for a county license of the kind desired. Such application shall be in a form prescribed by the regulations of the license board.

(b) File the application with the required license fee with the county license collector, who shall present the same to the license board at its next regular meeting.

The board may refer the petition to the sheriff, who shall report upon the same at the following regular meeting of the board. The board shall then and there grant or refuse the license prayed for or enter such other order as is consistent with its regulations. Except in the case of an application for a license to conduct a gambling game or device, the sheriff may, in his discretion, grant a temporary permit to an applicant, valid only until the next regular meeting of the board. In unincorporated towns and cities governed under the provisions of chapter 269 of NRS, the license board shall have the exclusive power to license and regulate the businesses herein set forth.

2. The board of county commissioners and the sheriff of each county shall constitute the license board, and the county clerk or other person designated by the license board shall be the clerk thereof, in the respective counties of this state.

3. The license board is empowered and commissioned to act for the purposes of this section (without further compensation to the board or the clerk thereof) as a license board to:

(a) Fix, impose and collect license fees upon the businesses herein mentioned.

(b) Grant or deny applications for licenses and impose conditions, limitations and restrictions upon the licensee.

(c) Adopt, amend and repeal regulations relating to licenses and licensees.

(d) Restrict, revoke or suspend licenses for cause after hearing. In an emergency the board may issue an order for immediate suspension or limitation of a license, but the order shall state the reason for suspension or limitation and shall afford the licensee a hearing.

4. The license board shall hold a hearing before adopting proposed regulations, before adopting amendments to regulations, and before repealing regulations relating to the control or the licensing of the businesses mentioned in this section. Notice of such hearing shall be published in a newspaper published in and having general circulation in the county at least once a week for a period of 2 weeks before the hearing.

5. New regulations shall be adopted after public hearing by a vote of at least two-thirds of the members present. Upon adoption of new regulations the board shall designate their effective date, which shall not be earlier than 15 days after their adoption. Immediately after adoption a copy of any new regulations shall be mailed to the address of each licensee and each practicing attorney in the county.

6. Except for the adoption of new regulations a majority vote of the members of the license board present shall govern in the transaction of all business. A majority of the members thereof shall constitute a quorum for the transaction of business.

7. Any person, firm, association of persons or corporation who shall engage in any of the businesses herein mentioned without first having obtained the license and paid the license fee therefor as herein provided shall be guilty of a misdemeanor.

8. In any county having a population of 200,000 or more, as determined by the last preceding national census of the Bureau of the Census of the United States Department of Commerce, the license board shall not grant any license to a petitioner for the purpose of operating a house of ill fame or repute or any other business employing any female for the purpose of prostitution.

[1:50:1923; NCL § 2037] + [2:50:1923; NCL § 2038] + [3:50:1923; NCL § 2039] + [4:50:1923; NCL § 2040]—(NRS A 1959, 838; 1961, 364; 1971, 11; 1973, 923; 1975, 562)

### Crimes Against Health, Safety

#### 202.140 Venereal diseases:

Sexual intercourse during infectious affliction unlawful; physician to report diseased prostitute.

1. Every person afflicted with any infectious or contagious venereal disease which may be conveyed to another, who shall have sexual intercourse with any other person, is guilty of a misdemeanor.

2. Any physician or other person, knowing that any common prostitute is afflicted with any infectious or contagious venereal disease who fails to notify immediately the police authorities of the, town, city or place where such prostitute is at the time of the discovery of the existence of such disease, is guilty of a misdemeanor.