

**STATE OF HAWAII  
DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS**

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February 1, 2018

To: The Honorable Jill N. Tokuda, Chair,  
The Honorable J. Kalani English, Vice Chair, and  
Members of the Senate Committee on Labor

The Honorable Brian T. Taniguchi, Chair,  
The Honorable Karl Rhoads, Vice Chair, and  
Members of the Senate Committee on Judiciary

Date: Thursday, February 1, 2018

Time: 2:50 p.m.

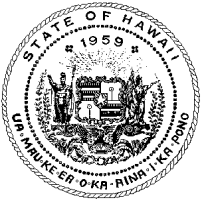
Place: Conference Room 229, State Capitol

From: Leonard Hoshijo, Acting Director  
Department of Labor and Industrial Relations (DLIR)

**Re: S.B. 2805 Relating to the Hawaii Civil Rights Commission**

DLIR is in strong support of SB2805, which gives the Hawaii Civil Rights Commission (HCRC) Executive Director the discretion to either issue a final conciliation demand or dismiss the complaint and issue a notice of right to sue after the Executive Director has been unable to secure an acceptable conciliation agreement, except in fair housing cases to comply with the Fair Housing Act.

By giving the Executive Director the discretion to either issue a final conciliation demand or dismiss the complaint and issue a notice of right to sue, the HCRC will be able to more effectively and efficiently utilize its attorney resources to pursue priority cases in the public interest. The statute as currently written often forces complaints into contested case hearings, which siphons limited civil rights enforcement resources from cases more suitable for litigation and in the public interest.



# HAWAI‘I CIVIL RIGHTS COMMISSION

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February 1, 2018  
Rm. 229, 2:50 p.m.

To: The Honorable Jill N. Tokuda , Chair  
Members of the Senate Committee on Labor

The Honorable Brian T. Taniguchi , Chair  
Members of the Senate Committee on Judiciary

From: Linda Hamilton Krieger, Chair  
and Commissioners of the Hawai‘i Civil Rights Commission

Re: S.B. No. 2805

The Hawai‘i Civil Rights Commission (HCRC) has enforcement jurisdiction over Hawai‘i’s laws prohibiting discrimination in employment, housing, public accommodations, and access to state and state funded services (on the basis of disability). The HCRC carries out the Hawai‘i constitutional mandate that no person shall be discriminated against in the exercise of their civil rights. Art. I, Sec. 5.

**The HCRC supports S.B. No. 2805.**

S.B. No. 2805, authorizes the HCRC Executive Director, in cases in which a notice of cause has been issued and conciliation efforts fail, to exercise discretion to either: 1) issue a final demand, and docket the case for a contested case hearing; **OR**, 2) dismiss the complaint and issue a notice of right to sue. The bill also provides an exception for dual-filed fair housing cases, as required by U.S. Department of Housing and Urban Development (HUD) federal substantial equivalence requirements.

The current HRS § 368-13(e) mandates that when conciliation efforts in a cause case fail to secure a conciliation settlement, the Executive Director *shall* issue a final conciliation demand. § 368-14 then requires that the case be docketed for contested case hearing / trial before a Hearings Examiner.

The mandatory language in the statute, with the use of the word "shall" in mandating each next step of the process has several consequences negatively affecting the efficiency and effectiveness of HCRC civil rights law enforcement, affecting the way that cases are investigated and conciliated.

The bill provides for prosecutorial discretion, allowing the Executive Director to decide which cases should be litigated. **Similar discretion is provided to and exercised by the U.S. Equal Employment Opportunity Commission under Title VII of the Civil Rights Act of 1964.**

The current mandatory language creates problems and inefficiencies, stemming from the difference between the “reasonable cause” standard applied in investigation and the “preponderance of evidence” standard applied in litigation, administrative hearing and judicial review. Simply put, there are cases that are cause cases but not litigation cases, in which there may be reasonable cause, but it would be difficult to prevail at hearing and on appeal. The result is that the HCRC Executive Director is forced to use limited resources and enforcement attorney time on conciliation of cases that meet the threshold reasonable cause standard, but are not suitable for litigation, some of which may not be provable by a preponderance of evidence standard at hearing or trial, rather than focusing resources on strong cases that should be litigated.

S.B. No. 2805 also provides a new subsection 368-13(f) that makes an exception to the exercise of discretion by the Executive Director under the amendment to subsection 368-13(e). The new subsection (f) maintains the mandatory language from the current statute for cases that are dual-filed under both our state fair housing law, chapter 515, and the federal Fair Housing Act. These comprise approximately 10-15% of the complaints filed with the HCRC. Our federal partners at the U.S. Department of Housing and Urban Development (HUD) Office of Fair Housing and Equal Opportunity (FHEO) have advised us that this exception is required to maintain substantial equivalence with federal fair housing law.

The HCRC supports passage of S.B. No. 2805.

**SB-2805**

Submitted on: 1/31/2018 12:25:43 PM

Testimony for LBR on 2/1/2018 2:50:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Louis Erteschik	Hawaii Disability Rights Center	Comments	Yes

Comments:

We take no position on the substantive contents of the bill. We have some concern that certain individuals will not have their claims fully pursued, but we do defer to the Civil Rights Commission to exercise appropriate discretion in those matters, as it relates to the merits of each case and the staffing requirements of the Commission. On the subject of the "workload" of the Commission, we believe there is a more immediate issue which the Legislature needs to address. Recently, the Hawaii Supreme Court in the case of *Hawai'i Technology Academy and the Department of Education, State of Hawai'i, v. L.E. and Hawai'i Civil Rights Commission*, 141 Hawai'i 147 (2017) ruled that under Chapter 368 of the Hawaii Revised Statutes, the Civil Rights Commission does not have jurisdiction to hear disability discrimination complaints where the aggrieved party has a claim against a state agency if the agency also receives federal funds. Many if not all state agencies receive federal funds and if the agency does receive federal funds, while there are remedies available under Section 504 of the federal Rehabilitation Act, those claims generally are pursued in Federal Court. For most claimants who are not represented by attorneys this is a very cumbersome, difficult process. This is a serious matter because many people look to the Civil Rights Commission as the entity to protect them against discrimination that may occur by state agencies under state law. We do not believe that that was the intent of the Legislature. Yet that is what the Supreme Court ruled and so it is now the law in Hawaii.

We note that the Commission itself argued before the Court that it interpreted the current law as granting it jurisdiction, so our view is not without some basis. We believe, based upon discussions with various stakeholders that there is widespread support for a "legislative fix" to amend the law to clarify that the Commission has jurisdiction over claims against a state agency, whether it receives federal funds or not. We would urge the legislature to either use this measure as a vehicle to accomplish that or to find another suitable bill for that purpose. We would be pleased to work with the Commission and the legislature to develop language which can be inserted for that effect.

