
Study of Civil Rights Protection for State or State-Funded Services

A Report to the
Governor
and the
Legislature of
the State of
Hawaii



THE AUDITOR
STATE OF HAWAII

Study of Civil Rights Protection for State or State-Funded Services

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Hawaii

Submitted by

THE AUDITOR
STATE OF HAWAII

Report No. 93-18
December 1993

Foreword

This report was prepared in response to Senate Concurrent Resolution No. 166, Senate Draft 1 of the Regular Session of 1992. The resolution requested the State Auditor to review nondiscrimination laws and assess the need to expand Section 368-1.5, Hawaii Revised Statutes, to protect against discrimination in state and state-funded services on the basis of race, sex, national origin, or religion. Section 368-1.5 currently protects only persons with disabilities.

We wish to acknowledge the cooperation and assistance extended to us by the commissioners and staff of the Hawaii Civil Rights Commission, staff of the Judiciary's Center for Alternative Dispute Resolution, and the American Arbitration Association. We also appreciate the assistance of the many state and private organizations that participated in our survey and interviews.

Marion M. Higa
State Auditor

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Chapter 1

Introduction

Section 368-1.5, Hawaii Revised Statutes, protects persons with disabilities from discrimination in state and state-funded services. If otherwise qualified, these persons may not be excluded from participation in state programs, denied program benefits, or subjected to discrimination. Currently, the Hawaii Civil Rights Commission is authorized to investigate, conciliate, and adjudicate complaints of violations of Section 368-1.5. In addition, the commission has responsibilities in the areas of employment, public accommodations, and real estate transactions.

The Legislature, in Senate Concurrent Resolution No. 166, Senate Draft 1 of the 1992 legislative session, requested that the State Auditor review existing state and federal nondiscrimination laws and assess the need to expand Section 368-1.5 to protect against discrimination in state and state-funded services on the basis of race, sex, national origin, and religion (in addition to disability). The State Auditor was also to consider additional resources required by the Civil Rights Commission if Section 368-1.5 were expanded.

During the 1992 legislative session, a bill was introduced that proposed expanding Section 368-1.5 to add race, sex, national origin, and religion as protected classes.¹ Organizations were concerned about discrimination against immigrants who have difficulty speaking English. The Civil Rights Commission testified that adequate staff would be needed to enforce an expanded statute. Instead of enacting the bill, the Legislature passed the resolution requesting this study.

Objectives of the Study

The objectives of the study were to:

1. Identify discrimination in access to services provided by state agencies, or private agencies rendering services to the public with state financial assistance, based on disability, race, sex, national origin, or religion.
2. Summarize the status of laws applying to denial of access based upon disability, race, sex, national origin, or religion, for state or state-funded services, and assess the need to provide specific state statutory protection against such discrimination.
3. Recommend any appropriate measures, including legislation or administrative measures.

Scope and Methodology

This study focused on discrimination in state services provided by state agencies (executive, legislative, and judicial) and by private or county organizations through purchase of service or grant-in-aid contracts with the State. We examined whether discrimination occurs based on disability, race, sex, national origin, or religion. We did not study discrimination in areas already within the jurisdiction of the Civil Rights Commission: employment under Part I of Chapter 378, HRS; public accommodations under Chapter 489; and real property transactions (housing) under Chapter 515.

To identify the bases for discrimination, we surveyed state agencies and state-funded organizations, asking them to describe complaints they had received from 1988 through 1992. We also asked them to describe the disposition of these complaints and their policies and procedures for handling them. We followed up on the survey, selectively, through interviews, but we did not test the reliability of the data submitted by the agencies and private providers.

We sent 24 survey questionnaires to the heads of state agencies with instructions to provide copies to each administratively attached agency and to any county agencies with which the state agency has a purchase of service or grant-in-aid contract. We included each of the executive departments, the Judiciary, the Ombudsman, the Legislative Reference Bureau, and the State Ethics Commission. We received 138 completed questionnaires.

We sent 344 survey questionnaires primarily to private organizations currently holding state contracts for purchases of service or grants-in-aid and to a few private organizations that held such contracts in the recent past. Some organizations were sent multiple questionnaires for multiple state-funded programs. We received 198 completed questionnaires.

We interviewed officials of the Hawaii Civil Rights Commission, the Office of Civil Rights, U.S. Department of Health and Human Services, and others knowledgeable about nondiscrimination laws and dispute resolution. We also reviewed federal and state laws on nondiscrimination and related literature. Finally, we attended and reviewed testimony from the July 20-21, 1993 hearing conducted by the Hawaii Civil Rights Commission to identify discrimination in state services.²

Our work was performed from February 1993 through November 1993 in accordance with generally accepted government auditing standards.

Chapter 2

Findings and Recommendations

In this chapter, we discuss discrimination in state-funded services and the avenues of redress. We also comment on programs designed to assist specific groups in the population.

Summary of Findings

1. Indications exist that clients or potential clients of state-funded services have been discriminated against on the basis of their disability, race, sex, national origin, or religion.
 2. Existing laws prohibiting discrimination do not assure protection for all proposed protected classes in all state-funded services, and the efforts of state and state-funded organizations to establish internal recourse vary widely. Uniform enforcement is needed.
 3. Whether programs which were established to assist specific groups, such as women or minorities, are discriminatory must be determined on a case-by-case basis.
-

Indications of Discrimination Exist in State-Funded Services

Through our survey and interviews, we found evidence of discrimination in state-funded services provided by state agencies or by private organizations funded by the State. State and private organizations reported complaints of discrimination based on disability, race, sex, national origin, and religion. The complaints included allegations of discrimination towards immigrants who have difficulty speaking or understanding English, which was one of the concerns leading to the request for this study.

Many types of discrimination

State and private agencies we surveyed reported 307 discrimination complaints, including those with multiple bases. Of these complaints, 183 alleged sex as a basis; 45 alleged race; 64 disability; 30 age; and 19 alleged national origin. Other allegations were as follows: 2 on sexual orientation; 1 on color; 3 on “retaliation;” 1 on “civil rights;” 3 on “harassment;” and 5 were unclear or unknown.

The Equal Employment Opportunity/Affirmative Action Office of the University of Hawaii at Manoa reported receiving approximately 6 to 12 complaints each year from students or members of the public. About 90 percent of these are complaints of sexual harassment and about 1 percent

are access complaints of the disabled. Other complaints reported by the university are included in the above tabulations. The Department of Public Safety estimates that about 50 percent of the complaints from women inmates are of sex discrimination. The American Civil Liberties Union of Hawaii receives about 75 to 100 prisoner complaints each year based on disability, sex, race, or religion.

Persons with physical disabilities appear to lack full access to services of the Department of Health (DOH). The Office of Civil Rights of the federal Department of Health and Human Services (DSSH) for Region IX found problems at more than 90 DOH sites. Some sites lacked wheelchair ramps or had parking stalls located in dangerous traffic areas. According to the DOH's affirmative action officer, the department is working with Region IX on a plan to remedy these problems and comply with the requirements of the federal Americans With Disabilities Act of 1990 (which prohibits discrimination against persons with disabilities in public services and accommodations), and with Section 504 of the federal Rehabilitation Act of 1973, as amended (which prohibits discrimination against persons with disabilities in programs or activities receiving federal financial assistance).

National origin language barriers

In 1992, various organizations had testified to the Legislature that many immigrants face discrimination based on national origin because language barriers prevent access to state services.¹ The Legislature in 1993 passed a resolution urging executive agencies to ensure full assistance to clients who are not fluent in English, implement a plan correcting any deficiencies, and report to the Legislature at the 1994 legislative session on their progress.² The Legislature noted that the U.S. District Court in Hawaii has ordered the DOH to provide for the full delivery of services to all qualified clients who speak little or no English.

Private organizations claim that state agencies are still not meeting their responsibility to provide interpreter services, and that some agencies ask immigrants to obtain their own interpreters. They charge that important state application forms and correspondence are written only in English. Many complaints were voiced during a recent hearing held by the Hawaii Civil Rights Commission. The federal Office of Civil Rights within DHHS reports that the problem of national origin language barriers is widespread in Region IX, which includes Hawaii.

State agencies have made some efforts to translate written material into foreign languages, hire bilingual employees who can serve as interpreters, and use the translation services of the nonprofit Bilingual Access Line (which screens, employs, and trains interpreters). Despite these efforts, the problem of language barriers persists.

Statutory Protections and Agency Recourse Are Not Assured

State and federal laws do not assure protection against discrimination for all proposed protected classes in all state-funded services. Furthermore, most state-funded programs lack policies and procedures for handling complaints. Expanding Section 368-1.5, HRS, could help to resolve these problems.

Many laws with varying protections

There are many laws prohibiting discrimination, but the scope of their protections varies. Section 368-1.5, HRS, is the only law that explicitly and with certainty applies to discrimination in all state-funded services in Hawaii. But it is limited because it protects only persons with disabilities.

Whether a particular law applies to the services and clients of a state agency or private organization receiving state funds depends on the facts of the situation. For example, the equal protection guarantee of the Fourteenth Amendment to the U.S. Constitution restricts the ability of state or local governments to discriminate in providing benefits. However, the courts hold private organizations liable for violations of the guarantee only if their activities involve sufficient “state action.” Direct state aid could qualify as state action, but the courts make this determination on a case-by-case basis. A similar interpretation applies to the equal protection clause in Article I, Section 5 of the Hawaii State Constitution.

Other laws include Title VI of the federal Civil Rights Act of 1964, as amended, which prohibits discrimination based upon race, color, or national origin by any state, local, or private organization receiving federal financial assistance. Similarly, Section 504 of the Rehabilitation Act of 1973, as amended, prohibits discrimination against the disabled when state, local, or private programs or activities receive federal financial assistance. Both laws are enforceable by the federal funding agency or through a private lawsuit against the violator, but do not apply to organizations which do not receive federal aid.

Examples of other federal laws prohibiting discrimination include those dealing with revenue sharing and educational programs and the Americans With Disabilities Act. The laws, however, differ not only in the programs they apply to, but also in the groups they protect. One may include race, color, national origin, and sex, but not disability or religion; another may include all of these groups; and still another may protect only the disabled. State statutes vary too in the programs they cover and the protections they offer.

The Appendix lists state laws and major federal laws that make up the puzzle of antidiscrimination laws falling within the scope of this study.

These laws need to be sorted through by persons who believe they may have been discriminated against in state services.

Lack of policies and procedures for redress

Many state and most state-funded organizations do not have written policies and procedures on how they handle discrimination in state-funded services. Our survey asked the organizations whether they have written policies on nondiscrimination or written procedures to handle discrimination complaints and to send us copies. Of the 337 responses, only 79 submitted written policies or procedures.

Some agencies and private organizations did have written policies or procedures. Most often, this would be an internal procedure for handling a discrimination charge, including some state agencies' administrative procedures which are generally applicable to discrimination complaints. Some programs have a policy of nondiscrimination or equal employment opportunity or affirm compliance with federal antidiscrimination laws. A few set forth a bill of rights for patients, including the right to equal and nonprejudicial treatment. However, the policies and procedures are neither widespread nor, in many instances, comprehensive enough to ensure that complainants receive appropriate attention and redress. Each state and state-funded organization should have both written policies and written procedures to facilitate the resolution of complaints it receives from its clients. State agencies should also make sure that their private providers have these policies and procedures.

Needed expansion of Section 368-1.5

Even though much could be done to improve recourse for persons who may have suffered discrimination without amending Section 368-1.5, we believe the law should be amended to add race, sex, national origin, and religion as protected classes. This would guarantee complainants an avenue of redress, maintain uniformity in the enforcement of nondiscrimination laws, and simplify the steps that complainants must take to rectify discriminatory situations. They would have a clear and direct avenue to the investigative and adjudicatory processes of the Hawaii Civil Rights Commission.

We had reported in 1989 that civil rights enforcement in Hawaii was fragmented and not receiving the priority it warranted.³ The 1988 Legislature created the Civil Rights Commission specifically to establish a uniform procedure for the enforcement of civil rights and granted the commission enforcement jurisdiction over the State's employment, public accommodations, and real estate nondiscrimination laws. The subsequent enactment of Section 368-1.5 extended civil rights guarantees to persons with disabilities in programs financed with state funds. Expanding Section 368-1.5 further would be consistent with clarifying, consolidating, and simplifying civil rights enforcement—the Civil Rights Commission's reason for existing. The primary concern in

expanding Section 368-1.5 would be the additional workload for the commission which is already experiencing a serious backlog in cases.

Backlog in cases

At a hearing of the House Committee on Judiciary in 1993, the commission testified with regard to a caseload crisis. When the commission first opened its doors, it inherited 266 employment discrimination cases. Since its establishment, it has not been able to process cases in a timely manner. Intake appointments have been delayed as long as two months, and complainants have waited up to two years to see their complaints resolved.

The commission informed us that the time span for case closures, from filing to disposition, has increased from an average of 307 days during FY1990-91 to 352 days for FY1991-92. Although the law requires the executive director of the commission to issue a determination of whether there is reasonable cause to believe that a violation has occurred within 180 days of the filing of a complaint, unless the commissioners grant an extension, the commission has generally not been able to adhere to the 180-day time limit.

The Legislature authorized two new investigators for the commission in 1993. The commission expects that this will prevent its caseload from continuing to increase every month. But the commission believes even more investigators are needed to significantly decrease the existing backlog.

Alternative dispute resolution

The commission believes that an expansion of Section 368-1.5 would substantially increase the caseload, further taxing its resources. We could not estimate the potential increase in the number of cases because: (1) the commission would be receiving new jurisdiction; and (2) complainants may choose to resolve their complaints within the organization or seek remedies under other laws. Therefore, we are not making any recommendations for additional staffing at this time.

We do acknowledge that the increase in cases could be substantial. However, we believe that one very promising means of alleviating the burden and reducing the backlog is alternative dispute resolution.

Section 613-1, HRS, defines alternative dispute resolution as “methods, procedures, or techniques that are used to resolve differences voluntarily and that do not require a traditional and formal adjudicatory trial or contested hearing. These methods include, but are not limited to, mediation, contractual arbitration, fact-finding, consensus-building, and neutral-expert evaluation.”

Mediation or some other form of alternative dispute resolution could help the Civil Rights Commission to better handle its caseload, including any additional complaints resulting from an expansion of Section 368-1.5. Hawaii would not be the first jurisdiction to implement alternative dispute resolution in civil rights enforcement proceedings. Cincinnati, Ohio, has recently implemented a mediation option for discrimination complaints in housing, employment, and public accommodations based on sex, color, religion, marital status, sexual orientation, Appalachian origin, or disability. Mediators provide confidential services to parties willing to discuss a possible solution to a complaint.

At least two experienced organizations indicate that they could assist the commission in developing an alternative dispute resolution program. One organization is the Judiciary's Center for Alternative Dispute Resolution. The center developed a mandatory small claims mediation project to reduce caseload and make the court process more efficient. It has a purchase of service contract with the Mediation Centers of Hawaii to provide trained volunteer mediators for all Small Claims Courts in the District Court of the First Circuit. The center also assisted the Family Court of the Second Circuit in designing and implementing a mandatory child custody/visitation mediation pilot project for divorce cases. Another of the center's projects is the Judiciary's Court Annexed Arbitration Program, which is a mandatory, nonbinding arbitration procedure for tort cases having a probable jury award of \$150,000 or less.

The other experienced organization is the American Arbitration Association, which is a public service, nonprofit organization. The association provides arbitration under the State's lemon law (Chapter 481I, HRS) and condominium property regimes law (Chapter 514A, HRS). The association is also helping to resolve Hurricane Iniki claims in programs set up through the Center for Alternative Dispute Resolution and the Department of Commerce and Consumer Affairs (DCCA). The association has tailored mediation programs for landlord-tenant disputes, contractor-homeowner disputes, and insurance claims under the jurisdiction of DCCA.

Both the Center for Alternative Dispute Resolution and the American Arbitration Association suggest attempting mediation early in a civil rights case. In mediation, the parties try to resolve the dispute themselves with the assistance of a neutral third party. Mediation is considered "user friendly" and cases are very likely to settle at this stage. The association recommends that arbitration be tried if mediation does not work. In arbitration, one or more impartial persons hear the dispute and make a decision that may be either binding or advisory.

The Civil Rights Commission could work with the Center for Alternative Dispute Resolution to adopt guidelines for determining when cases are appropriate for mediation or other techniques, and to integrate the techniques into the commission's complaint filing, investigation, and adjudication procedures. A purchase of service contract between the commission and organizations such as the Mediation Centers of Hawaii or the American Arbitration Association may be necessary to implement alternative dispute resolution. While some mediators are volunteers, others charge a fee, and there would be administrative expenses.

Programs for Specific Groups of People Must Be Constitutional

The resolution requesting this review asked for our recommendations on how to minimize legal challenges to legislative programs which are designed to assist specific groups of people and which may exclude persons in protected classes. These programs could include, for example, Native Hawaiian programs or affirmative action programs for minorities or women.

Our response is that these types of programs must be able to stand on their own constitutionally. The applicability of an expanded Section 368-1.5, HRS, to discrimination complaints involving such programs would have to be determined on a case-by-case basis, taking into consideration the purpose of the program. For example, Section 368-1.5 would probably not be applicable to a complaint alleging *race* discrimination in a program for Native Hawaiians, but it probably would be applicable to a complaint alleging *sex* discrimination in a Native Hawaiian program.

Recommendations

1. State agencies and private organizations with state-funded programs should strengthen their internal means of resolving discrimination complaints by adopting written nondiscrimination policies and discrimination complaint procedures.
2. The Legislature should expand Section 368-1.5, HRS, to include race, sex, national origin, and religion as protected classes.
3. The Hawaii Civil Rights Commission should work with the Judiciary's Center for Alternative Dispute Resolution to design a plan integrating alternative dispute resolution into the commission's procedures.

Notes

Chapter 1

1. House Bill No. 2692, House Draft 2, Regular Session of 1992.
2. "Access to State and State-Funded Services," hearing/conference of the Hawaii Civil Rights Commission, July 20-21, 1993, William S. Richardson School of Law.

Chapter 2

1. Testimony presented to the House Committee on Judiciary on House Bill No. 2692, House Draft 2, Regular Session of 1992.
2. Senate Resolution No. 221, Senate Draft 1, Regular Session of 1993.
3. Hawaii, Legislative Auditor, *A Study on the Implementation of the Civil Rights Commission for the State of Hawaii*, Report No. 89-8, Honolulu, January 1989.

Responses of the Affected Agencies

Comments on Agency Responses

We transmitted drafts of this report to the chairperson and the executive director of the Hawaii Civil Rights Commission and the director of the Center for Alternative Dispute Resolution on November 12, 1993. A copy of the transmittal letter to the chairperson of the commission is included as Attachment 1. Similar letters were sent to the executive director of the commission and the director of the center. The responses of the chairperson of the commission and the director of the center are included as Attachments 2 and 3, respectively. Attached to the commission's response was a summary of findings and recommendations from its own report on this subject. The commission's summary is not reprinted in this report, but is available for review at our office. The commission's entire report may be obtained from the commission.

The Hawaii Civil Rights Commission supports our recommendation to expand Section 368-1.5, Hawaii Revised Statutes, to include protection against discrimination based on race, sex, national origin, or religion. It would also like to include sexual orientation as a protected class. If the commission's jurisdiction is expanded, it estimates that its caseload will double. The commission says that significantly more staff and space will be necessary to ensure adequate enforcement. It suggests that its jurisdiction be expanded incrementally over most state and state-funded programs beginning with complaints at the Department of Education and the Department of Human Services. The commission believes that further studies on discrimination by the Department of Public Safety and other law enforcement agencies are needed before they are included. We see no justification for excluding state law enforcement programs from the jurisdiction of the Hawaii Civil Rights Commission in our recommendation to expand the protected classes under Section 368-1.5.

With respect to our recommendation that the commission work with the Center for Alternative Dispute Resolution to integrate alternative dispute resolution into the commission's procedures, the commission says it is interested in developing a pilot mediation program to improve case processing and alleviate its backlog. The commission would like to add a mediator trained in discrimination law to its staff. It is also open to contracting for mediation services if funding is provided.

The commission would like the governor to issue an executive order mandating that all departments adopt a uniform policy of nondiscrimination on the basis of race, color, sex, religion, ancestry, disability, or sexual orientation. The commission also wants the

Legislature to establish and fund a governor's committee on bilingual access to state and state-funded services to assess the need for bilingual services and to set up a system to provide bilingual assistance for all state and state-funded services.

The Center for Alternative Dispute Resolution says it would like to assist the commission in designing an alternative dispute resolution plan. The Center points out, however, that time-consuming issues must be resolved such as the form of the dispute resolution process and whether participation will be mandatory or voluntary. The Center says that it lacks the resources to administer the process and that funding would be needed for the fees of third-party neutrals and administrative costs.

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MARION M. HIGA
State Auditor
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November 12, 1993

COPY

Dr. Amefil Agbayani, Chair
Civil Rights Commission
888 Mililani Street, 2nd Floor
Honolulu, Hawaii 96813

Dear Dr. Agbayani:

Enclosed for your information are five copies, numbered 6 to 10 of our draft report, *Study of Civil Rights Protection for State or State-Funded Services*. Please distribute the copies to the members of the commission. We ask that you telephone us by Tuesday, November 16, 1993, on whether you intend to comment on our recommendations. If you wish your comments to be included in the report, please submit them no later than Monday, November 29, 1993.

The Executive Director of the Civil Rights Commission, the Director of the Center for Alternative Dispute Resolution, the Governor, and the presiding officers of the two houses of the Legislature have also been provided copies of this draft report.

Since this report is not in final form and changes may be made to it, access to the report should be restricted to those assisting you in preparing your response. Public release of the report will be made solely by our office and only after the report is published in its final form.

Sincerely,

Marion M. Higa
State Auditor

Enclosures



HAWAII CIVIL RIGHTS COMMISSION

888 MILILANI STREET, 2ND FLOOR HONOLULU, HI 96813 • PHONE: 586-8636 FAX: 586-8655 TDD: 586-8692

November 29, 1993

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OFF. OF THE AUDITOR
STATE OF HAWAII

MEMORANDUM

To: The Honorable Marion M. Higa
State Auditor

From: Amefil Agbayani, Chairperson *Amefil Agbayani*
Hawaii Civil Rights Commission

Subject: Draft Study of Civil Rights Protection for
State or State-Funded Services

We are in receipt of your draft report entitled "Study of Civil Rights Protection for State or State-Funded Services". The following are our comments on the report's findings and recommendations:

On July 20-21, 1993 the Hawaii Civil Rights Commission held a public hearing/conference on access to state and state funded services. The findings and recommendations from this hearing, as well as from our own survey and follow up with various state and private agencies, are summarized in the attached "Report On Access To State And State Funded Services" issued by the Commission in September 1993.

Consistent with the draft report, the Commission also received testimony regarding discrimination in state and state funded programs; that existing laws have varying protections and remedies; and that there is a need to expand the protections of H.R.S. § 368-1.5 on the basis of race, sex, national origin and religion. (See findings nos. 2-8 in our attached report.)

However, our findings and recommendations differ from the draft report in the following respects:

Findings:

1. On pages 3, 4 and 7 the draft report provides complaint statistics from some state and private agencies, states that it cannot estimate the potential increase in the number of cases and cannot make any recommendations for additional staffing at this time. Our findings and estimates regarding the existing number of complaints and potential increase in the number of cases involving

discrimination by state and state funded programs are much higher. For example, the ACLU testified that it received about 4 inmate complaints of discrimination per week, or approximately 200 complaints per year; the University of Hawaii Manoa Student Advocate testified that she received approximately 150 complaints of sexual harassment within the last 14 months; the Department of Education confirmed that it received 81 reports of sexual offenses and 1,022 reports of harassment offenses during the 1991-1992 school year. (See findings no. 6, 7 and 8 in our attached report.)

Therefore, we estimate that our caseload will likely double if our jurisdiction is expanded to include individuals discriminated by state agencies and state funded programs on the basis of race, religion, sex and national origin. Accordingly, we will need to significantly expand our staff and office space to effectively process, investigate and hear these additional cases. (See finding no. 10 in our attached report.)

2. On page 3, the draft report notes that two complaints based on sexual orientation were reported. The Commission also received testimony regarding discrimination based on sexual orientation in the form of harassment by state or state funded programs and in the provision of mental health services. (See findings nos. 7 and 8 in our attached report.) We therefore believe that sexual orientation should also be a protected basis under H.R.S. § 368-1.5.

Recommendations:

1. On pages 6, 7 and 9, the draft report states that the Commission's jurisdiction should be expanded to prohibit discrimination based on race, sex, national origin and religion by all state and state funded programs without additional staffing or funding. Based on our finding that there will be a substantial increase in the Commission's caseload, we recommend that our jurisdiction be **incrementally** expanded over **most** state and state funded programs and that the Legislature allocate additional funds to assure adequate enforcement of the new protected classes and covered agencies/programs. (See recommendations nos. 3, 4 and Appendix F of our attached report.)

The Honorable Marion M. Higa
November 29, 1993
Page 3

Specifically, we recommend that effective January 1, 1995 the Commission should be authorized to enforce complaints alleging discrimination in services by the Departments of Education and Human Services and the programs they administer. Effective January 1, 1996, the Commission should be authorized to enforce complaints alleging discrimination in services by all other state agencies and state funded programs, excluding the Department of Public Safety, the Department of Defense, the county police departments and all other law enforcement agencies and programs administered by these departments. This incremental expansion will enable the Commission to adequately train existing and new staff in the enforcement of this area of law. The appropriation of additional funds of \$1,896,984.00 each year for fiscal years 1994-1995 and 1995-1996 are necessary to expand the Commission's staff and office space.

Finally, we believe that further study on discrimination by the Department of Public Safety and law enforcement agencies and ways to address such discrimination is needed. (See recommendation no. 4 in our attached report.)

2. On pages 7, 8 and 9 the draft report states that some form of alternative dispute resolution should be integrated into the Commission's procedures to alleviate the Commission's present and projected backlog in cases. The Commission is interested in developing a pilot mediation program as a means of rapidly processing cases and alleviating the existing backlog. Additional necessary funds for a mediator trained in discrimination law are included in the projected budget attached in our report as Appendix F. We are also open to contracting for mediation services, but again, would need additional funds.

Because cases which cannot be conciliated already proceed to administrative hearing, we believe that arbitration would be superfluous.

3. On pages 6 and 9, the draft report states that state and state funded programs should adopt written non discrimination policies and discrimination complaint procedures. We recommend that the Governor issue an executive order mandating all departments to adopt a **uniform** non discrimination policy on the basis of race, color, sex, religion, ancestry, disability and sexual orientation. (See recommendation no. 1 in our attached report.)

The Honorable Marion M. Higa
November 29, 1993
Page 4

4. On page 4, the draft report states that there is evidence of national origin language problems. We believe that the problem of bilingual access to state and state funded services requires both technical and legal solutions. Therefore, we recommend that a Governor's committee on bilingual access to state and state funded services be established to assess the need for bilingual services and to set up a system for providing bilingual assistance at all service levels. (See recommendation no. 2 in our attached report.)

Thank you very much for allowing us to comment on your draft report. Should you have any questions, please do not hesitate to contact me or Executive Director Linda Tseu.



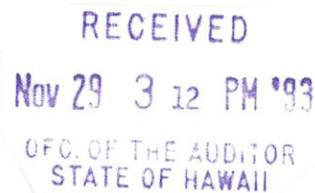
CENTER FOR
ALTERNATIVE DISPUTE RESOLUTION

Office of the Administrative Director of the Courts
The Judiciary • State of Hawaii

Post Office Box 2560 Honolulu, Hawaii 96804

November 29, 1993

Marion M. Higa
State Auditor
465 S. King Street Room 500
Honolulu HI 96813-2917



Dear Ms. Higa:

Thank you for the opportunity to comment on the DRAFT Report entitled, Study of Civil Rights Protection for State or State-Funded Services. The Center for Alternative Dispute Resolution's comments are enclosed.

Sincerely,

Michael F. Broderick
Director
Center for Alternative Dispute Resolution

The Center for Alternative Dispute Resolution's
Comments on "Study of Civil Rights Protection
for State or State-Funded Services"

The Auditor's DRAFT Report, entitled a "Study of Civil Rights Protection for State or State-Funded Services," expressly recommends that "The Hawaii Civil Rights Commission ... work with the Judiciary's Center for Alternative Dispute Resolution to design a plan integrating alternative dispute resolution into the Commission's procedures." The Center for Alternative Dispute Resolution (The Center) would be delighted to assist the Commission in designing an ADR component. It should be acknowledged, however, that such a project will be time consuming and will require that certain difficult, and potentially controversial, questions be answered, including the form of the ADR process, whether participation will be mandatory or voluntary, who will be permitted to participate, when in the life of the case ADR will be offered and so forth.

The Center also wants to make clear that if an ADR process is adopted, Center staff will not be able to serve as the actual mediators or arbitrators. The Center only has three professional staff and it has become impossible for Center staff to meet the many expanding missions of the Center and also simultaneously serve as the actual third party neutrals. Related, it must be recognized that third party neutrals most likely will require a fee. There are a number of existing options and others which could be explored. The Center has a Panel of Neutrals of approximately 60 persons, many of whom I believe would be interested in serving as neutrals. In addition, as the DRAFT Report notes, the American Arbitration Association (AAA) also could provide third party neutrals. However, in either case, the neutral would require an hourly fee. As for Mediation Centers of Hawaii, it is the umbrella organization for the community mediation centers statewide. (On Oahu, the community mediation center is the Neighborhood Justice Center of Honolulu (NJC).) As the DRAFT provides, the Center has a purchase of service (POS) contract with Mediation Centers of Hawaii. As part of that POS, the NJC provides mediators to handle the Small Claims Court mediations in the District Court of the First Circuit. It is conceivable that as part of the POS, NJC could provide mediators to handle the Commission's cases. However, it should be recognized that (1) such an arrangement may necessitate an increase in the amount of the Center's POS with Mediation Centers of Hawaii and (2) currently NJC has a shortage of mediators. The point here is that it is likely that third party neutrals will require a fee and it would be preferable if this budgetary aspect were acknowledged up front in the Report. In addition, it is likely that regardless of who serves as the neutrals, the Center will recommend that they be required to complete a one to two day mediation training session tailored to Civil Rights cases.

In addition to the fee for a third party neutral, as the DRAFT Report notes there also will be administrative expenses. Although the Center can assist the Commission in designing an ADR process and could offer members of its Panel of Neutrals who most likely would require a fee, the Center does not have the staffing capabilities to provide any administrative services. Although AAA probably does have the administrative capabilities, it is my understanding that these services would be provided for a fee. As for the Commission itself, based on its current staffing shortage, it may not be possible for the Commission to administer the ADR program. Again, the point is that it will be time consuming to administer the ADR process and the administrative function most likely will require additional monies.

To summarize, the Center is prepared to assist in designing an ADR system and believes its Panel of Neutrals would be interested in serving as neutrals, although for a fee. The Center could not administer the resulting ADR mechanism.

Appendix

Applicable Federal and State Laws

Major Federal Laws Generally Applicable to Types of Discrimination Reviewed in the Study

First Amendment, United States Constitution

The First Amendment applies to the states through the due process clause of the Fourteenth Amendment. It protects against state laws or practices which prohibit the free exercise of religion.

Fourteenth Amendment, United States Constitution

The Fourteenth Amendment's equal protection guarantee requires that state and local governments treat similarly situated persons in the same manner, and affects their ability to classify persons for purposes of governmental benefits or punishments. In certain limited circumstances, private organizations may be found to be subject to the equal protection provision. These circumstances include those where the state or local government provides direct aid for activities which would be held to violate the Constitution if carried out by the government.

42 U.S. Code Section 1983

For violations of federal constitutional or statutory rights by state or local governmental officers or employees who misuse their governmental authority, these officers or employees may be sued under 42 U.S. Code Section 1983 (The Civil Rights Act of 1871). Under certain circumstances, private individuals and organizations may be found to be acting under "color of law" (governmental action) and subject to Section 1983.

28 U.S. Code Section 1331

Section 1331 gives the federal courts jurisdiction over violations of the federal constitution and statutes by states and their political subdivisions, as well as by their personnel.

Title VI of the Civil Rights Act of 1964, as amended, and Section 504 of the Rehabilitation Act of 1973, as amended

For programs or activities receiving federal financial assistance, whether governmental or private, Title VI provides that no person shall be excluded from participation in, be denied the benefits of, or be subjected to discrimination based upon race, color, or national origin. Section 504 provides similar protection for the disabled. Both laws are enforced by the funding federal agency or through a private cause of action in court.

Educational programs

Title IX, Educational Amendments of 1972, as amended

Title IX prohibits sex discrimination in educational programs receiving federal financial assistance. Exceptions are religious schools where religious doctrine would be violated, military or merchant marine schools, and public undergraduate colleges which have always only admitted students of one sex. Title IX also provides that no person shall be denied admission to any course of study or any educational program or activity by a recipient of federal financial assistance on the ground of blindness or severely impaired vision. Federal funding agencies are responsible for enforcement. Title IX may also be enforced through a private cause of action in court.

Equal Educational Opportunities Act of 1974

Under the act, no state can deny equal educational opportunity to an individual on account of race, color, sex, or national origin. Failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs constitutes a denial of equal educational opportunity. Individuals discriminated against may sue in federal court.

Individuals With Disabilities Education Act, formerly called the Education for All Handicapped Children Act of 1975

The act provides federal money to assist state and local agencies in educating disabled children, but funds are contingent upon compliance with extensive requirements. The act confers an enforceable substantive right to public education. Generally, administrative remedies at the state level must be exhausted before a civil action may be brought in court.

State and Local Fiscal Assistance Act of 1972 (revenue sharing)

A state or local government is prohibited from discriminating against any person on account of race, color, national origin, sex, age, handicap, or religion in any program conducted with the aid of federal revenue sharing funds. The Secretary of the Treasury enforces this prohibition in cooperation with federal and state agencies having concurrent civil rights enforcement responsibilities (to the extent possible). An individual complainant must first seek an administrative remedy before bringing a suit for discrimination in federal district court.

Americans With Disabilities Act of 1990

The Act prohibits discrimination on the basis of disability in several situations, including public services (encompassing public transportation), public accommodations and services operated by private companies, and telecommunications. For public services, Title II of the Act provides that qualified individuals with a disability, by reason of such disability, cannot be excluded from services, programs, or activities of a public entity (state or local government or quasi-public authorities), or be discriminated against by such entity. For public accommodations, new facilities must meet federally established architectural guidelines.

State Laws Applicable to Types of Discrimination Reviewed in the Study

Constitution of the State of Hawaii

Applicable provisions of the State Constitution are as follows:

Article I, Section 3: "Equality of rights under the law shall not be denied or abridged by the State on account of sex. The legislature shall have the power to enforce, by appropriate legislation, the provisions of this section."

Article I, Section 5: "No person shall be...denied the equal protection of the laws, nor be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry." Similar to the Fourteenth Amendment, this equal protection guarantee requires state action.

Article I, Section 9: "No citizen shall be denied enlistment in any military organization of this State nor be segregated therein because of race, religious principles or ancestry."

Article X, Section 1: "...There shall be no discrimination in public educational institutions because of race, religion, sex or ancestry...."

Hawaii Revised Statutes

The applicable sections of the Hawaii Revised Statutes are as follows:

Section 42D-3 (compliance with nondiscrimination laws by recipients of grants, subsidies, or purchase of service contracts)

Section 90-2 (nondiscrimination in state agencies' volunteer programs)

Section 103-50 (accessibility to public buildings and facilities for persons with disabilities)

Section 171-64 (nondiscrimination in conveyance of public lands)

Section 296-61 (prohibition of sex discrimination in educational or recreational programs or activities receiving state or county financial assistance or utilizing state or county facilities)

Section 304-1 (nondiscrimination at the University of Hawaii)

Section 334E-2 (nondiscriminatory treatment of psychiatric patients)

Section 346-102 (nondiscrimination in employment on public works projects for persons on public assistance)

Section 347-13 (full and equal accommodations for persons who are blind, deaf, visually or physically handicapped)

Section 347-19 (rights and privileges for blind and visually handicapped persons not using a cane or guide dog in public places, accommodations, and conveyances)

Section 347-20 (State's policy on persons who are blind, visually disabled, and otherwise physically disabled)

Section 516-91 (nondiscrimination in the fee title acquisition programs of the Housing Finance and Development Corporation)

Section 612-2 (nondiscrimination in jury service)