



HAWAI`I CIVIL RIGHTS COMMISSION

830 PUNCHBOWL STREET, ROOM 411 HONOLULU, HI 96813 · PHONE: 586-8636 FAX: 586-8655 TDD: 568-8692

February 26, 2009
Rm. 016, 9:00 a.m.

To: The Honorable Brian Taniguchi, Chair
Members of the Senate Committee on Judiciary and Government
Operations

From: Coral Wong Pietsch, Chair
and Commissioners of the Hawai`i Civil Rights Commission

Re: Comments on S.B. No. 1183, S.D. 1

The Hawai`i Civil Rights Commission (HCRC) has enforcement jurisdiction over state laws prohibiting discrimination in employment, housing, public accommodations, and access to state and state-funded services. The HCRC carries out the Hawai`i constitutional mandate that "no person shall be discriminated against in the exercise of their civil rights because of race, religion, sex or ancestry". Art. I, Sec. 5.

Under H.R.S. Chapter 378, persons with a disability are protected against employment discrimination. In 1994 the HCRC promulgated rules that define the term "disability". These definitions are found in H.A.R. §§ 12-46-181 through -193. Some of these definitions provide stronger protections than those under federal law, which is allowed pursuant to California Federal Sav. and Loan Ass'n v. Guerra, 479 U.S. 272 (1987). Accordingly, federal law is a "floor" beneath which protections against discrimination cannot drop.

In September 2008, Congress passed the Americans with Disabilities Act Amendments Act (ADAAA) to correct several U.S. Supreme Court decisions and EEOC regulations that interpreted the definition of "disability" too narrowly and inconsistent with legislative intent. Congress then directed the

EEOC to promulgate new regulations to conform to that act. Pursuant to the ADAAA, certain federal law definitions such as an impairment that “substantially limits” a major life activity, as well as “being regarded as having such an impairment” are broader than current state administrative rules.

The HCRC supports the intent of SB 1183, SD1 to minimally conform state law terms used to define “disability” to the ADAAA. However, the HCRC suggests and recommends that the amended definitions should be made in its administrative rules, and not within H.R.S. Chapter 378. This is because: 1) the definitions of those terms are contained in administrative rules and not in H.R.S. Chapter 378, and the rules already contain some of the definitions proposed in SB 1183, SD1. For example, the provision that requires “disability” to be construed broadly is already in rule 12-46-2; the provision that an impairment that substantially limits one major life activity need not limit other major life activities is already in rule 12-46-182; making the determination of whether an impairment limits a major life activity without regard to mitigating measures is also already in rule 12-46-182. Therefore, inserting these definitions into H.R.S. Chapter 378 isn’t necessary. 2) the existing language in H.R.S. Chapter 378 that defines “disability” mirrors the ADA and is not inconsistent with the ADAAA. Therefore it is also not necessary to amend chapter 378. 3) certain terms, such as “substantially limits” were not specifically defined in the ADAAA and the EEOC is currently developing regulations to revise that term; 4) during the rule amendment process, the HCRC would be able to review and consider the EEOC regulations before amending its own rules; 5) during the rule amendment process the HCRC would be able to obtain public input regarding the definition of these terms; and 6) based on public input, the HCRC would be able to develop more protective definitions, if warranted.

The HCRC acknowledges that it would take at least six months to promulgate such rule amendments. In the interim, the legislature can still require the HCRC to minimally apply the ADAAA definitions by amending this bill to include express language stating: a) that the state law definition of “disability” found in H.R.S. Chapter 378 and in the implementing rules shall be minimally construed to conform with the ADAAA; and b) that the civil rights commission shall adopt administrative rules pursuant to chapter 91 necessary to effectuate the purposes of this act.

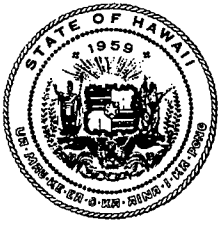
Attached please find proposed language to amend SB 1183, SD1 to this effect.

HCRC proposed amendments to SB 1183, SD1:

SECTION 2. It is the intent of the legislature that the section 378-1 definition of “disability” shall be minimally construed to conform to federal law as amended by the ADA. Where current administrative rules differ from stronger provisions of the federal law as amended by the ADA, the rules shall be amended to minimally conform to the stronger federal law provisions.

SECTION 3. The civil rights commission shall adopt rules pursuant to chapter 91, as necessary, to effectuate the purposes of this Act.

SECTION 4. This Act shall take effect upon its approval.



DISABILITY AND COMMUNICATION ACCESS BOARD

919 Ala Moana Boulevard, Room 101 • Honolulu, Hawaii 96814
Ph. (808) 586-8121 (V/TDD) • Fax (808) 586-8129

February 26, 2009

TESTIMONY TO THE SENATE COMMITTEE ON JUDICIARY AND GOVERNMENT OPERATIONS

Senate Bill 1183, Senate Draft 1 – Relating to Discriminatory Practices

The Disability and Communication Access Board (DCAB) is a statewide board with seventeen (17) members appointed by the Governor, thirteen (13) of whom are persons with disabilities or family members. The Board's mission is to advocate and promote full inclusion, independence, equal access, and quality of life for persons with disabilities in society. This testimony represents a position voted upon by the Legislative Committee of the Board.

DCAB's supports the intent of Senate Bill 1183, Senate Draft 1 which conforms State law to the recently passed ADA Amendments Act (signed September 25, 2008 by President Bush). DCAB also supported the changes in the federal law. All language proposed in Senate Bill 1183, Senate Draft 1 is directly from and consistent with federal law.

Thank you for the opportunity to provide testimony on this important matter.

Respectfully submitted,

CHARLES W. FLEMING
Chairperson

FRANCINE WAI
Executive Director