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February 25, 2009

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

Date: Thursday, February 26, 2009  
Time: 9:00 a.m.  
Place: Conference Room 016 State Capitol

From: Darwin L.D. Ching, Director  
Department of Labor and Industrial Relations

**RE: S.B. 667 - Relating to Whistleblowers**

**I. OVERVIEW OF PROPOSED LEGISLATION**

S.B. 667 proposes to provide additional protection to public employees who report violations of the law, and other improper activities such as economic waste, gross misconduct, incompetence, or inefficiency.

**II. CURRENT LAW**

Section 378-61, HRS already provides protection for whistleblowers.

**III. HOUSE BILL**

The Department strongly opposes this measure for the following reasons:

1. Current law already provides adequate protections for whistleblowers.
2. Allowing punitive damages could discourage administrators and officials from making tough decisions that would promote efficiency and productivity; and could ultimately discourage public service.

LINDA LINGLE  
GOVERNOR OF HAWAII



MARIE C. LADERTA  
DIRECTOR

CINDY S. INOUE  
DEPUTY DIRECTOR

STATE OF HAWAII  
DEPARTMENT OF HUMAN RESOURCES DEVELOPMENT  
235 S. BERETANIA STREET  
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February 25, 2009

COMMENTS TO THE  
SENATE COMMITTEE ON JUDICIARY AND GOVERNMENT OPERATIONS  
For Hearing on Thursday, February 26, 2009  
9:00 a.m., Conference Room 016

BY

MARIE C. LADERTA, DIRECTOR

**Senate Bill No. 667, SD1  
Relating to Whistleblowers' Protection**

TO CHAIRPERSON TANIGUCHI AND MEMBERS OF THE COMMITTEE:

The purpose of S. B. No. 667, S. D. 1 is to provide additional protection to public employees who report violations of the law, and other improper activities such as waste, gross misconduct, incompetence, or inefficiency.

The Department of Human Resources Development **strongly opposes** this measure since existing whistleblower protections provide sufficient coverage to public employees. In addition, the bill is overly broad in the kinds of public employer actions that could be covered.

An individual employee may perceive an action to be wasteful or inefficient without understanding the public policy basis for such actions. More importantly, the categories of "economically wasteful", "gross misconduct", "incompetence", and "inefficiency" are too broad and vague, as noted by the Senate Committee on Labor in SCR No. 393 dated February 20, 2009.

We are also concerned with the need to balance whistleblowers' protection with the public employer's right to take non-retaliatory and non-discriminatory personnel

actions for legitimate reasons, as provided by other statutes or applicable collective bargaining agreements. Public employers should be allowed to take such personnel actions without being exposed to liability under this bill. Notably, this bill does not provide an exception for an employee who intentionally or knowingly files a false complaint.

We believe that the existing provisions in the statute for relief and damages are adequate and that allowing civil action for punitive damages could be costly and lead to excessive litigation.

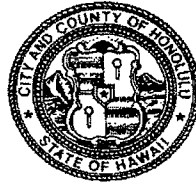
In addition, we find the language for the notice posting requirement to be vague and suggestive that the notices must be posted outside the worksite. The language in the existing statute is clear and provides sufficient notice to employees of their protections under this law.

Thank you for the opportunity to provide comments on this matter.

DEPARTMENT OF HUMAN RESOURCES  
**CITY AND COUNTY OF HONOLULU**

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MUFI HANNEMANN  
MAYOR



KENNETH Y. NAKAMATSU  
DIRECTOR

February 25, 2009

The Honorable Brian T. Taniguchi, Chair  
and Members of the Committee on  
Judiciary and Government Operations  
State Senate  
State Capitol  
Honolulu, Hawaii 96813

Dear Chair Taniguchi and Members:

**Subject: Senate Bill 667 SD1  
Relating To Whistleblowers' Protection**

I am Kenneth Y. Nakamatsu, Director of Human Resources, City and County of Honolulu, commenting regarding Senate Bill 667 SD1. While we recognize this measure is intended to provide additional protections to public employees who engage in protected complaint activity and agree that protection from acts of retaliation is absolutely imperative, we offer the following remarks opposing the bill in its current form.

Our primary concern is with the establishment of broad and vague categories of complaints that become protected activity under the proposed amendments, specifically actions that are categorized as "economically wasteful", involve "gross misconduct, incompetence, or inefficiency" in S.B. 667 SD1. These terms must be defined in the measure or they will arguably be subject to a wide range of interpretation and potentially unnecessary litigation.

The language in the bill regarding a "condition that may significantly threaten the health or safety of the public or the public employee" also raises concern as such issues are already highly regulated in various other statutes and regulations. Without proper definition and/or references to specific statutes, regulations, and ordinances, individual employees will be empowered to assert causes of action based on their own interpretations and standards. An individual would also be able to raise his or her own personal agenda under the guise of the proposed protection addressing the health and safety of the individual public employee.

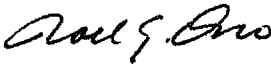
Finally, we are concerned about the provision in the proposed bill that would allow a public employee to bring an action seeking punitive damages. Punitive damages are awarded to punish individuals who engage in prohibited behavior. However, when such damages are awarded against a government entity it is the taxpayers, not the individual who engaged in the behavior, who are punished. We believe such an award against a municipality is clearly against public policy and accordingly request that this section be deleted from the measure.

We further note in this regard that punitive damages are used as a deterrent to others. However, we are unsure of the strength of this deterrent where the taxpayers pay the damages. Please know that we are not advocating that individual employees be permitted to seek damages against other employees. Instead we are advocating that actions already available to the public employer (such as terminating the employment of an employee who engages in wrongdoing) provide a stronger deterrent to individual employees than the punitive damages permitted under the bill.

Please let me be clear, that we support protection for employees who report violations of federal, state, and local laws, rules, regulations, or ordinances. With all due respect, we ask that you recognize that there are already an abundance of statutes, regulations and ordinances which provide for the protection of those who report such violations. For example, HRS Chapter 378, Part V specifically provides for the protection of an employee who reports such violations to a public body. Thus, while we support the need for whistleblower protections, we cannot support the passage of S.B. 667 SD1 in its present form.

Thank you for the opportunity to comment on this measure.

Sincerely,

  
for Ken Y. Nakamatsu, Director  
Department of Human Resources



## HAWAII GOVERNMENT EMPLOYEES ASSOCIATION

AFSCME Local 152, AFL-CIO

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The Twenty-Fifth Legislature, State of Hawaii  
Hawaii State Senate  
Committee on Labor

Testimony by  
Hawaii Government Employees Association  
February 26, 2009

### S.B. 667, S.D. 1 – RELATING TO WHISTLEBLOWERS' PROTECTION

The Hawaii Government Employees Association strongly supports the purpose and intent of S.B. 667, S.D. 1 - Relating to the Whistleblowers' Protection. We believe improvements to the State's whistleblowers' protection law are necessary to make it more effective. This bill protects public employees in the event they experience retaliation from their employers after reporting practices or policies that are violations of the law, economically wasteful, inefficient, or which they believe pose a danger to public health and safety.

Under the provisions of S.B. 667, S.D. 1, public employees who become the objects of retaliation for serving as a whistleblower would be able to seek relief and damages through Section 378-63, HRS, as well as civil action for punitive damages. Employees will be reluctant to come forward and report these types of problems if they are subject to retaliation. An employer's power to discipline or fire public employees should not be used to undermine the law or to compromise the safety and health of employees or the general public.

A wide range of federal legislation provides protection to government and private sector employees who report illegal actions or a specific danger to public health and safety. Under federal environmental laws, employees are permitted to come forward and report alleged violations affecting public safety. Many states also protect reporting of actions that are contrary to health, safety, welfare and environmental laws. It is time to improve Hawaii's law and provide stronger protection to its state and county employees.

Many state and county employees are directly responsible for protecting public health and safety through the administration of statutory requirements and the enforcement rules and regulations. S.B. 667, S.D. 1 will help them uphold appropriate standards in their area of expertise. We suggest changing the effective date back to July 1, 2009. Thank you for the opportunity to testify in support of S.B. 667.

Respectfully submitted,

Nora A. Nomura  
Deputy Executive Director