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LEGISLATIVE REFERENCE BUREAU
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State Capitol, Room 446
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Written Comments

HB77 HD1 RELATING TO AN OFFICE OF ADMINISTRATIVE HEARINGS

Comments by the Legislative Reference Bureau
Charlotte A. Carter-Yamauchi, Director

Presented to the House Committee on Finance

Thursday, February 23, 2017, 11:00 a.m.
Conference Room 306
Agenda No. 1

Chair Luke and Members of the Committee:

Good morning Chair Luke and members of the Committee, my name is Charlotte Carter-Yamauchi and I am the Director of the Legislative Reference Bureau. Thank you for providing the opportunity to submit written comments on H.B. No. 77, Relating to an Office of Administrative Hearings.

The purpose of this measure is to have the Legislative Reference Bureau conduct a study relating to the establishment of an independent, centralized office of administrative hearings in the executive branch of state government and report to the Legislature prior to the convening of the Regular Session of 2018.

Specifically, the measure requires the Bureau to:

- (1) Identify the departments and agencies that conduct hearings or delegate that authority to another agency;
- (2) Determine and identify the placement of the hearings agency in the department's organization;
- (3) Identify and quantify the personnel and state resources that are necessary to operate each hearings agency;

- (4) Identify and determine the types of issues and subjects that are subject to the hearings jurisdiction;
- (5) Identify and determine the process to appeal a decision of each agency's administrative hearing, including chapter 91, Hawaii Revised Statutes, and rights to and process for judicial appeals; and
- (6) Identify potential legal conflicts and barriers that affect each agency's administrative hearings jurisdiction.

Furthermore, the measure requires the Bureau to determine the appropriateness, feasibility, and cost effects of establishing and operating an office of administrative hearings that is based on the guidelines stated in the February 3, 1997, model of the American Bar Association House of Delegates, as modified.

The Bureau takes no position on this measure, but submits the following comments for your consideration.

The Bureau would like to note that, while the measure requires the Bureau to study the foregoing issues, it does not *require* any potentially affected agencies to provide the relevant information to the Bureau. Of particular concern are the requirements that the Bureau:

- (1) Identify and quantify the personnel and state resources that are necessary to operate each hearings agency;
- (2) Identify potential legal conflicts and barriers that affect each agency's administrative hearings jurisdiction; and
- (3) Determine the appropriateness, feasibility, and cost effects of establishing and operating an office of administrative hearings that is based on the guidelines stated in the February 3, 1997 model of the American Bar Association House of Delegates, as modified.

The measure contemplates a study that requires the compilation, review, and analysis of a considerable amount of data already in the hands of the relevant agencies. Without a requirement that potentially affected agencies provide relevant information to the Bureau, and do so in a timely manner, the Bureau would be extremely hard-pressed to complete the study prior to the 2018 Regular Session.

Furthermore, the measure provides no guidance on what is meant by and how to "identify potential legal conflicts and barriers that affect each agency's administrative hearings jurisdiction," or how to determine or measure "the appropriateness, feasibility, and cost effects of establishing and operating an office of administrative hearings." Moreover, the measure is silent on how the Bureau is to study issues such as where to physically house such an independent, centralized agency, what parameters should be considered when trying to determine the feasibility of which executive department the office of administrative hearings would be attached to or whether the office is intended to be established as a stand

alone executive department, and how the Bureau should address the employment status of existing public employees who currently perform administrative hearing and ancillary services and whose positions may potentially be eliminated due to a consolidation of services and functions.

The Bureau would also like to note that it lacks any specific expertise in how the budgets of the various executive branch departments and agencies operate. Due to this lack of expertise, the Bureau feels that it may have to contract the services of a person or entity with relevant budgetary knowledge and experience. If the Bureau is allowed to contract for services, an appropriation for this purpose would need to be added, since there are no funds included in the Bureau's base budget to contract for study services. In addition, to ensure the study can be completed in a timely manner and submitted prior to the 2018 Regular Session, we would request that the contract be made exempt from the Procurement Code (Chapter 103D, HRS).

In summary, if the Bureau is to conduct the study, we respectfully request the following amendments:

- (1) Guidance be provided on how to "identify potential legal conflicts and barriers that affect each agency's administrative hearings jurisdiction," and parameters on how the Legislature would like the Bureau to determine "the appropriateness, feasibility, and cost effects of establishing and operating an office of administrative hearings";
- (2) Executive departments and agencies be explicitly required to provide all statutory and administrative rules information that establishes their respective agency's administrative hearings functions, and all relevant fiscal and personnel information relating to the respective administrative hearings functions;
- (3) Executive departments and agencies be explicitly required to provide a summary of caseload subject matter and statistics on the number of administrative hearings it conducts annually and average duration of cases from filing to disposition;
- (4) Executive departments and agencies be explicitly required to provide information that specifically identifies and quantifies the personnel and state resources, and any other relevant information, that are necessary to operate their respective hearings agency;
- (5) Executive departments and agencies be explicitly required to transmit the aforementioned information to the Bureau by no later than August 1, 2017;
- (6) An appropriation section for an unspecified sum be added to allow the Bureau to contract for services to conduct the study; and
- (7) An exemption from the Procurement Code (Chapter 103D, HRS) be provided for any contract executed for the study.

These amendments will facilitate the compilation, review, and analysis of the submitted data in a more expeditious manner. Otherwise, the study could be stalled due to waiting for the executive departments and agencies to submit the necessary information, and the Bureau would not be able to complete the study within the given time frame.

If the measure is amended to fully address the concerns noted above, the Bureau believes that the services requested under this measure are manageable and that the Bureau will be able to provide the services in the time allotted; provided that the Bureau's interim workload is not adversely impacted by too many other studies or additional responsibilities, such as conducting, writing, or finalizing other reports, drafting legislation, or both, for other state agencies, task forces, or working groups that may be requested or required under other legislative measures.

Thank you again for your consideration.



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**TO THE HOUSE COMMITTEE ON
FINANCE**

**TWENTY-NINTH LEGISLATURE
REGULAR SESSION OF 2017
Date: Thursday, February 23, 2017
Time: 11:00 a.m.
Conference Room: 308**

**TESTIMONY FOR HEARING ON HOUSE BILL NO. 77, H.D. 1
RELATING TO AN OFFICE OF ADMINISTRATIVE HEARINGS**

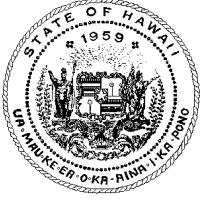
**TO THE HONORABLE SYLVIA LUKE, CHAIR,
AND THE HONORABLE TY J.K. CULLEN, VICE CHAIR,
AND MEMBERS OF THE COMMITTEE**

The Office of Administrative Hearings (“OAH”) of the Department of Commerce and Consumer Affairs (“DCCA” or “Department”) appreciates the opportunity to offer comments for the Committee’s Hearing on House Bill 77 (“Bill”), relating to an Office of Administrative Hearings. My name is Craig Uyehara, and I am the Senior Hearings Officer of OAH.

This measure would require the Legislative Reference Bureau (“LRB”) to study the feasibility and cost effectiveness of establishing a centralized administrative hearings office for the State’s executive branch agencies (“Study”). The Study would consider the creation of a new office that would use the guidelines for the creation of central hearings agencies as stated in the February 3, 1997 model of the American Bar Association House of Delegates, and would operate as an independent, adjudicatory body within the State’s executive branch. Various specific aspects of the State’s existing administrative hearings system would be reviewed, and a report of LRB’s findings and recommendations would be submitted prior to the Regular Session of 2018.

The Department appreciates the amendments made previously by the House Committee on Judiciary that would give due consideration to the creation of a centralized administrative hearings office for the State. While the Department still has concerns about the necessity and potential negative impacts of creating a centralized administrative hearings office, as expressed in its previous testimony on this measure, the Department does not object to the study being proposed in this measure and it supports Legislature’s desire to create a better administrative hearings process throughout the State that will protect against potential conflicts of interest, maintain the integrity of administrative adjudications, and ensure an effective administrative hearings process. The Department tries to ensure that these same core elements are part of the administrative hearings office structure that it operates in support of DCCA’s various regulatory functions.

Thank you for the opportunity to provide comments on this proposed legislation.



HAWAI‘I CIVIL RIGHTS COMMISSION

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February 23, 2017
11:00 a.m.
Conference room 308

To: The Honorable Sylvia Luke, Chair
and Members of the House Committee on Finance

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

Re: H.B. No. 77, H.D.1

The Hawai‘i Civil Rights Commission (HCRC) has jurisdiction over state laws prohibiting discrimination in employment, housing, public accommodations, and access to state and state-funded services.

The HCRC opposed H.B. No. 77 in its original form, which would have eliminated the Commission’s adjudication functions and placed these functions in a centralized office of administrative hearings. **The HCRC continues to oppose H.B. No. 77, H.D.1, which directs the Legislative Reference Bureau to conduct a study of the feasibility of implementing a centralized office of administrative hearings, because the study would be based on a 1997 American Bar Association model act, and the premise that the HCRC’s administrative hearing and decision making functions should be eliminated and replaced by a functioning centralized office of administrative hearings.**

The HCRC is composed of two sections. The HCRC enforcement section receives, investigates, and conciliates complaints of discrimination. The HCRC adjudication section conducts contested case hearings on complaints that do not conciliate, and the Commissioners issue final decisions on those cases. Pursuant to HRS § 368-2(a), Commissioners are selected by the Governor based on their knowledge and experience in civil rights matters, and pursuant to HRS § 368-3(2) and (5), the Commission is authorized to hold hearings and order appropriate legal and equitable relief. To avoid any conflicts of interest, there is a physical separation between the HCRC enforcement and adjudication sections. In addition, pursuant to HAR § 12-46-40, ex parte communications between the enforcement section and the adjudication section/Commissioners on any open cases are strictly prohibited.

The HCRC opposes H.B. No. 77, H.D.1, which directs the Legislative Reference Bureau to conduct a study relating to the establishment of a central hearing agency that, based on the ABA model act, would eliminate the Commission's administrative hearing and decision making functions and would place these functions in a centralized office of administrative hearings. The discrimination laws (statutes, administrative rules, and caselaw) that are interpreted and applied in HCRC contested cases involve complex analyses and a myriad of elements, proof standards and defenses. Hearings officers in a centralized office of administrative hearings would likely not have the specialized expertise or experience required to correctly apply the law in conducting contested hearings, ruling on motions, and rendering proposed and final decisions in HCRC discrimination cases. The result will be

poorer quality final decisions in HCRC cases, and messier records on appeals to the courts.

The intent of the legislature in creating the HCRC was "... to establish a strong and viable commission with sufficient ... enforcement powers to effectuate the State's commitment to preserving the civil rights of all individuals." 1989 House Journal, Standing Committee Report 372. The legislature believed that "[t]he establishment of a civil rights commission would facilitate the development of a staff with expertise in all discrimination laws..." 1988 House Journal, Standing Committee Report 660. H.B. No. 77, H.D.1, would erode and diminish the strong Civil Rights Commission that the legislature intended to create more than twenty-five years ago.

For these reasons, the HCRC urges you to hold this bill. Alternatively, the HCRC urges you to include the HCRC on the list of exempted agencies in Section 2.(b) of H.D.1, so that the HCRC's administrative hearing and decision making functions would not be replaced by the proposed central hearing agency.