



# Hawaii Civil Rights Commission



*Harry Yee, Commission Chair*  
*William Hoshijo, Executive Director*





## **Mission Statement**

**The mission of the Hawaii Civil Rights Commission is to eliminate discrimination by protecting civil rights and promoting diversity through enforcement of anti-discrimination laws and education.**

## **Overview: Fair and Effective Enforcement**

The state of Hawaii has a strong commitment to the protection of civil rights. Article I, Section 5 of the Hawaii Constitution provides that “no person shall ... be denied the enjoyment of ... civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry.” The legislature gave meaning to this commitment by creating the Hawaii Civil Rights Commission (HCRC), through enactment of Act 219 in 1988 and Acts 386 and 387 in 1989.

The HCRC was organized in 1990 and officially opened its doors in January 1991. For twelve years the HCRC has enforced state laws prohibiting discrimination in employment (H.R.S. Chapter 378, Part I), housing (H.R.S. Chapter 515); public accommodations (H.R.S. Chapter 489), and access to state and state-funded services (H.R.S. §368-1.5). The HCRC receives, investigates, conciliates, and adjudicates complaints of discrimination.

The HCRC has five (5) uncompensated volunteer Commissioners. They are appointed by the Governor, with the consent of the Senate, based on their knowledge and experience in civil rights matters and commitment to preserve the civil rights of all individuals.

The HCRC is attached to the Department of Labor & Industrial Relations (DLIR) for administrative purposes. The HCRC has a staff of twenty-nine (29) persons who are divided into separate enforcement and adjudication sections.

## **An Effective And Uniform Enforcement Scheme**

Prior to the establishment of the HCRC, jurisdiction over state anti-discrimination laws was split among several state departments. Enforcement was limited and sporadic. State litigation to enforce fair employment practices law was virtually non-existent. Nearly all aggrieved were left with litigation of individual lawsuits as their only recourse. Few employment discrimination cases brought under state law were adjudicated, and there was little case law. For complainants who could not afford private attorneys to seek remedies in court, there was no administrative process to adjudicate their claims.

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.”<sup>1</sup> The cornerstone of the HCRC statutory scheme was the establishment of a uniform procedure “...designed to provide a forum which is accessible to anyone who suffers an act of discrimination.”<sup>2</sup>

## **A Fair Administrative Process**

The HCRC is committed to, and its procedural safeguards are structured to ensure, fairness to both complainants and respondents. The HCRC is a five-member Commission with jurisdiction to enforce state civil rights laws. The HCRC is divided into two separate and distinct sections: the enforcement section, which receives, investigates, and prosecutes discrimination complaints; and the adjudication section which hears, issues orders and renders final determinations on complaints of discrimination filed with the HCRC.

The Commissioners have delegated HCRC enforcement authority to the Executive Director. The Commissioners retain the authority to adjudicate and render final decisions based

on the recommendations of their Hearings Examiner, and oversee the adjudication section through their Chief Counsel.

The Commissioners and Hearings Examiner are not involved in or privy to any actions taken by the Executive Director in the investigation and pre-hearing stages of the HCRC process. Likewise, the Executive Director and enforcement section are not permitted to communicate ex parte with the Commissioners or Hearings Examiner about any case.

The HCRC investigates complaints of discrimination as a neutral fact-gatherer. At the conclusion of an investigation, a determination is made whether or not there is reasonable cause to believe unlawful discrimination has occurred.

The law requires filing of a complaint with the HCRC before filing a discrimination lawsuit in state court. Otherwise, the circuit court will dismiss a lawsuit for failure to exhaust administrative remedies. This requirement prevents overburdening the courts with non-jurisdictional and non-meritorious cases, as well as those cases that can be closed or settled in the administrative process. The great majority of cases filed with the HCRC are resolved, reach disposition, and are closed without resort to the courts.

### **Civil Rights Law Enforcement: State & Federal Law**

Federal fair employment and fair housing laws are enforced by the U.S. Equal Employment Opportunity Commission (EEOC) and U.S. Department of Housing and Urban Development (HUD), respectively. Pursuant to workshare cooperative agreements, both EEOC and HUD rely on the HCRC to investigate complaints filed under both state and federal law (“dual-filed” complaints).

While Hawaii and federal fair employment and fair housing laws are similar, they are not identical. Hawaii has protected bases that are not covered under federal law, and there are substantial differences in the definition of “employer” and the statute of limitations for filing a charge of employment discrimination. In addition to these jurisdictional differences, Hawaii law provides stronger protection against pregnancy discrimination, sexual harassment, and disability discrimination in employment.

The greater protections in Hawaii law are attributable to a strong civil rights mandate contained in the Hawaii State Constitution, HCRC statutes, HCRC rules, HCRC Commission decisions, and state court interpretations. In contrast, federal court interpretations of federal civil rights laws have resulted in fewer protections against discrimination, particularly in the areas of disability and sexual harassment. The issue of state versus federal standards is an important one, particularly in states like Hawaii that have a historically strong commitment to equal opportunity and non-discrimination.

There is a trend of limiting jurisdiction and process under civil rights statutes: sovereign immunity barring individual claims against the states under several federal civil rights statutes; free speech and free exercise of religion claims raised in defense of discrimination complaints; and equal protection and other constitutional claims raised to challenge enforcement processes. In this context, strong enforcement of state civil rights laws is more important than ever before.

## The HCRC Today

During FY 2002-2003, the HCRC experienced several significant changes in management and attorney staff, with the departure of the Deputy Executive Director and two out of three enforcement attorneys. After delays in filling these key vacancies due to budgetary concerns and a state hiring freeze, the HCRC ended the year with full staffing, refocusing its efforts and resources on activities in several key areas:

**Investigation and charge processing.** The HCRC made a concerted effort to complete investigation of the oldest complaints, focusing investigation time and resources on complex or intensive investigations, while expediting disposition of cases when appropriate.

**Mediation.** The HCRC's voluntary mediation program completed its fourth full year of operation, working with the Mediation Centers of Hawaii and community mediation centers on Oahu, Hawaii, Maui, and Kauai. The number of cases referred to mediation increased and 54% of the cases referred to mediation settled.

**Public education.** The HCRC continued its commitment to prevent and eliminate discrimination through public education. HCRC staff made numerous presentations on civil rights and discrimination to labor, business, professional organization, civil rights advocacy, and other community organization audiences. An updated and enhanced HCRC website was also an effective outreach tool, recording nearly 12,000 hits per month.

**Litigation.** The HCRC litigated two major cases on appeal, a constitutional challenge to the HCRC administrative hearing process and a declaratory ruling on the scope of HCRC jurisdiction to accept and investigate sex discrimination complaints.

The Hawaii Supreme Court heard oral argument on a constitutional challenge to the HCRC administrative hearing process, and issued its decision in June 2003. SCI Management Corp., et al. vs. Sims, et al., 101 Haw. 438, 71 P.2d 389 (2003). The Court held that respondents before the HCRC are entitled to a jury trial de novo when seeking judicial review of an HCRC final decision awarding legal relief including compensatory and punitive damages, but are not entitled to "opt out" of HCRC hearing proceedings. The HCRC also appealed a circuit court decision reversing a Commission decision declaring that the Executive Director had jurisdiction to investigate complaints of sex discrimination filed by transsexual or transgendered employees. The appeal is pending before the Hawaii Supreme Court.

The HCRC Commissioners and staff continue their unwavering commitment to the HCRC mission - to eliminate discrimination by protecting civil rights and promoting diversity through enforcement of anti-discrimination laws and education. We renew our pledge to fair and effective enforcement, so that no person shall be denied his or her civil rights under Hawaii law.

## **Objectives and Goals for 2003-2004:**

### **Case Inventory:**

The HCRC is committed to maintain its case inventory at a level that allows for timely investigation of complaints and allocation of resources to complex and meritorious complaints. Toward this end, the HCRC will convene a complaint processing working group, to solicit ideas from businesses, labor, civil rights organizations and attorneys on improving the HCRC's procedures and efficiency without sacrificing fair and effective law enforcement. Special focus will be placed on reducing older case inventory.<sup>3</sup>

### **Voluntary Mediation Program:**

The HCRC plans to improve and expand its voluntary mediation program to encourage and offer mediation in more cases. A pilot program will be implemented which will utilize mediation in housing discrimination cases.

### **Public Awareness:**

Continued focus on HCRC public education activities is planned for the upcoming year. HCRC will work with federal, state, business, labor, and community partners to expand outreach and public education statewide, especially on the neighbor islands. The HCRC will offer scheduled introductory training for the public on civil rights laws on a regular basis. Outreach efforts to public schools, through sponsorship of the annual Hawaii Civil Rights Art Contest and cooperative efforts on diversity education initiatives will be broadened to engage more participation.

The accompanying report is submitted pursuant to H.R.S. §§ 368-4 and 515-9.

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<sup>1</sup>1989 House Journal, Standing Committee Report 372.

<sup>2</sup> Id

<sup>3</sup> Aged case reduction is a priority for the HCRC, as well as for the U.S. Department of Housing and Urban Development (HUD) and the U.S. Equal Employment Opportunity Commission (EEOC), the federal agencies that contract with the HCRC to process complaints dual-filed under state and federal law.

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## **Mediation Program**

HCRC's voluntary mediation program successfully completed its fourth full fiscal year on June 30, 2003. Complainants, respondents, and the HCRC, with the strong support of all the Commissioners, want prompt and fair resolutions to discrimination complaints. To help accomplish this goal, the HCRC developed its voluntary mediation program, a process in which neutral third parties (usually a team of two co-mediators) help the involved individuals discuss, clarify, and settle complaints.

Mediators are unbiased and do not rule on the merits of the complaint. Rather, the HCRC provides them with the basic facts of each case needed to understand the dispute. The mediators then assist parties in reaching agreements such as simple apologies, policy changes, monetary settlements, or other appropriate solutions. Mediation saves time, money and resources, and reduces stress by allowing the parties to explain their side of the case and to control the process of resolving their dispute in a non-adversarial manner.

HCRC works with trained, senior mediators from the Mediation Centers of Hawaii (MCH), a statewide network of community non-profit mediation centers. MCH mediators are trained in civil rights laws by HCRC staff on a regular basis. An HCRC mediation coordinator facilitates the process by explaining mediation and its benefits to the parties. There are mediation centers on Oahu, Maui, Hawaii, and Kauai. The centers charge nominal fees for the sessions, which can be waived or reduced where there is a situation of financial hardship. Private mediation is also available, at a higher cost, if the parties choose.

Mediation can occur at any stage of the complaint process. Mediation is first offered when the complaint is accepted, because disputes are often easier to resolve while the facts are fresh and before potential damages accumulate and the positions of the parties become rigid.

During FY 2002-2003, 47 cases were referred into mediation; 37 were disposed of during the year, with 20 of those cases resulting in mediated settlements. This represented a 54.1% overall settlement rate, which was down from a 70% settlement rate last year. However, the total monetary value of mediated agreements was up by 35% to \$230,686 (this did not include 2 privately mediated agreements, for which the figures were not disclosed). Most of the mediation referrals (81.2%) were referred to the Mediation Center of the Pacific in Honolulu; followed by Mediation Services of Maui (8.1%); West Hawaii Mediation Center (2.7%); and Kuikahi Mediation Center in Hilo (2.7%). Two cases (5.3%) were referred to private mediation upon the parties' request.

The three most typical primary protected bases of referred cases were: sex (30%); disability (22%); and race/national origin (14%). Other primary protected bases included: retaliation, religion, age, arrest and court record, and sexual orientation. Employment cases accounted for all 47 referrals this year.

The program has received high marks in satisfaction. Evaluations are sent to the parties in all mediated cases. The average rating of whether parties "would recommend the program to others," was a 4.2 (on a 1-5 scale, with 5 being, "strongly agree").

The following are some examples of cases settled in mediation:

- A 19-year employee earning \$30,000/year at a large food products company was terminated from his position as a supervisor, for an alleged physical disability. His requests for reasonable accommodations were declined and he alleged the company threatened to terminate him if he had surgery for his impairment. In mediation, the parties agreed on a settlement of \$56,000 and modification of personnel records to reflect a voluntary termination. Both parties were represented by counsel.
- A security officer alleged discrimination by his employer, a large security firm, on the basis of his race (African-American). The alleged discrimination consisted of unequal assignment of posts, verbal racial harassment by his supervisors and co-workers, and assignment to an undesirable post in alleged retaliation for filing an internal complaint. In mediation, the parties agreed on a settlement of \$70,000. In addition, the company agreed to revise and post its policies to confirm zero tolerance regarding discrimination, quarterly refresher announcements, training of all employees, and a letter of apology. Both parties were represented by counsel.
- A 21-year-old delivery driver for a food distribution company was terminated from his position. The complainant alleged he was terminated due to his mental disability shortly after the employer found out about his condition. His job performance was satisfactory. In mediation, the parties agreed that a settlement of \$6,500 would be applied directly to treatment and therapy for the complainant and ensured payment was made in such a way as to properly minimize loss of welfare benefits.
- A complainant alleged that she was sexually harassed during her employment as an accounting clerk for a national retail chain store. The alleged harassment was by a company officer and was verbal and physical in nature. Although she complained to her supervisor and human resources department, no corrective action was taken. The complainant then resigned due to the hostile and offensive working environment. In mediation, the parties agreed to a settlement of \$7,000, a letter of acknowledgement of the complainant's painful experience, and posting of the company's sexual harassment policies.
- A female complainant alleged that she was discriminated against in her position as assistant supervisor with a beverage product company because of her gender. She alleged that she was subjected to numerous adverse and unequal job conditions, including reductions in hours, while male employees were not subjected to the same conditions. She alleged that when she filed an internal complaint, she was terminated. A second respondent, a payroll and personnel services firm, also participated in the mediation. In mediation, the three parties agreed to a settlement of \$30,000, payment of a single premium health insurance the complainant had while with the employer, and a comprehensive release. The parties were represented by counsel.

Although monetary settlements were achieved in many agreements, all mediated agreements involved some form of non-monetary affirmative relief. Typical examples of non-monetary relief include:

- 1) training of employers and employees on pertinent civil rights laws;
- 2) restoration of employee benefits;
- 3) formal apology;
- 4) increasing hours for part-time employees;
- 5) providing neutral or positive references for former employees;
- 6) removal of inappropriate negative comments in employee records;
- 7) addition of reasonable accommodations for the disabled;



- 8) clarifications of communications between employer and employee;
- 9) policy revisions and postings;
- 10) thorough and candid discussion of issues, under mediator supervision, which can lead to a settlement of the pending dispute.

### **Public Education & Outreach**

In addition to enforcing anti-discrimination laws, the HCRC is committed to preventing and eliminating discrimination through public education. The HCRC Commissioners and staff have maintained a number of public education efforts, working with civil rights, business, labor, professional, and non-profit organizations, on new and continuing initiatives.

### **Accomplishments**

- The HCRC continued to provide speakers and trainers for conferences, workshops, schools, employers, labor organizations, businesses, landlord and tenant organizations, government agencies, and non-profit and other community groups on rights and responsibilities under anti-discrimination laws and other diversity issues. Some representative trainees included the University of Hawaii - Manoa, Kamehameha Schools, William S. Richardson School of Law, East-West Center, Hawaii Dental Association, Honolulu Medical Group, State Department of Human Services, Society of Human Resource Management, and listeners to the KGU/KHNR radio program, "Flashpoint".
- The HCRC continued to work with the U.S. Department of Housing and Urban Development, the state and counties, and community fair housing organizations to co-sponsor fair housing training on all islands. Some representative trainees in the housing area included the Community Associations Institute, Building Industry Association, property managers, and the V.A. Medical Center.
- The HCRC website ([www.state.hi.us/hcrc](http://www.state.hi.us/hcrc)) received a record total of over 143,000 hits. These hits were in addition to over 5,000 telephone and walk-in inquiries during the year plus approximately 250 email inquiries. The website was continually enhanced and updated during the year.<sup>1</sup>
- HCRC co-sponsored and participated in a number of Martin Luther King, Jr., commemorative events, including the 14th Annual Holiday King Program and the 2003 Annual King Parade and Rally.
- In conjunction with other Martin Luther King, Jr. Day activities, HCRC sponsored a second annual art contest for grades 4-6 with a theme of "What can we do in our daily lives to promote civil rights and diversity in our community?" The winning student artists were honored in a ceremony hosted by Lt. Governor James Duke Aiona.
- HCRC continued its annual trainings on civil rights for mediators of the Mediation Centers of Hawaii from Honolulu, Maui, and the Big Island.

<sup>1</sup> The HCRC again thanks Dr. William Puette, Executive Director of the Center for Labor Education and Research ("CLEAR") at the University of Hawaii - West Oahu, for his continuing service as voluntary webmaster and technical advisor to the HCRC website and on many of its public presentations.

## Special Advisory Committee On Diversity

Because discrimination cannot be eliminated through law enforcement efforts alone, the HCRC established a Special Advisory Committee on Diversity in 1999. For a second year, the Diversity Committee distributed a flyer on diversity and fairness in education to all public school teachers and co-sponsored a civil rights art contest in Oahu public schools.

The flyer included a message encouraging teachers to discuss diversity issues in their classes to eliminate prejudice as part of a commitment to quality education:

*Schools and classrooms are a logical place for us to help to heal the disease of racism and prejudice -- offering the best opportunity to come to grips with the prejudices that can divide us. We need to address the destructive impact prejudice, bullying, and teasing have on our ability to provide safe schools and a healthy learning environment.*

*Our challenge is not merely to teach tolerance -- with rules of conduct to prevent negative incidents -- but to teach healthy attitudes towards people of different cultures and backgrounds, and an understanding of our common humanity. In order to do this, the schools must provide a safe place to discuss and deal with our own biases and prejudices because no one is completely free of prejudice.*

The message urged teachers to facilitate discussion “about the problem we are seeing among our children, and how we can all work together -- parents, teachers, community members -- to develop healthy and respectful attitudes among all of us, but especially to help our children learn new and healthier ways of treating one another.”

The Committee on Diversity with co-sponsors, the Honolulu Chapter of the Japanese American Citizens League (JACL), Student Excellence Equity and Diversity (SEED) program at the University of Hawaii at Manoa, National Industry Liason Group (NILG), and Hawaii Justice Foundation (HJF), held a second annual civil rights art contest for Oahu public school students in grades 4, 5 and 6 based on the theme “What can we do in our daily lives to promote civil rights and diversity in our society?”

Held in conjunction with Martin Luther King, Jr., Day, the contest encourages children to reflect upon Dr. King's life and work, the civil rights movement, and what they can do in their daily lives to promote civil rights and diversity. In addition to artwork, students were required to write one or two lines explaining their ideas at the bottom of their picture. Congratulations to the contest winners:

- Adayna Wong-Sagio, 4th Grade; Kauluwela Elementary School; Teacher: Ms. Anna Lee
- Charlene Malapitan, 5th Grade; Thomas Jefferson Elementary School; Teacher: Ms. Edna Takaki
- Shearamie Esteban, 6th Grade; Kapalama Elementary School; Teacher: Ms. Kaizawa Miyata
- Kristina Kam, 6th Grade; Nu`uanu Elementary School; Teacher: Ms. Geraldine Kajitani

Each winning student received \$50 individually and \$100 for their class. The students participated in a special awards ceremony with Lt. Governor James Duke Aiona, Jr. They also received congratulatory messages from the State Senate and House of Representatives.

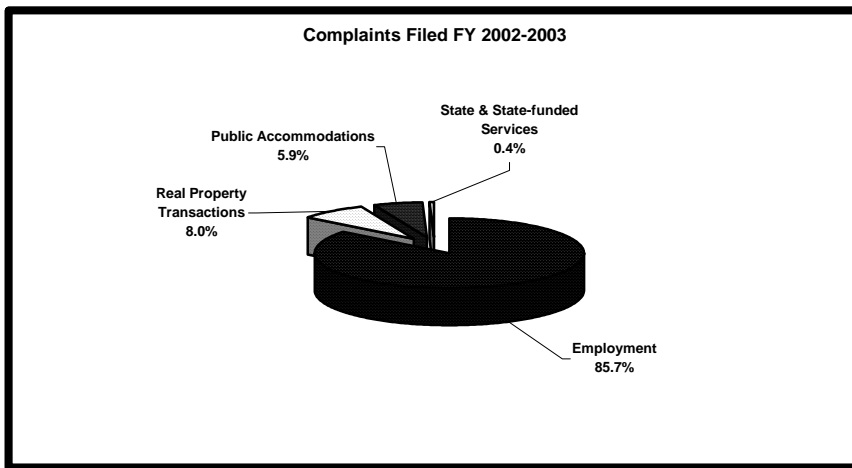
The HCRC Committee on Diversity also initiated discussion with the Hawai`i Justice Foundation on developing and implementing a pilot diversity education project at Kawananakoa Middle School during the 2003-2004 school year.

## Caseload Statistics

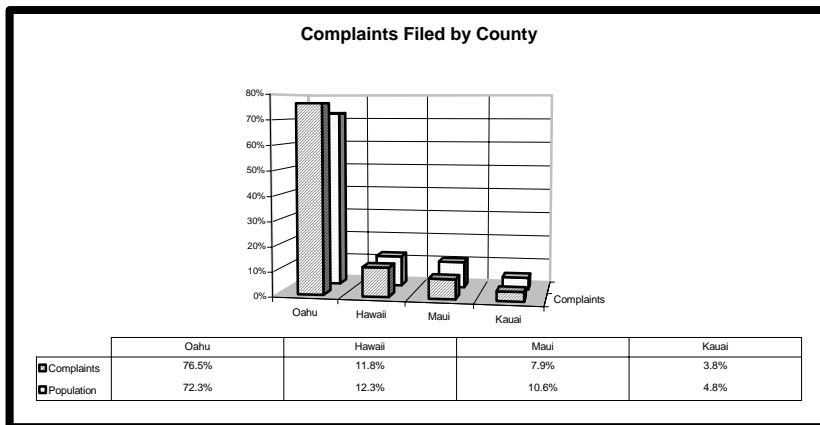
### Intake

During FY 2002-2003, the HCRC received more than 5,000 telephone and walk-in inquiries. 982 intakes were completed by HCRC investigators.

The 712 charges of discrimination were filed with HCRC, or an average of 59 cases a month. These consisted of 491 complaints originating with HCRC investigators (averaging 41 per month), and another 221 more cases originating with and to be investigated by the federal Equal Employment Opportunity Commission (“EEOC”), and dual-filed under state law with HCRC. The 712 cases included 610 employment cases, 42 public accommodations cases, 57 housing cases, and 3 cases involving state and state-funded services. The other inquiries and intake interviews did not lead to filed charges primarily due to: a) lack of jurisdiction; b) failure to correlate the alleged act(s) with the protected basis or bases; or, c) a complainant's decision not to pursue the complaint.



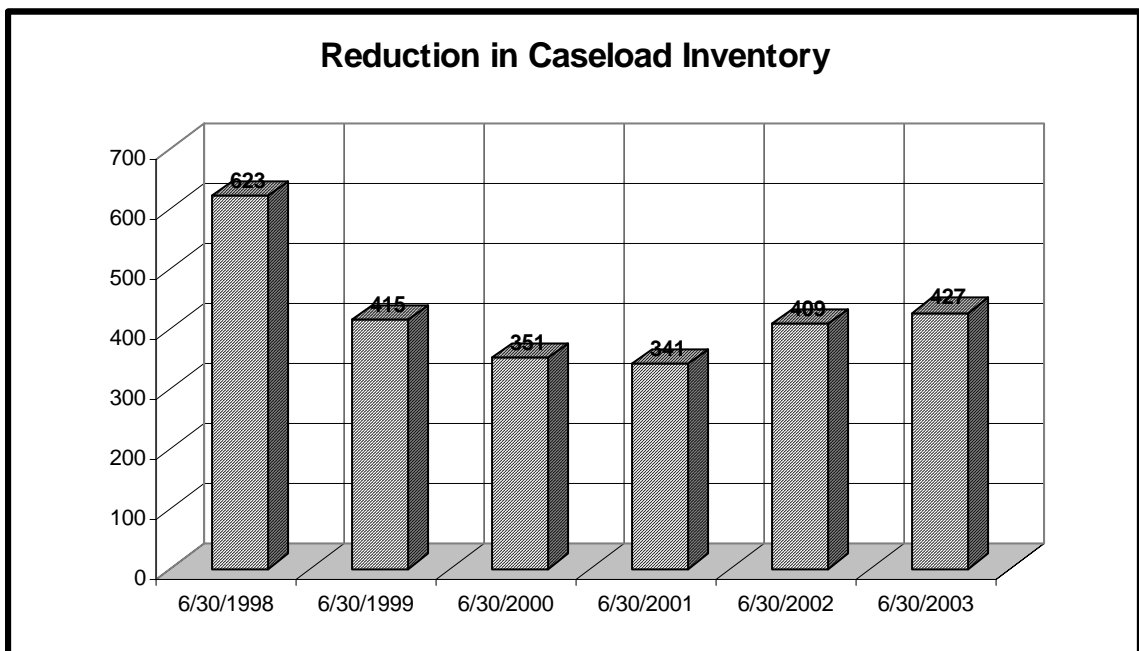
The 712 charges accepted by HCRC consisted of the following number of complaints from each county: Oahu (545), Hawaii (84), Maui (56) and Kauai (27). The number of complaints filed from each county was consistent with its portion of resident population.



## Closures

HCRC investigators and attorneys closed 471 cases during FY 2002-2003, up from 411 cases in FY 2001-2002. This equates to an average closure rate of 39.25 cases per month, up from 34.25 cases in FY 2001-2002. In addition to the 471 closures during the fiscal year, HCRC investigations resulted in cause determinations in another 29 cases.

As of June 30, 2003, there were 427 cases pending with HCRC investigators. Through its prioritized charge processing system and specialization in investigation, the HCRC has maintained its inventory at consistent levels over the past five fiscal years. Maintaining this reduced case inventory brings the HCRC closer to the optimum caseload of 30 cases per investigator, as recommended by the Legislative Auditor in, "A Study on Implementation of the Civil Rights Commission for the State of Hawaii" (Report No. 88-9, January 1989). In order to maintain the case inventory at this level, however, HCRC must continue to close at least 450 cases each fiscal year.



The HCRC has continued to maintain an average closure period of approximately eleven months. The average period for case closure by investigators was 342 days, as compared to 351 days for FY 2001-2002 and 336 days for FY 2000-2001. A review of this fiscal year shows the following reasons for closures<sup>4</sup>:

### <sup>4</sup>Analysis and Explanation of Closure Data

This closure data does not reflect the number of completed investigations which resulted in cause recommendations and determinations. The reason for this is that cases are not closed upon issuance of a notice of cause, but are then conciliated, and, if conciliation fails, are docketed for hearing. (Cause determination are not "closures".)

	No. of cases	% of subtotal	% of total closures
<b>Merit Closures</b>			
Resolved by Parties	42	11.02%	8.92%
Pre-Determination Settlements	14	3.68%	2.97%
Cases Settled or Otherwise Resolved After a Cause Determination	22	5.77%	4.67%
No Cause Determinations	<u>303</u>	<u>79.53%</u>	<u>64.34%</u>
Subtotal	381	100.0%	80.90%
<b>Non-merit Closures</b>			
Complainant Elected Court Action	47	52.23%	9.98%
No Jurisdiction	2	2.22%	0.42%
Complaint Withdrawn	14	15.56%	2.97%
Complainant Not Available	11	12.22%	2.34%
Complainant Failed to Cooperate	13	14.44%	2.76%
No Significant Relief Available	<u>2</u>	<u>2.22%</u>	<u>0.42%</u>
Subtotal	90	100.0%	19.10%

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Historically, there is a relationship between the number of cause cases and predetermination settlements/resolutions between parties. The larger the number of notices of cause, the smaller the number of settlements/resolutions, and vice versa. Typically as a percentage of cases that are investigated to a cause/no cause determination or settled or resolved by predetermination settlement or resolution between the parties, cause recommendations and settlements/resolutions constitute between 15-25% of the total.

During FY 2002-2003, HCRC investigations resulted in 29 cause recommendations. Fifty-six cases were closed on the basis of pre-determination settlement or resolution between parties. Three hundred three cases were closed on the basis of no cause determinations upon completion of investigation. Predetermination settlements/resolutions between parties (85) constituted 22% of the total number of investigation cases closed on a cause/no cause determination or settlement/resolution.

## Employment Cases

H.R.S. Chapter 378, Part I prohibits discriminatory employment practices based on race, sex, sexual orientation, age, religion, color, ancestry, disability, marital status, arrest and court record, assignment of income for child support obligations, National Guard participation, or breast feeding/expressing milk. Examples of such practices are outlined in H.R.S. § 378-2.

The HCRC has a workshare agreement with the EEOC. Where there is concurrent jurisdiction, a case is filed with both agencies, but only the intake agency conducts the investigation, thereby eliminating duplicate enforcement activity. During the fiscal year, a total 610 employment cases were accepted by the HCRC. HCRC was the intake agency for 389 of these cases and dual-filed another 221 cases originating with EEOC. Of the HCRC-originated cases, 79.4% were also filed with EEOC.

Of the 610 employment cases accepted in FY 2002-2003, sex was the basis cited most often, with 151 cases, accounting for 28% of all employment discrimination cases. Within the sex category, 52 cases alleged sexual harassment (34% of all sex cases) and 34 cases were based on pregnancy (23% of all sex cases).

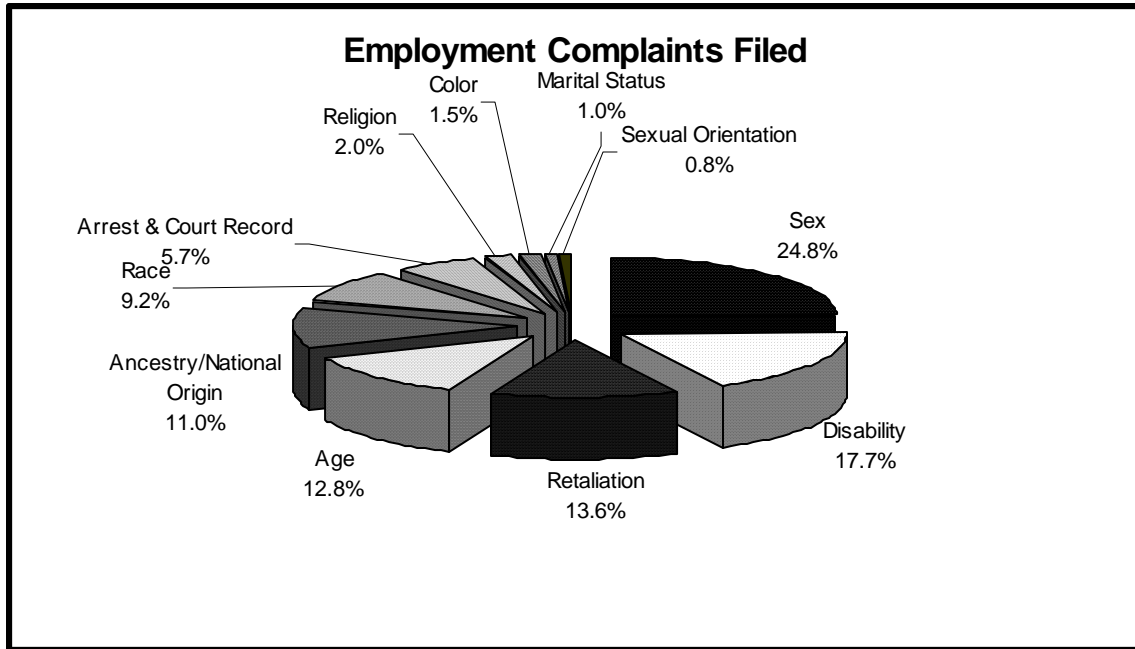
Disability was the second most common basis with 108 cases, representing 17.7% of all employment cases. Retaliatory conduct followed with 83 cases, representing 13.6% of accepted employment cases, followed by age discrimination with 78 cases (12.8%), and ancestry/national origin discrimination with 67 cases (10.9%).

There were 56 cases based on race discrimination (9.2%); 35 cases based on arrest & court record (5.7%); 12 cases based on religion (2%); 9 cases based on color (1.5%); 6 cases based on marital status (1%); and 5 cases based on sexual orientation (0.8%). There were no cases based on National Guard participation or child support obligations.

The case closure period averaged 367 days for the 399 employment cases that were closed (or caused) by HCRC investigators during FY 2001-2002.

### PRIMARY BASIS OF EMPLOYMENT DISCRIMINATION COMPLAINTS ACCEPTED IN FY 2002-2003

<b>Sex</b>	<b>151</b>	<b>Arrest &amp; Court Record</b>	<b>35</b>
<b>Race</b>	<b>56</b>	<b>Sexual Orientation</b>	<b>5</b>
<b>Disability</b>	<b>108</b>	<b>Ancestry/National Origin</b>	<b>67</b>
<b>Marital Status</b>	<b>6</b>	<b>Color</b>	<b>9</b>
<b>Religion</b>	<b>12</b>	<b>Retaliation</b>	<b>83</b>
<b>Age</b>	<b>78</b>	<b>National Guard Participation</b>	<b>0</b>
<b>Child support obligations</b>	<b>0</b>		



### Housing Cases

H.R.S. Chapter 515 prohibits discriminatory housing practices based on race, sex, color, religion, marital status, familial status, ancestry, disability, age, or HIV infection. Examples of such unlawful practices are listed in H.R.S § 515-3 and include actions such as refusing to rent, sell, or grant loans to an individual because of one or more of the above protected bases.

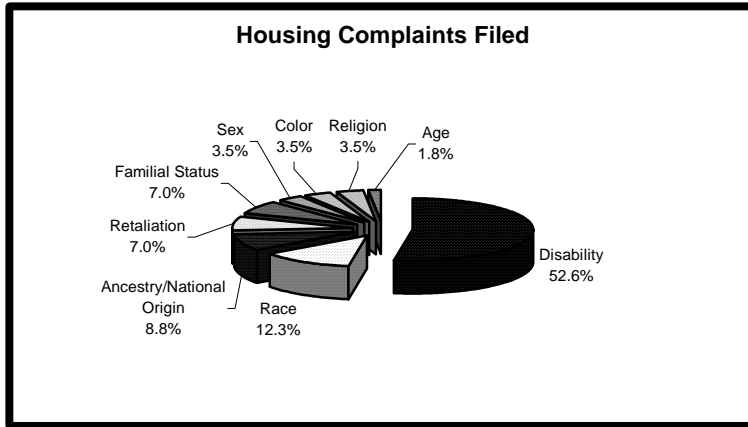
The HCRC has a workshare agreement with the U.S. Department of Housing & Urban Development (HUD). HUD refers most of the complaints it receives regarding unlawful discrimination in real estate transactions in Hawaii to the HCRC for investigation.

During FY 2002-2003, the HCRC accepted 57 cases of housing discrimination. The breakdown of these cases are as follows:

Disability status	30
Race	7
Ancestry/National origin	5
Retaliatory Conduct	4
Familial Status	4
Sex	2
Color	2
Religion	2
Age	1

Housing case closures averaged 199 days for the 42 cases closed (or caused) during FY 2002-2003.



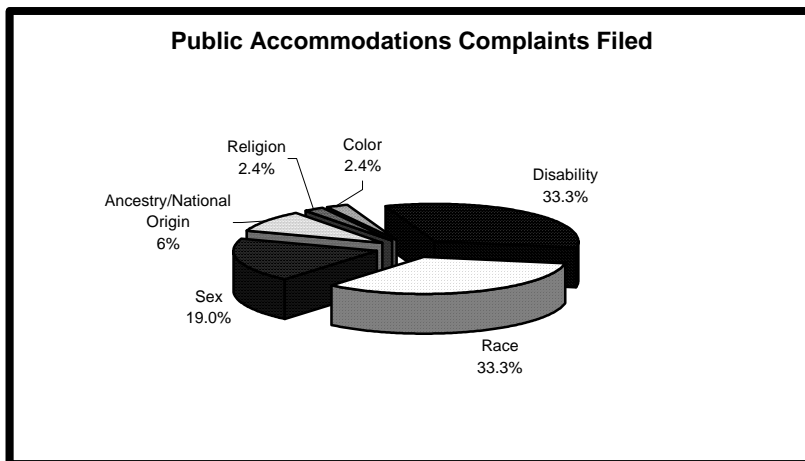


### Public Accommodations Cases

H.R.S. Chapter 489 prohibits unfair discriminatory practices that deny, or attempt to deny a person the full and equal enjoyment of the goods, services, facilities, privileges, advantages or accommodations of a place of public accommodation on the basis of race, sex, color, religion, ancestry, or disability. Public accommodations include retail stores, restaurants, theaters, sports arenas, public transportation, healthcare providers, hotels, and banks.

During the fiscal year, 42 new cases of public accommodations discrimination were accepted. There were 14 cases based on disability discrimination, 14 cases alleging race discrimination, 8 cases based on sex discrimination, 4 cases based on ancestry, and 1 case each based on religion and color.

Public accommodations case closures averaged 240 days for the 36 cases closed (or caused) during FY 2002-2003.



## Access To State & State-Funded Services Cases

H.R.S., §368-1.5 prohibits state agencies, or any program or activity receiving state financial assistance, from excluding from participation, denying benefits or otherwise discriminating against persons with disabilities (the only protected class under this statute).

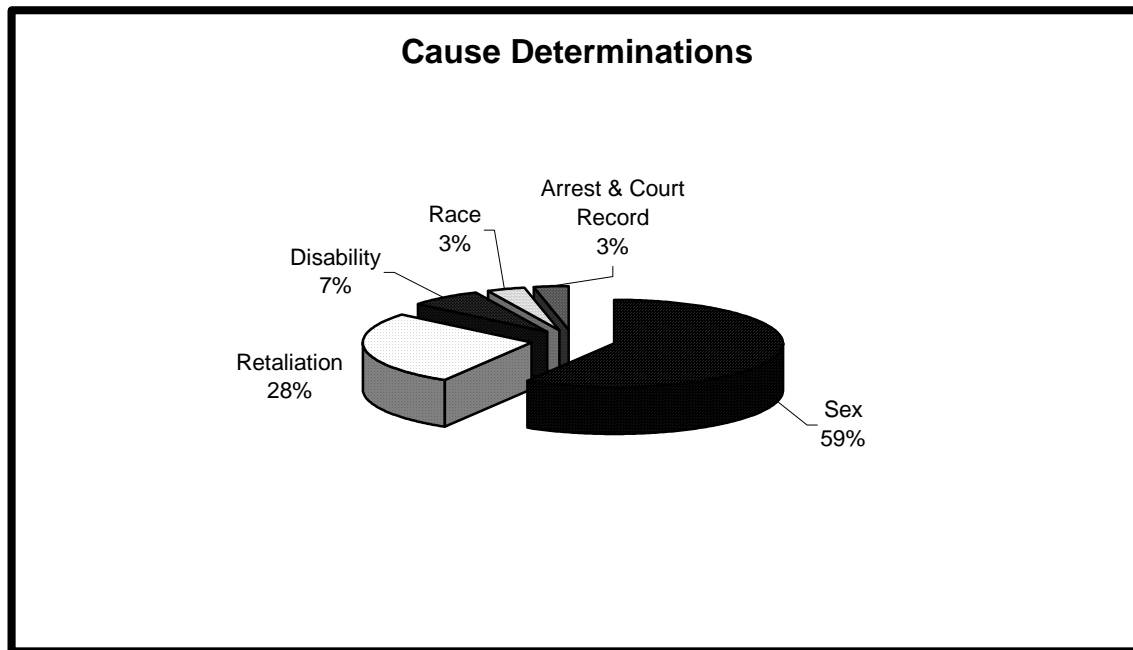
During the fiscal year, there were 3 cases filed under § 368-1.5. One case was closed during FY 2002-2003, which was closed in 87 days.

## Cause Cases

When the investigation results show that there is “reasonable cause” to believe that discrimination has occurred, the case is assigned to an HCRC enforcement attorney for legal action. In FY 2002-2003, the enforcement attorneys received 29 recommendations for cause determinations. Of these, 25 (86%) were employment cases, 3 (10%) were housing cases, and 1 (3%) was a public accommodation case.

Of the 29 investigations resulting in a cause recommendation, 17 (59%) involved discrimination on the basis of sex, 8 (28%) involved retaliation, 2 (7%) investigations or 7% involved discrimination due to disability, and 1 (3%) involved discrimination due to arrest and court record, and 1 case (3%) involving race.

During FY 2002-2003, enforcement attorneys closed 27 cases, and all but one were negotiated settlements.



## Case Settlements

The HCRC promotes and encourages settlement during all stages of the complaint process. Through pre-determination settlements, mediation, and conciliation, the HCRC obtains relief and resolves complaints while avoiding unnecessary litigation. These settlements provide closure for the parties and conserve HCRC investigation and litigation resources for complex or precedent setting cases.

During FY 2002-2003 the total monetary relief obtained through settlements totaled more than \$545,000.00. In the 14 settlements obtained by HCRC attorneys in cases with a finding of reasonable cause, the monetary relief obtained for parties through conciliation exceeded \$264,315.00. In the 40 cases settled prior to an investigative finding, monetary relief totaled more than \$280,000.00. This figure includes both pre-determination settlements obtained through HCRC investigators (\$50,051.44) and investigative settlements obtained through the HCRC Mediation program (\$230,686.00).

In addition to monetary relief, significant affirmative relief was also obtained. The HCRC seeks affirmative relief for four basic reasons: to enforce civil rights laws, stop discriminatory conduct, prevent future harm to complainants, and assist respondents in avoiding future violations. HCRC settlements and conciliation agreements routinely include various types of affirmative relief, including developing and implementing anti-discrimination policies, employee and supervisor training on anti-discrimination policies, posting policies, and publishing notices informing the public of HCRC's role in enforcing state anti-discrimination laws.

In some instances, non-monetary relief can be an important element of a settlement. For example, in FY 2002-2003, there were complainants who received letters of apology pursuant to the terms of a settlement. A simple apology sometimes goes a long way towards healing the rift between a complainant and respondent, and this form of relief is often not available as a court ordered remedy. Some cases are resolved when an employer, housing provider, or public accommodation corrects an unlawful discriminatory policy or practice after notice of the violation. During FY 2002-2003, a significant number of employers, housing providers, and public accommodations voluntarily agreed to correct unlawful employment applications, leave policies, or house rules.

The following descriptions are illustrative of the HCRC cases that were conciliated and the relief that was obtained during FY 2002-2003:

- A complainant alleged he was harassed and subjected to unequal working conditions because of his sex and religion. The settlement included payment of \$60,000 to the complainant, adoption of anti-discrimination employment policies in compliance with Chapter 378, and training for the employer's staff in compliance with such non-discrimination policies.
- In four cases filed against a national company, the complainants alleged they were unlawfully fired or suspended due to their arrest and court records. Settlement included payment in the sum of \$40,000, to one complainant, \$32,500 to another complainant and \$25,000 to each of the other complainants. The Respondent also agreed to affirmative relief in a companion action filed by the Executive Director.
- Settlement of a case alleging employment discrimination based on pregnancy resulted in the complainant receiving over \$8000 and restoration of all sick leave. The employer also adopted a written non-discrimination policy and agreed to affirmative relief.
- In a case in which the complainant alleged she was not restored to her position after a period of leave and terminated because of her disability, the case was settled for \$32,500. The complainant was terminated after the recurrence of an illness that had been in remission for several years.
- A case alleging unlawful questions based on national origin and ancestry resulted in a settlement of \$4,000 to the complainant. The employer also agreed to adopt a non-discrimination policy and to train its workers on how the policy should be applied.

- A complainant who was allegedly subjected to sexual harassment was paid \$12,500 in settlement of her claims. The respondent agreed to re-affirm its policy of non-discrimination, as well as provide training to all employees.
- A case alleging same-sex harassment in employment was settled for \$12,000. Affirmative relief included a reference letter and adoption of an anti-discrimination policy.
- In a case alleging the complainant was not hired because of race, the complainant received a full-time position and \$5,000.
- A case alleging denial of goods and services because of race resulted in a settlement of \$3,000 to the complainant.

### **HCRC Warning Letters**

In an effort to prevent future or recurring problems, HCRC provides respondents with “warning letters” advising them of unlawful or potentially unlawful practices that HCRC discovers during the course of its investigation of other claims against the respondent. In those instances where the HCRC investigation does not result in a recommendation of reasonable cause on the claims filed but the HCRC investigator finds other unlawful practices, such as a discriminatory written policy or employment application, or conduct in the workplace that could rise to the level of unlawful harassment if repeated, HCRC will advise the respondent of the potential violations and give the respondent information on how it can correct the possible violation of the law. Warning letters have resulted in policy and application form changes, as well as discrimination prevention training for employees and managers.

## Case Decisions

### Contested Case Hearings

During FY 2002-2003, HCRC Enforcement Attorneys docketed only one case for hearing, and two cases were pending at the end of the fiscal year. The low number of cases docketed was directly attributable to staff turnover, the departure of the Deputy Executive Director and two of three enforcement attorneys, a 6-month delay in filling the vacant attorney positions due to budget considerations, and a statewide hiring freeze. In addition, the pending constitutional challenge to the HCRC administrative hearing process created uncertainty over the efficacy of docketing cases for hearing, which was resolved by the Hawaii Supreme Court's decision in SCI Management Corp., et al. vs. Sims, et al., 101 Haw. 438, 71 P.2d 389 (2003).

### Circuit Court

In RGIS Inventory Specialist v. The Hawaii Civil Rights Commission, Civil No. 02-1-1703-07 (EEH), appellant RGIS appealed to circuit court challenging the HCRC decision in a declaratory relief petition that it had jurisdiction to investigate complaints of sex discrimination filed by male to female transsexual or transgendered employees. The HCRC ruled, based on a U.S. Supreme Court case, Price Waterhouse v. Hopkins, 490 U.S. 228, 109 S.Ct. 1775 (1989), that if an employer discriminates because an individual does not conform to gender stereotypes, such action can constitute sex discrimination. The HCRC decision authorized the Executive Director to investigate the complaints despite RGIS' refusal to respond to the investigation.

On January 27, 2003, the circuit court reversed the HCRC decision on the grounds that sex discrimination only covers the biological differences between men and women. It held that sex discrimination under the employment discrimination law did not encompass transgender and transsexual discrimination. The court drew a distinction between RGIS and Price Waterhouse, because that case involved gender stereotyping of women, and not transgender and transsexual individuals.

The HCRC has appealed the circuit court's decision to the Hawaii Supreme Court.

### Supreme Court

In SCI Management L.P. v. Sims, 101 Haw. 438, 71 P.3d 389 (June 18, 2003), the Hawaii Supreme Court vacated the circuit court's decision which held that HRS § 368-12 was unconstitutional because it violated a respondent's right to equal protection by denying their right to jury trial.

However, the Court ruled that a respondent must be given the right to a jury trial if the HCRC final decision awards legal remedies (including compensatory and punitive damages) to the complainant after a contested case hearing. A respondent can then file a request for jury trial with the circuit court and get a de novo jury trial. If legal remedies are not awarded, the final decision will be reviewed by the circuit court as set forth under existing law and neither party will be entitled to a jury trial.

The effect of the Supreme Court's decision is that the HCRC administrative hearing process remains unchanged, but if a case is appealed to circuit court, respondents may be entitled to a jury trial if the HCRC awards legal remedies.

## **Legislation**

Act 33 amends the hate crimes law to add gender identity or expression as a protected basis. This means that a defendant, who intentionally selects a victim or the property of a person because of hostility toward the person's actual or perceived gender identity or expression, can be sentenced to an extended prison term. It also requires that hate crime reports include information about hate crimes based upon gender identity or expression.

Act 95 incorporates the recommendations of the criminal history records checks working group established pursuant to Act 263, SLH 2001, to address inconsistencies and duplicative statutory language authorizing record checks for employment background checks, certifications, and licensing of individuals. The HCRC was a participant in the working group. The Act amends the employment discrimination law to clarify which employers are allowed to inquire into an applicant's criminal convictions before making offers for certain jobs, based upon express exemptions contained in other laws. It also authorizes public employers (the state and counties) to consider criminal convictions, after making a conditional job offer, if the offense is rationally related to the job duties and functions and occurred within the past 10 years. This change allows state and county employers to consider criminal convictions to the same extent as private employers. Act 95 excluded the period of incarceration of an individual from the 10-year time period.

Act 76 amends the Administrative Procedures Act to allow state agencies to encourage the parties to resort to voluntary mediation in lieu of a contested case hearing. The HCRC already encourages parties to voluntarily mediate cases which are docketed for hearing, as well as cases under investigation.

## Appendix

### Administrative Procedure

Before the HCRC accepts a complaint of discrimination, a complaining person must allege that:

- 1) She or he has been subjected to unlawful discrimination<sup>1</sup> because of a "protected basis,"<sup>2</sup> and,
- 2) The unlawful discrimination occurred within the previous 180 days.<sup>3</sup>

After a complaint is filed with HCRC, in appropriate cases the parties are offered an opportunity to voluntarily mediate the complaint through the HCRC Mediation Program. If the parties agree to mediate, the HCRC mediation coordinator refers the parties to a community mediation center, which schedules and holds mediation sessions. Parties may alternatively choose to hire a private mediator.

In cases not referred to mediation, or those in which mediation is unsuccessful, an HCRC investigator conducts an objective, fact-finding investigation. As objective fact-finders, HCRC investigators favor neither party, and gather evidence to allow the Executive Director to make a determination in each case. As appropriate, the HCRC investigator collects, reviews, and analyzes documents, and contacts and interviews witnesses. Some witnesses questioned may be identified by the complainant or by the respondent, and some are independent witnesses, including experts, who are identified by the investigator, by other witnesses, or are discovered during the investigation. In many cases, the investigator also attempts to settle the complaint prior to an investigative determination (pre-determination settlement).

After an HCRC investigation is completed, H.R.S. 368-13(b)-(c) requires the Executive Director to determine whether reasonable cause exists to believe that discrimination has occurred. Where no reasonable cause is found, the Executive Director dismisses the complaint and issues a right to sue letter to the complainant. Where a determination of reasonable cause is recommended, the complaint is assigned to an HCRC enforcement attorney for legal review and final recommendation to the Executive Director.

Upon the issuance of a finding of reasonable cause to believe that unlawful discrimination has occurred, the HCRC enforcement attorney attempts to conciliate or settle the complaint.<sup>4</sup> If conciliation is unsuccessful, the complaint is docketed for a contested case hearing. An HCRC enforcement attorney presents the case in support of the complainant before an impartial hearings examiner. The respondent (represented by themselves or by counsel or representative of their choice) is also given the opportunity to present its case at the hearing. Generally, a complainant may intervene in the contested case process as a party and also be represented by counsel or other representative of their choice.

After the completion of the contested case hearing, the hearings examiner issues a proposed decision based on the evidence. The five-member Commission Board then reviews the proposed decision and the hearing record. The parties may file written exceptions and support statements and present oral arguments to the Board. The Commission Board then accepts, rejects, or modifies the proposed decision, issues a final decision and order, and awards remedies, if appropriate. This decision is legally binding. If any party disagrees with the decision, she/he has 30 days to file an appeal to the State Circuit Court. Furthermore, a Respondent who appeals a decision of the Commission Board is entitled to a jury trial on any claims that form the basis for an award of common law damages.<sup>5</sup>

The HCRC enforcement and administrative process is more cost effective than litigation in court. It provides for the investigation of complaints and access to justice for those who lack the resources to pursue their claims in court. This is particularly important in employment discrimination cases, where employees have often lost their source of income through termination and have little or no control over the evidence needed to prove discrimination.

The HCRC enforcement and adjudication process also funnels cases away from the courts, saving judicial resources and associated costs. Complainants who file suit in court must first exhaust administrative remedies by filing a complaint with the HCRC. The primary reason for this requirement is to prevent the courts from being overburdened with non-judicial or non-meritorious complaints, or with complaints that can be closed or settled in HCRC's administrative process. In fact, the great majority of complaints filed with HCRC are resolved or disposed of without resort to the courts.<sup>6</sup>

Although only a small number of cases are brought to administrative hearing and result in final Commission decisions, these cases are important because they create a body of legal precedent. Case law precedents – in Hawaii and across the United States -- provide the basis for anti-discrimination principles, such as the doctrine of sexual harassment. Case law also establishes standards that define the rights and protections under civil rights laws, and give guidance to employers, landlords, and businesses on how to prevent and eliminate discrimination.

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1 “Unlawful discrimination” may occur in any of the following ways:

- a. Disparate Treatment – this is the usual form of discrimination; it occurs when individuals are treated in an unequal manner because of a “protected basis.” Examples of disparate (unequal) treatment include: firing an employee because of her race, her age, or because she is pregnant; refusing to serve a person because of his race or his disability; refusing to rent to a person because of her race; or refusing to rent to a family because it has young children.
- b. Reasonable Accommodation – this is the second most common way that discrimination appears; it occurs when an individual is denied a “reasonable accommodation” designed to allow an individual to have equal access or equal benefits. Examples of failure to accommodate include: refusing to allow a seeing-impaired customer into a taxicab because he is accompanied by a seeing-eye dog; refusing to allow a pregnant cashier to sit on a stool so that she can work while pregnant; or refusing to make exceptions to a condominium association's "no pets" house rule to allow a disabled resident to keep a service animal.
- c. Disparate Impact -- the least common way that discrimination appears; however, when discrimination occurs in this form, it may impact the greatest number of people. Disparate impact occurs when a policy, practice, or test that has a “disparate impact” on persons with a particular “protected basis.” Examples of disparate impact include: a pre-employment test that includes a number of questions that are not job-related but have the effect of disqualifying a large number of women, or men, or any other protected basis.

<sup>2</sup>“Protected basis” is the criteria that it is unlawful for a respondent to discriminate upon. Protected bases vary depending on the statute involved:

- a. State Funded Services (Chapter 368, H.R.S.) The only protected basis is disability.
- b. Employment (Chapter 378, Part I, H.R.S.) The protected bases that an employer, employment agency, or labor organization may not discriminate on are: race, sex, sexual orientation, age, religion, color, ancestry, disability, marital status, or arrest and court record.
- c. Public Accommodations (Chapter 489, H.R.S.) The protected bases that a public accommodation may not discriminate on are: race, sex, color, religion, ancestry, or disability.
- d. Housing (Chapter 515, H.R.S.) The protected bases that an owner, a real estate broker or any person engaging in a real estate transaction, may not discriminate on are: race, sex, color, religion, marital status, familial status, ancestry, disability, age or HIV (human immunodeficiency virus) infection.

<sup>3</sup> Complaints filed with HCRC usually involve a discrete act – such as termination, eviction, demotion, etc. – or involve acts that are ongoing and constitute a continuing violation. An example of a “continuing violation” is sexual harassment that began more than 180 days before the complaint is filed, but continued or ended less than 179 days before the complaint is filed. When discrimination involves a discrete act, such as termination, the HCRC can only accept a complaint within 180 days of that complained action.

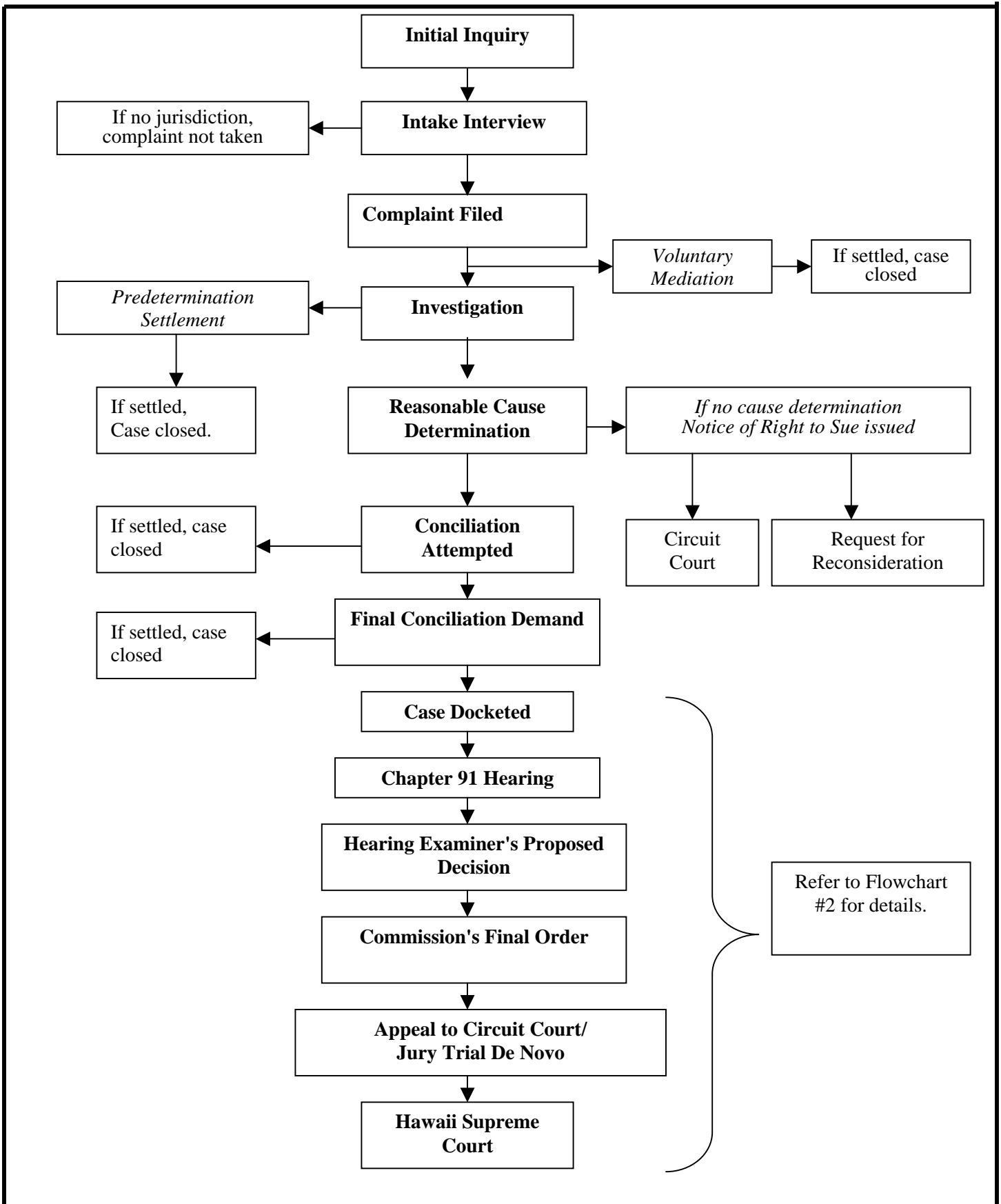


<sup>4</sup> During FY 2002-2003, of all complaints closed (471), 19.11% (90) were closed on the basis of the complainant electing court action or other administrative closure. The remaining cases (381) were closed on the basis of a completed investigation or a pre-determination settlement: in 64.33% (303) the Executive Director found no cause and dismissed the complaint; in 4.67% (22) the case was resolved through settlement or litigation by HCRC enforcement attorney after the issuance of a notice of cause; and 11.89% (56) were settled prior to a cause determination.

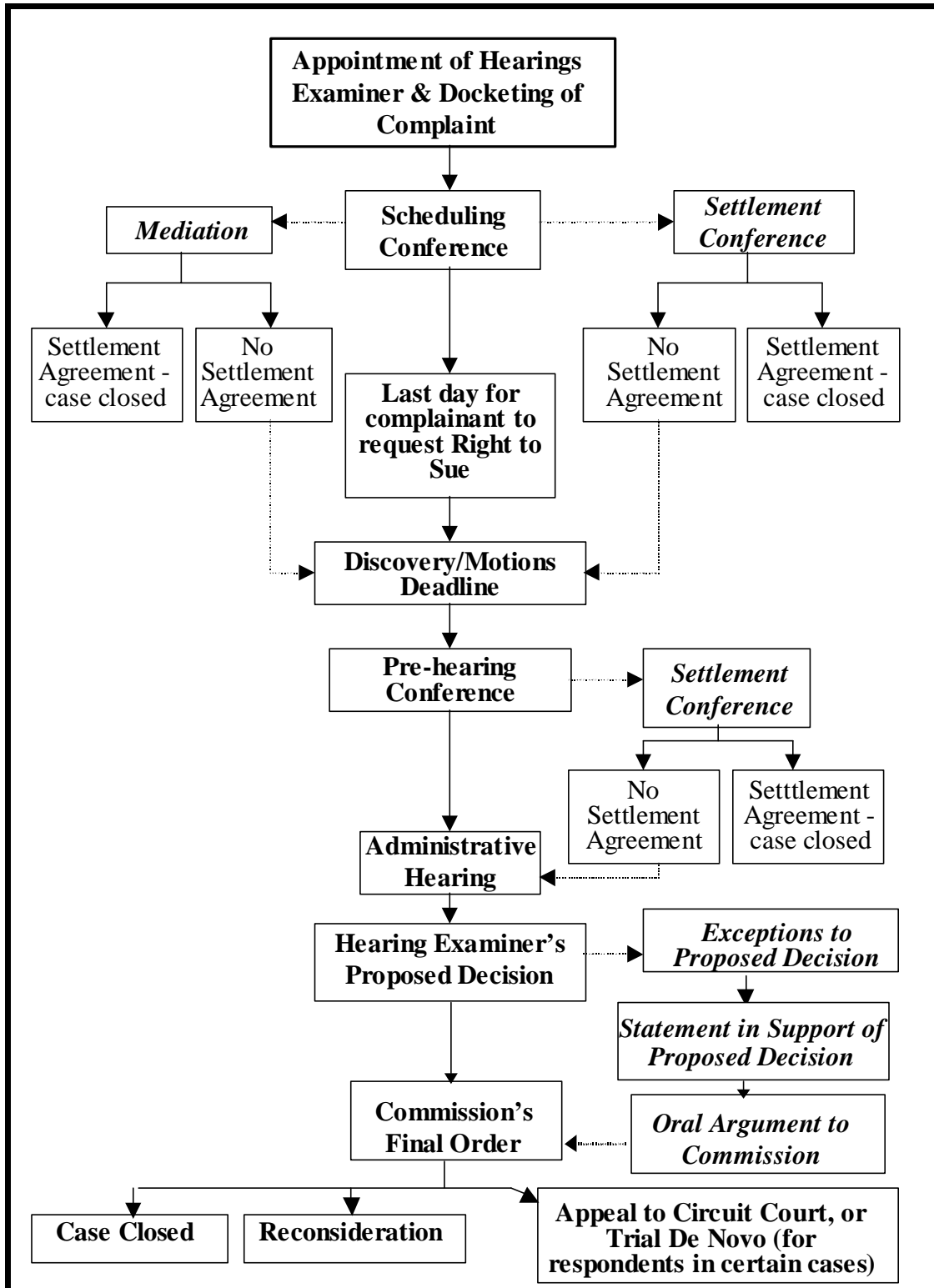
<sup>5</sup> The HCRC administrative procedure and circuit court appeal is illustrated in Flowchart # 1. In SCI Management Corporation, et. al. v. Darryllyne Sims, et. al., No. 24485, June 18, 2003, the Hawaii Supreme Court held that “a respondent who appeals a final order of the HCRC, pursuant to HRS § 368-16, is entitled to a jury trial on any claims that form the basis for an award of common law damages by the HCRC.”

<sup>6</sup> HCRC case dispositions are illustrated in Flowchart # 2 .

# HCRC Procedural Flowchart #1



HCRC Contested Case Flowchart # 2



## **HCRC Commissioners**

### **Harry Yee**

Chair (Terms 1997-2001, 2001-2005)

During FY 2002-2003, Mr. Yee was an attorney in private practice. He served as President of the Federal Bar Association, Hawaii Chapter and on the board of the National Asian Pacific American Bar Association. Mr. Yee served as an Assistant Attorney General with the Civil Rights Division of the Massachusetts Office of the Attorney General and managing attorney for Greater Boston Legal Services, Chinatown Office. He was a member of the Greater Boston Civil Rights Coalition and the George Lewis Ruffin Society, which promotes greater understanding between minority communities and the criminal justice system. Mr. Yee was appointed Chair of the Commission in December 1998. He was reappointed for another four-year term in 2001. Mr. Yee resigned as Chair and Commissioner, effective September 5, 2003, and is now an Assistant United States Attorney in Honolulu.

### **Faye Kennedy**

Commissioner (Terms 1995-97, 1997-2001, 2001-2003)

Ms. Kennedy is a former New York social worker and author. She is a past member of the Martin Luther King, Jr. Commission and the Commission on the Status of Women. She is also a member of the U.S. Civil Rights Commission's Hawaii Advisory Committee and is currently listed in Who's Who of American Women. Appointed in 1995 to serve out the remaining term caused by a vacancy on the Commission, she was appointed to her first full term in 1997. Among her other duties as a Commissioner, Ms. Kennedy coordinated the Commission's participation in Martin Luther King, Jr., Holiday Commemoration events and activities. She was reappointed for another two-year term in 2001. Ms. Kennedy's term expired on June 30, 2003.

### **Allicyn Hikida Tasaka**

Commissioner (Terms 1996-2000, 2000-2004)

Ms. Tasaka is Executive Director of the Hawaii State Commission on the Status of Women. She is serving her second four-year term as a commissioner. She was the Communications Director for former Lieutenant Governor Mazie K. Hirono, Chair of the Hawaii State Commission on the Status of Women, and the first woman president of the Honolulu Chapter of the Japanese American Citizens League (JACL). She also serves as director on the boards of the Hawaii Women's Political Caucus, Winners at Work, Awareness Foundation, and as a commissioner of the Department of Education's Gender Equity in Athletics Advisory Commission.

### **June Motokawa**

Commissioner (Terms 1998-1999, 1999-2003)

Ms. Motokawa is a special education teacher at Kawanānakoā Middle School and has been a teacher in Hawaii public schools for 30 years. She is a past president of the Hawaii State Teachers' Association and Civic Forum on Public Schools. She served on the Commission on the Handicapped in the 1980's and formerly served as Congresswoman Patsy T. Mink's Hawaii liaison. Ms. Motokawa was appointed in October 1998 to serve the remainder of the late Commissioner Claudio R. Suyat's term. She was appointed to her second term in 1999. Ms. Motokawa chairs the HCRC Special Advisory Committee on Diversity.

### **Richard Turbin**

Commissioner (Term 2002-2006)

Mr. Turbin was born in New York City and graduated from Cornell University, Magna Cum Laude, and Harvard Law School where he served as editor and author of the Harvard Civil Rights Law Review. He has been a litigation lawyer in Hawaii for 31 years. He is the Chair of the Kahala Neighborhood Board, the President of the Consumer Lawyers of Hawaii, and a board member of Mothers Against Drunk

Driving (MADD) and the Judicial History Center. He has also served as the Hawaii State Bar Association Chair of the legal malpractice insurance section and the 1999-2000 Chair of the Tort and Insurance Practice Section (TIPS) of the American Bar Association (ABA), which is comprised of 30,000 members, the largest such organizations in the world.

### **HCRC Staff**

The HCRC staff consists of 29 individuals in the following positions:

- Executive Director
- Enforcement Staff:
  - Deputy Executive Director
  - Enforcement Attorneys (4)
  - Administrative Services Asst.
  - Investigator-Supervisors V (2)
  - Investigator III-IV (11)
  - Secretary III
  - Legal Stenographer I
  - Clerk Typists (4)
- Adjudication Staff:
  - Chief Counsel
  - Hearings Examiner
  - Secretary II