

**HAWAI'I
CIVIL
RIGHTS
COMMISSION**

ANNUAL REPORT
JULY 1, 1991–JUNE 30, 1992

JOHN WAIHEE,
Governor

KEITH AHUE,
Director, Department of Labor & Industrial Relations

AMY AGBAYANI,
Commission Chairperson

LINDA TSEU,
Executive Director

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INTRODUCTION

The Hawai'i Civil Rights Commission (HCRC) was established by the legislature in 1988 under Act 219. The Act and its subsequent amendments declare that discriminatory practices—based on race, color, religion, age, sex, sexual orientation, national origin, ancestry, or disability—in employment, housing, public accommodations, or access to services receiving state financial assistance are against public policy. The Commission's mandate is to provide a uniform procedure for the enforcement of the state's discrimination laws.

The Commission is comprised of five (5) members, all of whom are volunteers appointed by the Governor on the basis of their knowledge and experience in civil rights matters and a demonstrated commitment to the preservation of the civil rights of all individuals. The members include persons from private sector business, the University of Hawaii, people with disabilities, and community groups.

The HCRC is attached to the Department of Labor & Industrial Relations (DLIR) for administrative purposes. The Commission oversees a staff of approximately twenty-six (26) persons who are divided into two separate sections (enforcement and adjudication) to carry out its functions. Pursuant to Hawai'i Revised Statutes (H.R.S.) § 368-3, these functions are to:

- 1) receive, investigate and conciliate complaints alleging any unlawful discriminatory practice under H.R.S. Chapter 368 (programs and activities receiving state financial assistance), Chapter 489 (public accommodations), Chapter 515 (real property transactions) and part I of Chapter 378 (employment practices);
- 2) issue to a complainant the right to sue in circuit court;
- 3) hold administrative hearings on such complaints and order appropriate legal and equitable relief or affirmative action when a violation is found;
- 4) commence civil actions in circuit court to seek appropriate relief, including the enforcement of any commission order, conciliation agreement, or predetermination settlement;
- 5) issue publications, results of investigations, and research that in its judgement will tend to promote goodwill and minimize or eliminate discrimination in employment, housing, and public accommodations.

The accompanying report is submitted pursuant to H.R.S. § 368-4 and 515-9, and to give a review of the major accomplishments of the Commission during the fiscal year of July 1, 1991–June 30, 1992.

ADMINISTRATIVE PROCEDURE

Two requirements must be fulfilled before the HCRC can accept a complaint of discrimination:

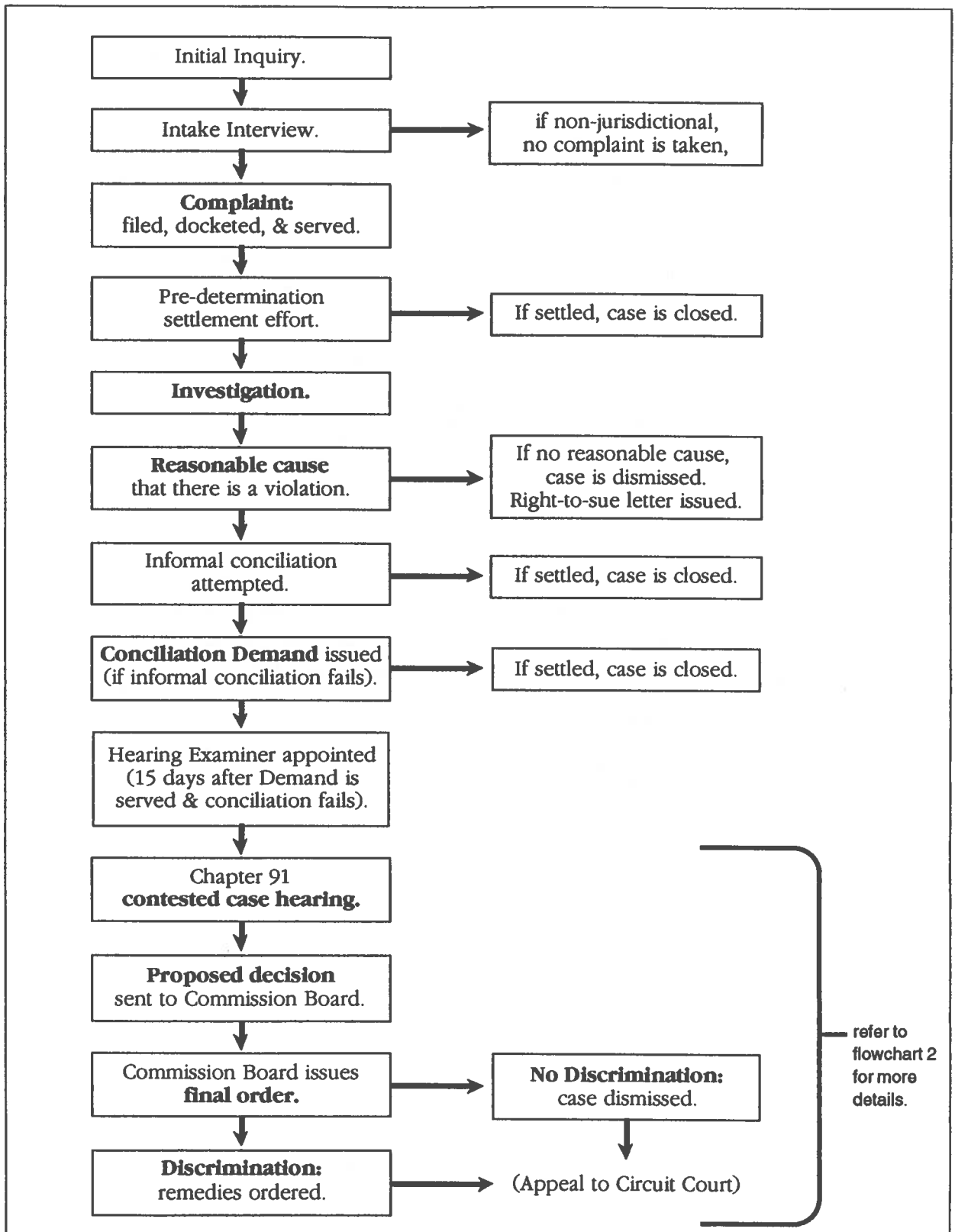
- there must be a “basis” for the alleged discriminatory action; the complainant has to have been treated in an unequal, unfair manner because of race, sex, or other protected basis.
- the complaint must be filed with the HCRC within 180 days of the alleged incident (or most recent incident if there is a recurring pattern of discrimination).

When a **complaint** is filed, a HCRC investigator will begin a neutral, fact-finding **investigation** collecting documents and contacting witnesses from both the complainant’s and respondent’s sides. The investigator also explores the possibility of settling the complaint. If a preponderance of the evidence shows that there is no “reasonable cause” to believe that discrimination has occurred, the case is closed and a right-to-sue letter is issued. A right-to-sue letter can also be issued to the complainant at any time if they wish to file their own civil suit. Should **reasonable cause** be determined, the HCRC enforcement staff will attempt to conciliate or settle the complaint.

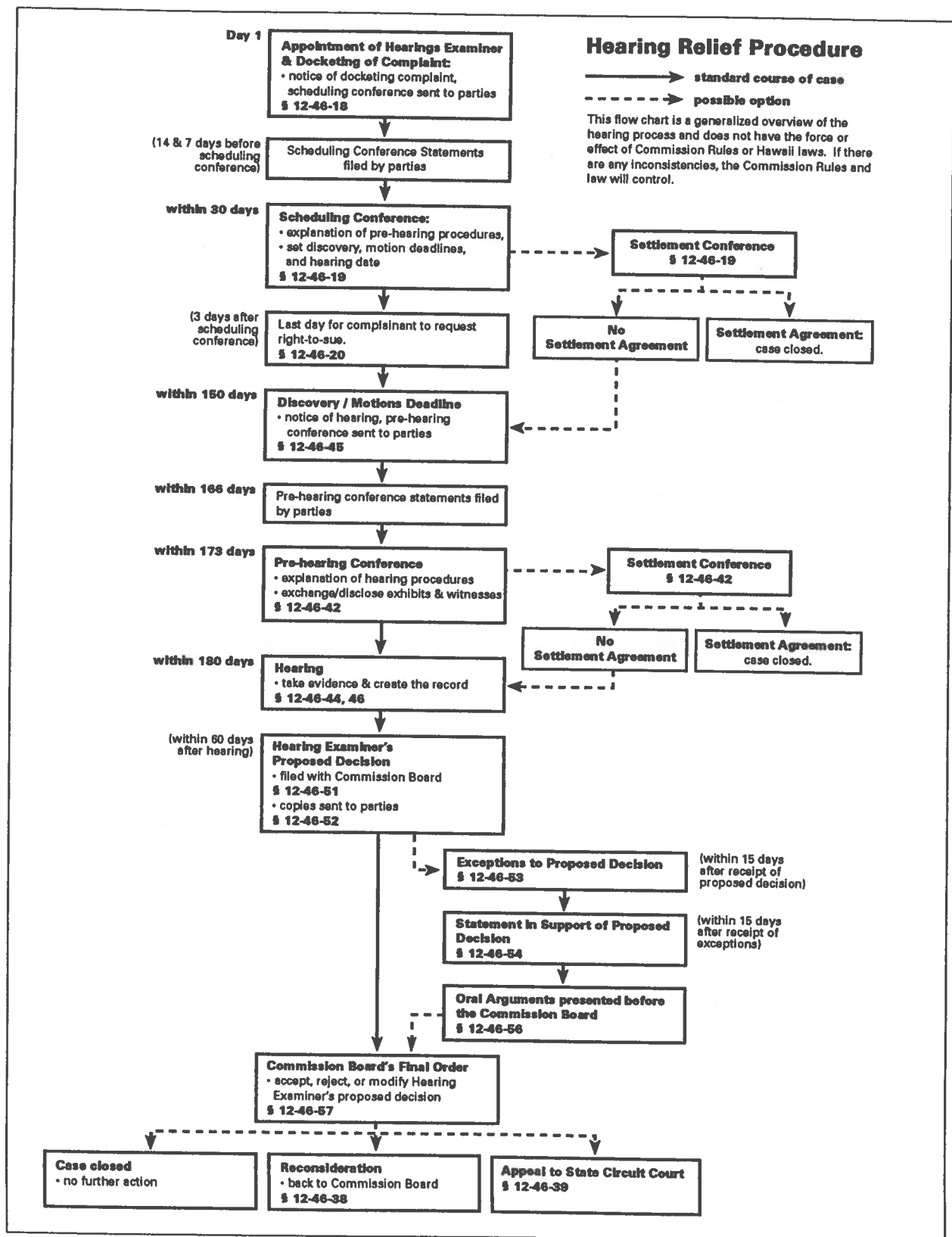
If conciliation is unsuccessful, a **hearing** is scheduled. An HCRC enforcement attorney will present the case in support of the complaint before an impartial HCRC hearings examiner. The respondent (represented by themselves or any counsel of their choice) also presents its case at this time. The complainant may also be represented by counsel or other representative. The hearings examiner will issue a **proposed decision** based on the evidence.

The proposed decision and the hearing record will be reviewed by the five-member Commission Board. The parties will also be able to file written exceptions and present oral arguments to the Board. The Board will accept, reject, or modify the proposed decision, issue the **final order**, and award remedies if appropriate. This decision is legally binding. If either party feels that the decision is unfair, they have 30 days to file an **appeal** in the Circuit Court. This will be the first time that the case will be in the judicial arena. This procedure is illustrated in flowchart 1.

The hearing relief procedures are presented in greater detail in flowchart 2. The timeframes for these administrative procedures are highlighted, as are the Hawaii Administrative Rules that govern the procedures.



Flowchart 1: HCRC administrative procedures.



Flowchart 2: Hearing relief procedures.

DISCRIMINATION LITIGATION & RULINGS

ADMINISTRATIVE HEARINGS:

In accordance with Hawaii Administrative Rules 12-46, three cases, where the Executive Director found reasonable cause that a violation occurred, were docketed with the hearings examiner. One case was settled prior to scheduling of the hearing; another was scheduled for administrative hearing, but settlement terms were negotiated prior to the actual hearing. The third discrimination case was scheduled for an administrative hearing in October 1992.

DECLARATORY RULINGS:

The Commission Board has decided petitions for declaratory relief. Two petitions dealt with interpretations of procedural rules on administrative hearings.

In another petition, the Commission Board decided that an employer's policy on sex-differentiated grooming standards for hair length does not *per se* constitute unlawful sex discrimination. In other words, an employer may have a policy which provides that men cannot wear long hair while women can. However, the Board further ruled that an investigation may be conducted to determine if such standards are being enforced in a discriminatory manner based on sex or any other protected basis (Essentially, the HCRC has officially adopted the guidelines utilized by the EEOC on this subject).

CIRCUIT COURT:

During the fiscal year, the Enforcement Section of the HCRC filed three complaints in Circuit Court where there was reasonable cause that a violation occurred and conciliation efforts were unsuccessful. Because the alleged acts of harm in these cases occurred prior to the new law and procedures taking effect, they were not subject to the HCRC administrative hearing process.

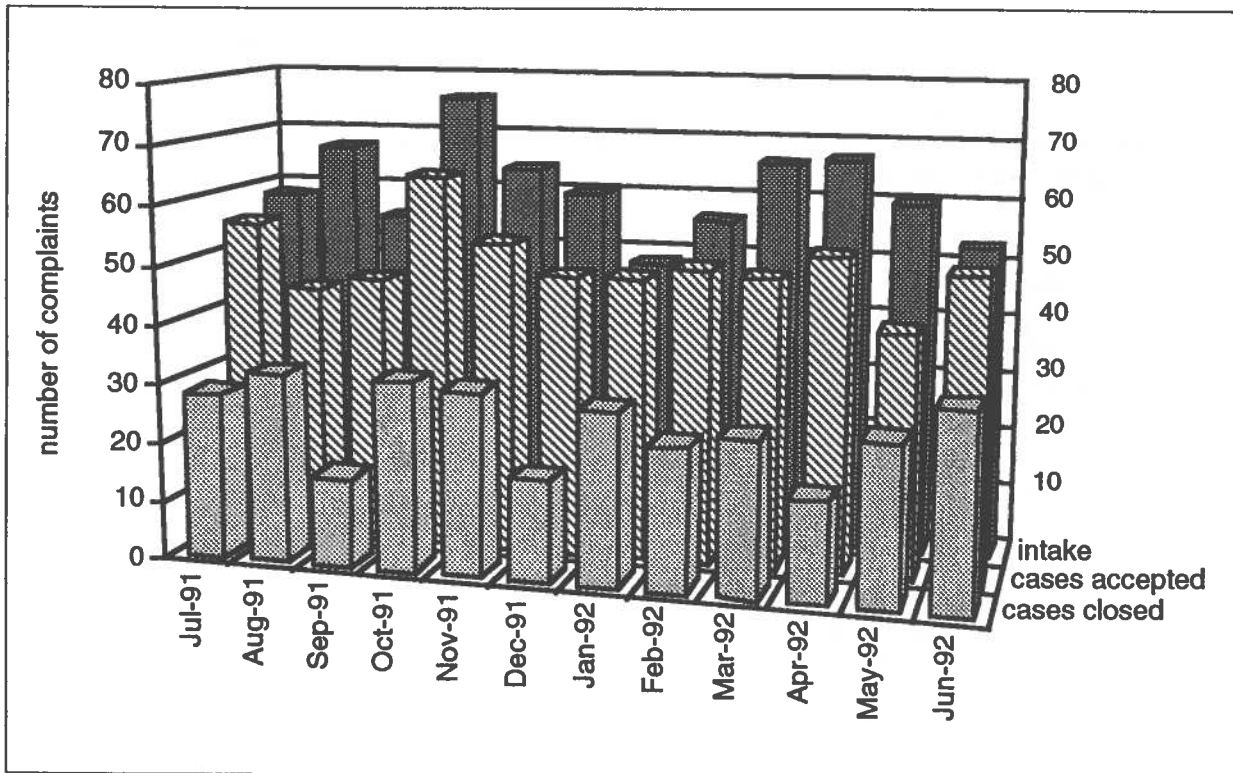
FEDERAL COURT:

Certain religious organizations and individuals filed a lawsuit in federal court against the Governor, Attorney General, and the HCRC to challenge the law which prohibited employment discrimination based upon sexual orientation. The court dismissed the case because it was not ripe for adjudication. Thus, the law remains in effect, and Hawaii employers cannot discriminate based upon sexual orientation (unless they are excepted by the religious organization exemption).

CASELOAD DEMOGRAPHICS

There were 4,995 telephone inquiries to the HCRC during this fiscal year. This led to 731 intake interviews between investigators and complainants, of which 393 of the complainants were women (53.8%). These intake interviews resulted in 528 charges of discrimination being actually accepted by the HCRC.

216 cases were closed during this period. 591 cases remained open at the end of the fiscal year. There were also 74 cases accepted by the Equal Employment Opportunity Commission (EEOC), which were dual-filed with the HCRC, bringing the total accepted caseload to 602. Case closures averaged 351.7 days per case, but this figure is somewhat skewed due to the fact that the caseload also included some of the 266 backlog cases that were transferred from the DLIR on January 1, 1991.



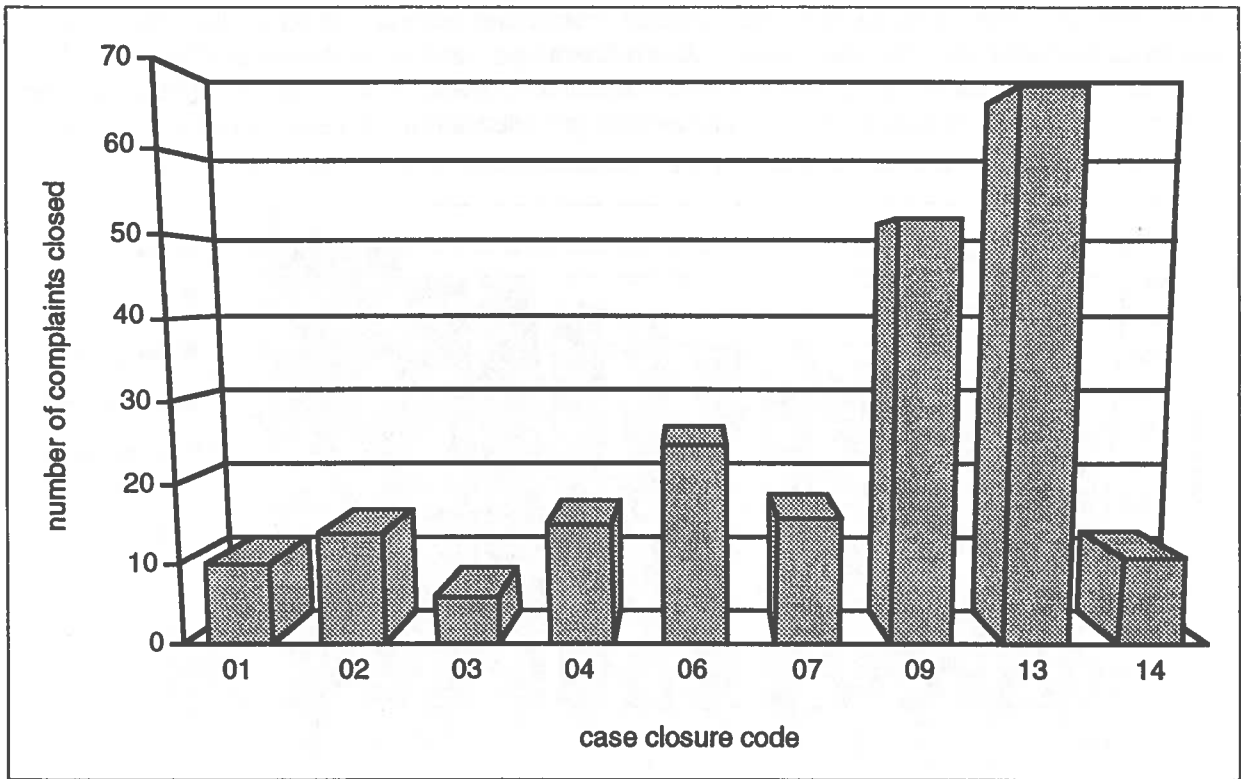
Graph 1: Intake interviews, accepted cases, and closed cases.

The legend abbreviations are: "intake" for initial intake interviews with HCRC investigators (in person or by telephone); "cases accepted" are cases under the jurisdiction of the HCRC and accepted as official charges of discrimination; and "cases closed" represents active cases that were closed by HCRC investigators.

A review of case closures for this fiscal year shows the following determinations for the closures:

<u>code</u>	<u>type of closure</u>	<u>number</u>	<u>percentage</u>
01)	.....no jurisdiction	10	4.6%
02)	..... complaint withdrawn	14	6.5%
03)	..... complainant not available	6	2.8%
04)	..... complainant failed to cooperate	15	6.9%
06)	..... complaint withdrawn—court action by complainant.....	25.....	11.6%
07)	..... complaint withdrawn—resolution by parties	16	7.4%
09)	..... negotiated settlement or field resolution	52.....	24.1%
13)	..... insufficient evidence to prove violation of statute.....	67.....	31.0%
14)	..... “cause” determination	11	5.1%

The reasons for case closures during the fiscal year are illustrated below:



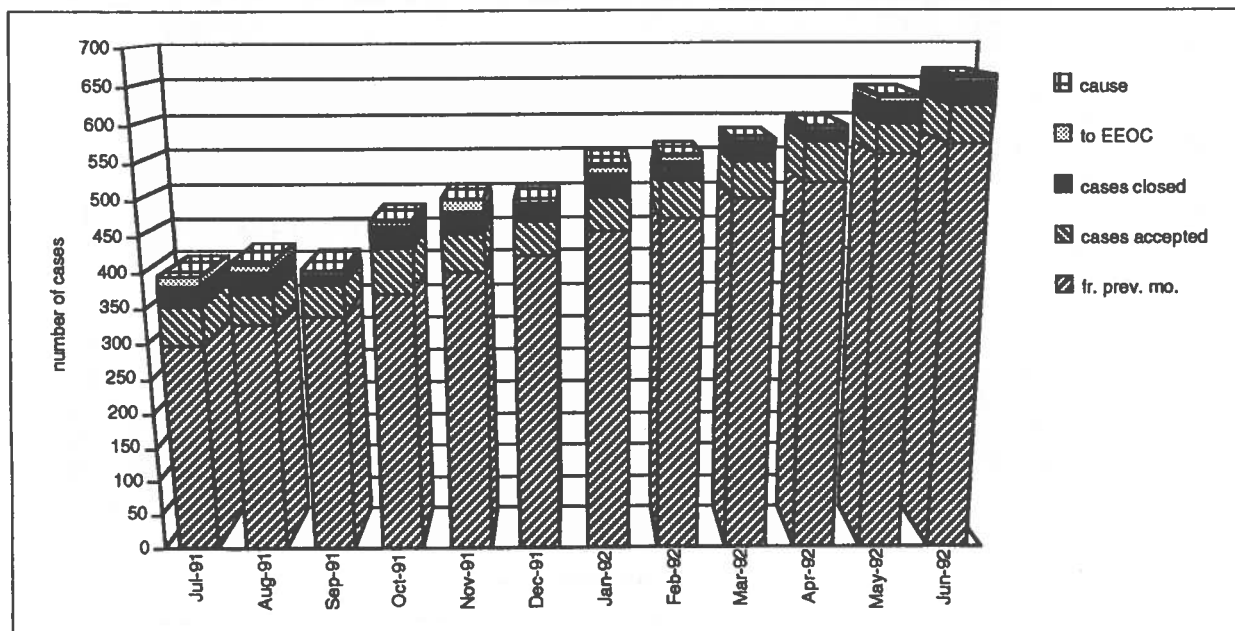
Graph 2: Closure of all cases of discrimination.

The total caseload for the HCRC consists of complaints of discrimination in four areas of jurisdiction: employment practices, real property transactions, public accommodations, and access to state & state-funded services.

During the fiscal year, an average of 42.2 cases were accepted per month by the HCRC. The average monthly closure rate by HCRC investigators was 17.8. Cause determinations averaged about one case per month. As of June 30, 1992, the active caseload for HCRC investigators was 591 cases.

In addition, 96 cases were dual-filed with the HCRC, but pursuant to the terms of the workshare agreement with the EEOC, these cases will be investigated by the federal agency. The HCRC is committed to conducting neutral, thorough investigations. However, the caseloads of the investigators have increased over the last year from 50 to 80 complaints per investigator. This has resulted in longer investigations and dissatisfaction on the part of complainants who must wait up to two years to see their complaint resolved. The Legislative Auditor in "A Study on Implementation of the Civil Rights Commission for the State of Hawaii" (Report #89-8, January 1989), stated that investigators can handle only 25-35 cases at any given time. The current caseloads of the investigators far exceed this mark, and cannot be sustained indefinitely.

Compounding this problem has been the passage of state and federal civil rights laws (the Americans with Disabilities Act, the Fair Housing Amendments Act, and amendments to Chapter 378 covering discrimination on the basis of sexual orientation). These laws have increased the number of complainants who file with the HCRC, but have not provided additional resources for enforcement.



Graph 3: Total caseload for all four areas of jurisdiction.

The label abbreviations are: "fr. prev. mo." indicate active cases carried over from the previous month; "cases accepted" are cases accepted in that month; "cases closed" are cases closed by HCRC investigators in that month; "to EEOC" are dual-filed cases where the EEOC will conduct the investigation; "cause" are cases where HCRC Executive Director has determined that there is "reasonable cause" to hold that of discrimination has occurred.

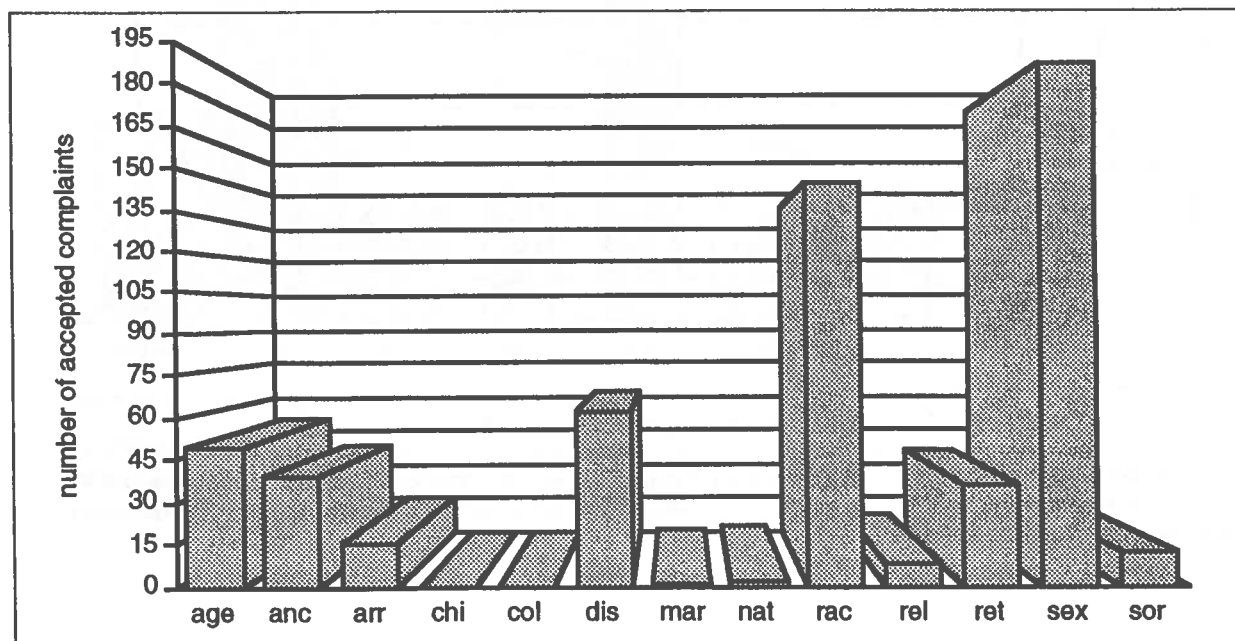
EMPLOYMENT DISCRIMINATION

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, or National Guard participation. Examples of such unlawful practices are listed in H.R.S. section 378-2.

The HCRC has a work share agreement with the federal Equal Employment Opportunities Commission (EEOC). Where there is concurrent jurisdiction, the case is "dual-filed" with both the receiving agency and the other agency. During the fiscal year, 555 employment cases were accepted. Of these, 425 (76.6%) were dual-filed with the EEOC.

The predominant bases of discrimination, as alleged by individual complainants, are shown below for the total employment caseload. It is important to note that the majority of complaints filed with the HCRC listed two or more bases of discrimination, i.e., race, sex, and age.

Sex was the largest category with 186 cases accounting for 33.5% of all employment discrimination cases. Within the sex category, 49 cases were based on pregnancy (26.3% of all sex discrimination cases) and 47 cases (25.3%) were based on sexual harassment. Race was the second largest basis with 144 cases accounting for 25.9%. Together, sex, race, ancestry, and color accounted for nearly two-thirds (66.5%) of all cases of discrimination in employment practices. Disability was the basis for 62 cases (11.2%), and there were 50 age discrimination cases (9.0%). There were 36 cases of retaliation (6.5%); 15 cases based on arrest & court record (2.7%); 12 cases based on sexual orientation (2.2%), and the remaining protected classes had 10 or fewer cases.



Graph 4: Primary basis of discrimination in employment practices.

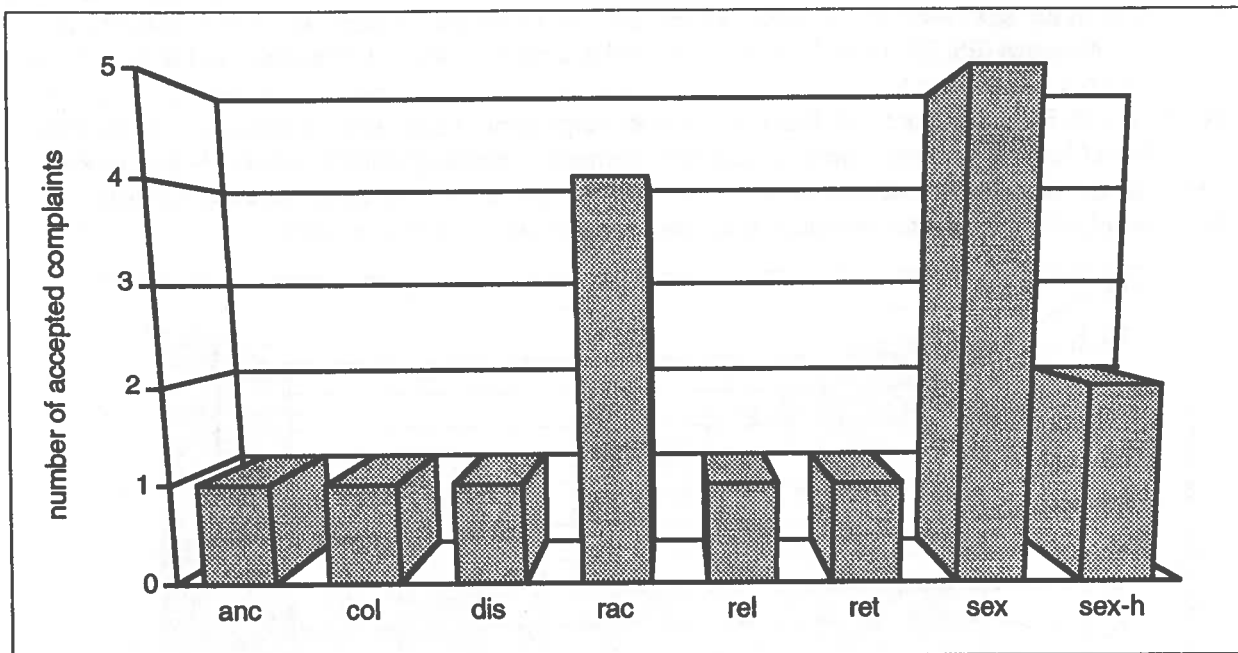
The label abbreviations are: "age" for age; "anc" for ancestry & national origin; "arr" for arrest & court record; "chi" for assignment of income for child support obligations; "col" for color; "dis" for disabilities; "mar" for marital status; "nat" for National Guard participation; "rac" for race; "rel" for religion; "ret" for retaliation; "sex" for sex (including sexual harassment and pregnancy); and "sor" for sexual orientation.

DISCRIMINATION IN PUBLIC ACCOMMODATIONS

H.R.S. Chapter 489 prohibits unfair discriminatory practices which deny, or attempt to deny, a person the full and equal enjoyment of the goods, services, facilities, privileges, advantages and accommodations of a place of public accommodation on the basis of race, sex, color, religion, ancestry, or disability.

Although it has been unlawful to discriminate in public accommodations since 1986, no state agency was previously charged with the enforcement of this law, although individuals could proceed directly to state court. This changed after the HCRC received enforcement jurisdiction over public accommodations.

During the fiscal year, sixteen cases of public accommodations discrimination were accepted. The bases for discrimination are shown below. There were seven cases of sex discrimination (two of which were sexual harassment) which accounted for 43.8% of the public accommodation cases; four cases were based on race discrimination for 25.0% of the cases. One case was based on ancestry, color, disability, religion, and retaliation respectively.



Graph 5: Primary basis of discrimination in public accommodations.

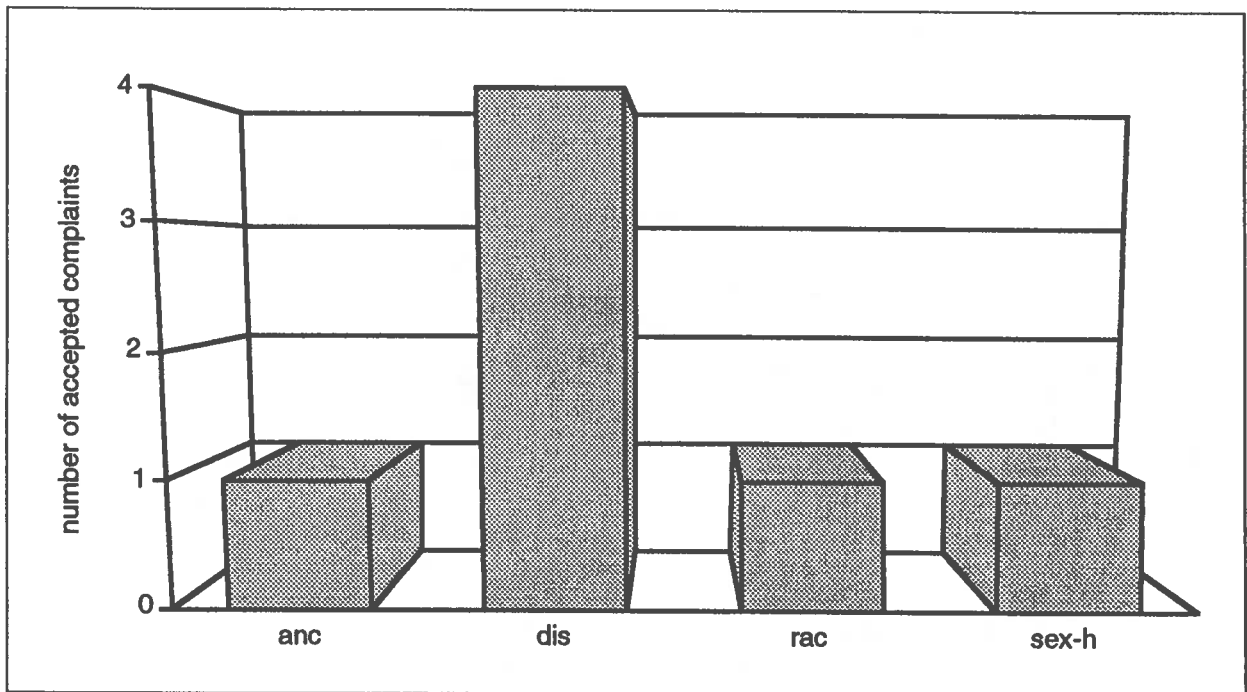
The label abbreviations are: "anc" for ancestry & national origin; "col" for color; "dis" for disabilities; "rac" for race; "rel" for religion; "ret" for retaliation; "sex" for sex; and "sex-h" for sexual harassment (a form of sex discrimination, but displayed separately for illustrative purposes).

ACCESS TO STATE & STATE-FUNDED SERVICES AND COMBINATION COMPLAINTS

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 based on their disability (the only protected class in this area of jurisdiction). During the fiscal year, there were no cases filed solely under § 368-1.5.

However, seven cases of “combination” basis discrimination were accepted. These cases were based on alleged violation of some combination of access to state & state-funded services with either real property or public accommodations discrimination. Five cases were based on access to state & state-funded services & public accommodations, and two cases were based on public accommodations and real property discrimination.

Four of the seven cases were based on disability which accounted for 57.1% of all accepted combination cases.



Graph 6: Primary basis of discrimination with a combination basis.

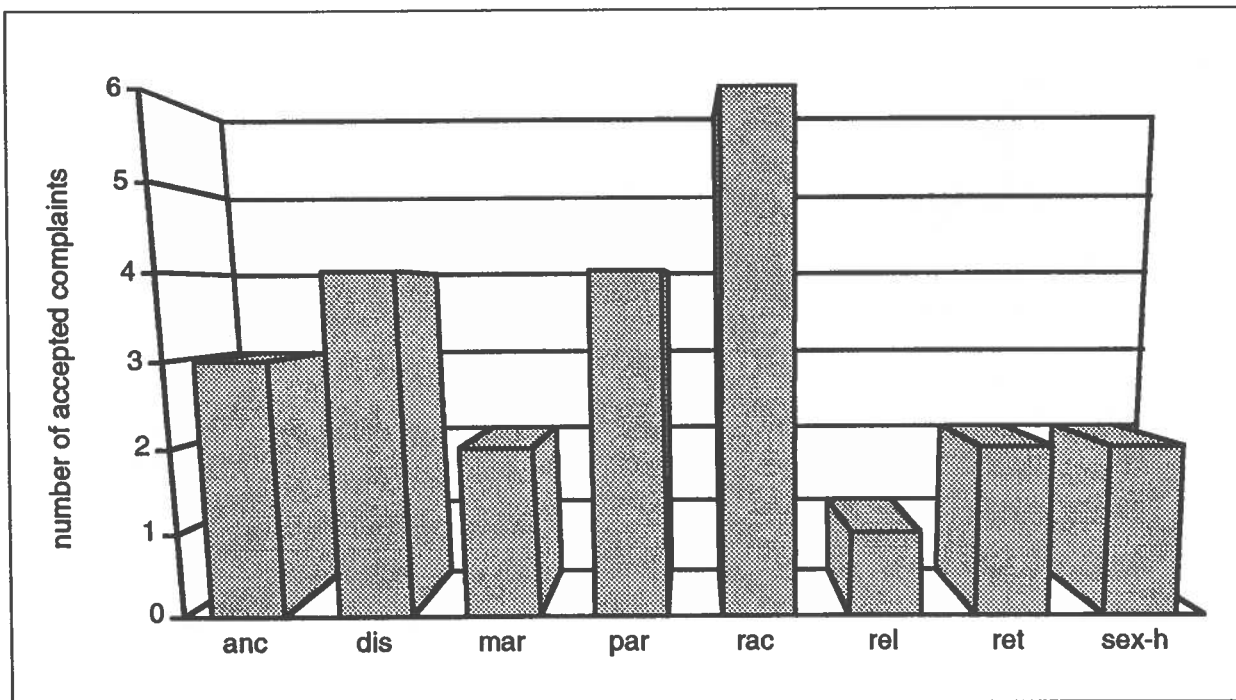
The label abbreviations are: “anc” for ancestry & national origin; “dis” for disabilities; “rac” for race; and “sex-h” for sexual harassment (a form of sex discrimination, but displayed separately for illustrative purposes).

DISCRIMINATION IN REAL PROPERTY TRANSACTIONS

H.R.S. Chapter 515 prohibits discriminatory real estate practices based on race, sex, color, religion, marital status, parental (now termed "familial") status, ancestry, disability, age, or HIV infection. Examples of such unlawful practices are listed in H.R.S. section 515-3 and include discriminatory actions such as refusing to rent, sell, or enter into financial transactions with an individual because of a protected basis (as listed above).

The state Department of Commerce & Consumer Affairs' Office of Consumer Protection (OCP) handled housing discrimination cases prior to the HCRC receiving jurisdiction of such complaints.

During the fiscal year, the HCRC accepted 24 cases of housing discrimination. The primary bases for housing complaints are shown below. Race was the basis for 25.0% of these cases, followed by disability and parental/familial status (both at 16.7%), ancestry (12.5%), and marital status, retaliation, sexual harassment (8.3% each), and religion (4.6%).



Graph 7: Primary basis of discrimination in housing transactions.

The label abbreviations are: "anc" for ancestry & national origin; "dis" for disabilities; "mar" for marital status; "par" for parental/familial status; "rac" for race; "rel" for religion; "ret" for retaliation; and "sex-h" for sexual harassment (a form of sex discrimination, but displayed separately for illustrative purposes).

EDUCATION & OUTREACH

It is important to conduct public education and outreach activities to inform the public of their rights and responsibilities under state law. It is hoped that public education will also serve as a preventative measure with the HCRC eventually seeing a gradual decline in the number of complaints filed.

During the fiscal year, commissioners and staff participated in the following public education and outreach activities:

- Developed a Guide for Complainants to inform individuals who file complaints as to the process and their responsibilities.
- Was a resource speaker for the Office of Community Services' training workshop for immigrant service providers.
- Spoke before the Hawaii Association of Public Accountants, Hawaii Chapter, in Hilo.
- Gave a presentation to the Windward Oahu Branch of the American Association of University Women.
- Was a guest speaker for the Senior Community Service Employment Program's workshop.
- Participated in a panel discussion about the Americans with Disabilities Act for the Mid-Pacific Rehabilitation Center's conference.
- Spoke at the Cambridge Institute's employment seminar.
- Was a guest speaker at the Hawaii Publishers' Association meeting.
- Conducted a presentation for the FBI Honolulu field office.
- Was a speaker at the Conference of Civil Service Commissioners and Personnel Directors.
- Spoke at a seminar sponsored by the Board of Hawaii Museums Association.
- Was a resource speaker for the Hawaii Hotel Association's hospitality law class.
- Briefed the staff of the Office of the Auditor about the HCRC and its functions.
- Spoke at the American Business Women's Association meeting.
- Provided in-service training to commissioners and staff of the Commission on Persons with Disabilities.
- Spoke before a class of business students at Kapiolani Community College.

CIVIL RIGHTS CONFERENCE

The HCRC coordinated a two-day civil rights conference, entitled "Civil Rights for the People of Hawaii," as its major educational outreach for the fiscal year. In December 1991, the HCRC co-sponsored this forum with the Afro-American Lawyer's Association, No Loio No Na Kanaka (Lawyers for the People of Hawaii), and the state Commission on Persons with Disabilities. The conference was intended to inform, inspire, and create a sense of unity among advocates of civil rights in Hawai'i. 266 people attended this event.

Educators, attorneys, government agency and interest group spokespersons were among the workshop panel members. They represented the: the American Civil Liberties Union, Catholic Immigration Center, Commission on the Status of Women, Equal Employment Opportunities Commission, Governor's Committee on AIDS, Center for Hawaiian Studies, University of Hawai'i-Manoa, Hawaii Employers Council, Department of Housing and Urban Development, Ka Lahui Hawai'i, Life Foundation, Office of the American Disabilities Act, Department of Justice, Protection and Advocacy of Hawaii, and the United Public Workers.

Keynote speakers were:

- the Honorable Jack E. Tanner, senior judge of the U.S. District Court of the Western District of Washington, who addressed the "National Overview and Evolution of Civil Rights."
- Mari Matsuda, professor of law (UCLA School of Law), spoke about "How Civil Rights Affects Hawai'i."
- John Wodatch, director of the civil rights division of the Office of Americans with Disabilities Act, spoke about the implications of the new ADA law.
- Kathryn Takara, UH Ethnic Studies, addressed "Racism in Hawai'i."
- Mililani Trask, of Ka Lahui Hawai'i, spoke about "Civil Rights and Native Hawaiian Rights."
- Sharon McPhail, president of the National Bar Association, was a panel discussion participant about Affirmative Action.
- Charles Lawrence, professor of law (USC Law Center), moderated the "Affirmative Action and the Myth of Preferential Treatment" panel discussion.

Topics included both procedural and "burning issue" subjects: sex discrimination, drug testing, multi-culturalism (including accent in language, unconscious racism), employment disabilities law, housing law, racist speech, HIV & public accommodations, Affirmative Action, Native Hawaiian rights, and ethnocentrism (including English-only rules).

LEGISLATIVE HIGHLIGHTS

The Commissioners and staff of the HCRC testified before the State Senate and House of Representatives, in support of the following civil rights legislation which was enacted into law:

- Legislation which conformed the state's Real Estate Transactions Law, H.R.S. § 515, with the federal Title VIII of the Civil Rights Act, as amended.

This added a new protected class of age, and renamed the old "parental" status as "familial" status. Protection for couples expecting a child, "hanai" families, and persons in the process of adopting a child are included under the new familial status definition.

- Legislation which gave victims of sexual harassment at work two years to file civil actions in court, if they miss the statute of limitations for filing a charge with the HCRC or EEOC.
- Legislation which replaced the term "handicapped status" with "disability" under various laws.
- Legislation which granted civil service status to 12 exempt employees of the HCRC.
- A concurrent resolution directing the Legislative Auditor to conduct a study to determine if the Commission's jurisdiction over state and state-funded services should be expanded to protect against discrimination based upon race, sex, religion, and national origin.

Because of the possible correlation between discrimination and hate crimes, the HCRC also supported legislation which would create a model for the gathering of data and statistics about the nature and occurrences of hate crimes in Hawaii. The data collection and model design will proceed under the aegis of the Attorney General.

STAFF OF THE HCRC

The permanent staff of the HCRC is comprised as follows:

- Executive Director

Enforcement Staff:

- Deputy Executive Director
- Enforcement Attorneys (3)
- Information Officer
- FEP Specialist VI
- HCRC Investigator Supervisors (2)
- Investigators (8)
- Secretary III
- Legal Stenographer I
- Clerk Typists (4)

Adjudication Staff:

- Chief Counsel
- Hearings Examiner
- Secretary II

COMMISSION BOARD MEMBERS

AMY AGBAYANI: chairperson (term 1989-93).

Dr. Agbayani was educated at the University of the Philippines and the University of Hawai'i-Manoa. She holds a Ph.D. in political science and is currently Director for Student Equity, Excellence & Diversity at the University of Hawai'i-Manoa. Dr. Agbayani was previously the Director of Operation Manong at the UH, and Chair of the Inter-Agency Council for Immigrant Services.

DAPHNE BARBEE-WOOTEN: commissioner (term 1991-95).

Ms. Barbee-Wooten was educated at the University of Wisconsin and the University of Washington, where she received a law degree. She currently is an attorney in private practice. In the past, she worked in the Office of the Public Defender and as independent grand jury counsel for the First Circuit Court. Ms. Barbee-Wooten is a member of the Afro-American Lawyers' Association, the Afro-American Association of Hawaii, and a Board Member of the Hawaii Association of Criminal Defense Lawyers.

JOSEPHINE EPSTEIN: commissioner (term 1989-93).

Ms. Epstein was educated at the University of Hawai'i and is a retired LPN who worked at Leahi Hospital. In the past, she has served as a member of the Commission on the Status of Women, and the Commission on Persons with Disabilities. She currently is a member of the Coalition of Hawaii State & County Retirees, and the Hawaii AFSCME Retirees Chapter 646.

JACKIE MAHI ERICKSON: commissioner (term 1992-96).

Ms. Erickson was educated at the University of Denver and the University of Hawai'i where she received her law degree. She is the Vice-President General Counsel, and has been the head of the legal department for Hawaiian Electric Company since 1981. Previous to 1981, she was a deputy attorney general with the Office of the Attorney General, and also worked as a law clerk for the Hawaii Supreme Court.

RICHARD J. PORT: commissioner (term 1992-96).

Mr. Port was educated at Boston College, Columbia University where he received a Master of Arts degree, and at the University of Hawaii where he received a professional certificate. Recently retired from a position as an education specialist with the Department of Education, he previously worked for the U.S. Agency for International Development in Nigeria and as a member of the Peace Corps in Ghana. He is an ordained deacon assigned to Saints Peter and Paul Roman Catholic Church in Honolulu.

**HAWAII
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888 Mililani Street, 2nd floor
Honolulu, HI 96813

telephone (Oahu): 586-8636
TDD (Oahu): 586-8692
Neighbor Islands (toll-free): 1-800-468-4644 ext. 6-8636