Maine Human Rights Commission

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The Honorable Anne Carney, Senate Chair
The Honorable Matthew Moonen, House Chair
Joint Standing Committee on Judiciary
100 State House Station
Augusta, ME 04333

Re: LD 2195 – An Act to Protect Businesses from Fraudulent or Predatory Financial Settlements by Allowing Those Businesses Opportunities to Remove Architectural Barriers in Violation of the Maine Human Rights Act

Dear Senator Carney, Representative Moonen, and Members of the Joint Standing Committee on Judiciary:

The Maine Human Rights Commission ("Commission") is Maine's quasi-independent, neutral, apolitical State agency[1] charged with enforcing our state anti-discrimination law, the Maine Human Rights Act, 5 M.R.S. §§ 4551, *et seq.* ("MHRA" or the "Act"). The Act charges the Commission with: investigating, conciliating, and at times litigating discrimination cases under the MHRA; promulgating rules and regulations to effectuate the MHRA; and making recommendations for further legislation or executive action concerning infringements on human rights in Maine. 5 M.R.S. § 4566(7), (11). Given these duties, the Commission provides this testimony against LD 2195, An Act to Protect Businesses from Fraudulent or Predatory Financial Settlements by Allowing Those Businesses Opportunities to Remove Architectural Barriers in Violation of the Maine Human Rights Act.

The MHRA's Requirements of Equal Access to Places of Public Accommodation, Including Removal of Architectural Barriers When Readily Achievable

The policy of the Commission and the MHRA itself is to "keep continually in review all practices infringing on the basic human right to a life with dignity, and the causes of these practices, so that corrective measures may, where possible, be promptly recommended and implemented, and to prevent discrimination in employment, housing or access to public accommodations on account of race, color, sex, sexual orientation, physical or mental disability, religion, ancestry or national origin". To that end, the Commission is charged with, among other things, investigating complaints of invidious discrimination in Maine by places of public accommodation.

[1] The Commission itself is made up of five Commissioners, appointed by the Governor and confirmed by this Committee for staggered five-year terms. By statute, there can be no more than three Commissioners from any political party. 5 M.R.S. § 4561.

Public accommodations are generally private or public entities which provide goods or services to the public. The MHRA makes it unlawful for these entities to, on the basis of protected class status, "directly or indirectly refuse, discriminate, or in any manner withhold from or deny the full and equal enjoyment . . . of the accommodations, advantages, facilities, goods, services or privileges of public accommodation, or in any manner discriminate against any person in the price, terms or conditions upon which access to accommodations, advantages, facilities, goods, services and privileges may depend." 5 M.R.S. § 4592(1). With regard to individuals with disabilities, this includes making physical spaces accessible by complying with statutory building standards for new construction and certain renovations (with differing standards applicable depending on the date of construction/renovation), providing necessary auxiliary aids and services (such as translation services), and making reasonable accommodations.

The MHRA also requires that public accommodations "remove architectural and communication barriers that are structural in nature in existing facilities . . . where the removal is readily achievable." 5 M.R.S. § 4592(1)(D). This requirement was added to the MHRA in 1995. *See* P.L. 1995, c.393, §§ 22-24. To be clear, this means that existing facilities have been legally obligated to remove existing barriers to access for more than 25 years.

The MHRA does not define the term "readily achievable" other than to say that it is a lower standard than "undue burden". *See* 5 M.R.S. § 4553(9-B). The federal Americans with Disabilities Act ("ADA"), which contains identical language regarding removal of barriers as that found in the MHRA, *compare* 5 M.R.S. § 4572(1)(D) *with* 42 U.S.C. § 12182(b)(2)(A)(iv)&(v), does provide a definition for the term "readily achievable", which is useful guidance in interpreting the MHRA. Pursuant to the ADA, "readily achievable" means "easily accomplishable and able to be carried out without much difficulty or expense." 42 U.S.C. § 12181(9); *see also* 28 CFR § 36.304. Examples of readily achievable barrier removal include installing grab bars, repositioning shelves, insulating sink pipes when exposed, and repositioning paper towel dispensers. *Id.* at § 36.304(b). When barrier removal is not readily achievable, covered entities must provide an alternate means for individuals with disabilities to access the goods and services of the place of public accommodation. 5 M.R.S. § 4592(1)(D); 42 U.S.C. § 12182(b)(2)(A)(v).

LD 2195 Improperly Shifts the Burden of MHRA Compliance to Individuals with Disabilities and Will Not Relieve Public Accommodations of Their Duty to Perform Readily Achievable Barrier Removal

The Commission does not dispute that there may be individuals who bring disability claims as money-making endeavors, rather than to redress discrimination due to a denial of the goods and services of a place of public accommodation that is inaccessible. This Bill, however, will not do anything to deter those individuals from continuing to file claims against businesses which they may never have intended to visit. Instead, it places an unnecessary additional burden on Mainers with disabilities to wait at least 180 additional days to access a place of public accommodation with physical barriers to their entry. Given that these businesses have known – or should have known – of their legal obligations since 1995 (or whenever they began doing business, whichever is later), this delay is unfair and unreasonable.

The MHRA correctly places the burden of nondiscrimination on the entities which have chosen to do business with the public; such businesses must ensure that all members of the public have the same opportunity to access those public goods and services. This Bill would upend that to require individuals with disabilities who encounter barriers to their access to simply accept the denial for at least six months while they contact the noncompliant business and describe both the barrier and the actual denial of access "in detail". This is

contrary to both the language and the spirit of the MHRA. It places the burden of knowing the law on the individual, rather than the entity engaging in commerce; it requires these individuals to provide and receive written notices when their disabilities may make written communication virtually impossible (a person who is paralyzed may not be able to write a letter; a blind person may not be able to read one); and it presumes that even when the barrier removal is obvious and readily achievable it is more acceptable to make individuals with disabilities forgo access for at least six months than to require the business to promptly comply with the law.

This burden-shifting, purportedly necessary to provide the businesses with notice of their noncompliance, is particularly inappropriate in light of the fact that businesses have been required to remove these barriers by both state and federal law for more than two decades. For them to claim a lack of notice now is disingenuous at best. In addition, while this Bill would provide additional notice under Maine law, it nonetheless would do nothing to relieve these places of public accommodation from facing immediate claims before the notice period passes. As noted above, the MHRA's language is identical to federal law here. Accordingly, regardless of any waiting period Maine imposes, suits can and will still be brought immediately: they will be federal claims, and will be brought in court without the benefit of first being heard and assessed by the Commission.

To require individuals with disabilities to suffer first the indignity of being unable to access a place purportedly open to the public, then point out the law and the violation to the business, and then wait while the business decides whether to remedy the problem, is a regression from the longstanding principles of access and equality which guide the Maine Human Rights Commission in its enforcement of Maine's nondiscrimination laws. For this reason, the Commission opposes LD 2195.

Conclusion

Thank you for the opportunity to provide testimony against LD 2195. The Commission would be pleased to discuss these issues with you at your convenience, including at the work session on this matter.