



Maine Human Rights Commission

51 State House Station, Augusta, ME 04333-0051

Physical location: 19 Union Street, Augusta, ME 04330

Phone (207) 624-6290 ▪ Fax (207) 624-8729 ▪ TTY: Maine Relay 711

www.maine.gov/mhrc

Kit Thomson Crossman
EXECUTIVE DIRECTOR

Barbara Archer Hirsch
COMMISSION COUNSEL

The Honorable Joseph Baldacci, Senate Chair
The Honorable Suzanne Salisbury, House Chair
Joint Standing Committee on State and Local Government
100 State House Station
Augusta, ME 04333

Re: LD 1372 – An Act to Establish a Special Committee to Review Routine Technical Rules

Dear Senator Baldacci, Representative Salisbury, and Members of the Joint Standing Committee on State and Local Government:

The Maine Human Rights Commission (“Commission”) is Maine’s quasi-independent, nonpartisan State agency charged with enforcing our state anti-discrimination law, the Maine Human Rights Act, 5 M.R.S. §§ 4551, *et seq.* (“MHRA”). The Commission is statutorily charged with the duties of: investigating, conciliating, and at times litigating protected-class discrimination cases under the MHRA; promulgating rules and regulations to effectuate the Act; and making recommendations for further legislation or executive action concerning infringements on human rights in Maine. 5 M.R.S. § 4566(7), (11). With those duties in mind, the Commission provides this testimony against LD 1372.

Background: The Commission’s Rulemaking Authority and Process

The Commission has the statutory authority to “adopt, amend and rescind rules and regulations to effectuate this Act, such adoption, amendment and rescission to be made in the manner provided by” the Administrative Procedures Act (“APA”). 5 M.R.S. § 4566(7). Only amendments to rules implementing § 4553-A of the MHRA (which defines “disability” for purposes of the Act) are major substantive rules subject to Legislative approval, *id.*; the remainder of the Commission’s rules are routine technical rules, subject only to review by the Attorney General’s office (“AG”) for legal sufficiency and form.

The Commission’s rules are drafted by its Commission Counsel, with assistance from the Deputy Commission Counsel and the Executive Director. Prior to being sent for public comment, the draft rules are reviewed by the five Commissioners and revised by Commission Counsel as necessary to meet their approval; these proposed rules are then sent to the AG for preliminary review and approval. Commission Counsel then follows the APA to publish notice and receive public comment on the proposed rules, summarizes and responds to any comments received, and advises the Commission regarding potential changes suggested by the commenters. Counsel also must ensure that any rulemaking proposals do not conflict with rules effectuating federal antidiscrimination laws promulgated by the Equal Employment Opportunity Commission (“EEOC”) and the U.S. Department of Housing and Urban Development (“HUD”), which provide substantial funding to the Commission based on a determination that the MHRA and its regulations are “substantially similar” to those agencies’ laws.

The Commission has seven rules in total, two of which are procedural rules (one general, and one for education cases), one each for housing, employment, public accommodations, and education, and a rule addressing disability discrimination in public conveyances. The rules are routinely reviewed, and while only the procedural rule is updated regularly, other rules are amended when necessary due to a change in the statute or a new legal ruling.

LD 1372 Could Infuse the Rulemaking Process with Partisan Politics and Could Put the Commission's Federal Funding at Risk

The Special Committee proposed in LD 1372 is fundamentally flawed. First, it permits membership only to the two largest political parties, effectively depriving minority viewpoints of any voice. Second, by installing an even number of members and requiring membership to be evenly divided between the two prevailing political parties, the bill invites gridlock on any controversial matter, given the growing tendency of votes to be divided along party lines. There is nothing in the bill addressing how a tie vote on whether to approve any agency rule will be resolved. Without such a mechanism, agency rules could be held in limbo, preventing agencies from adopting any rules at all. While the Commission understands that the first task of the Special Committee is developing a procedure for its review of agency rules, even that could end up an impossible task for a committee equally divided between opposing viewpoints. This Bill also appears to overreach the reasonable scope of the Legislature's duties. The Legislature is charged with adopting and enacting Maine's statutes, while interpreting and enforcing those statutes falls to other branches of government.

For the Commission, the inability to adopt its own routine technical rules, without interference, would substantially undermine its effectiveness. The Commission evaluates discrimination claims against the State, including all branches of government. Many members of the Legislature also own business, or rental property, or have children attending Maine schools, all of which are subject to the Commission's jurisdiction. It is of vital importance for the Commission to be truly apolitical and independent, so that discrimination claims by Mainers, and claims against Maine businesses, are adjudicated without outside influence. This cannot happen if the Commission cannot act with independence when processing and deciding claims.

Finally, we note that a substantial part of the Commission's annual budget comes from federal agencies which do similar work. The Commission has work-sharing agreements with the Equal Employment Opportunity Commission and the Department of Housing and Urban Development, which are dependent upon both agencies certifying that the laws they enforce are "substantially equivalent". If the Special Committee refused to allow the Commission to promulgate rules or required changes that were in plain conflict with their federal counterparts, the Commission's funding would be at risk.

Thank you for this opportunity to provide testimony against LD 1372. The Commission would be pleased to discuss these issues with you at your convenience, including at the work session on this matter.

Sincerely,

/s/ Barbara Archer Hirsch, Commission Counsel

cc: Commissioners