



# HAWAII STATE ETHICS COMMISSION

State of Hawaii • Bishop Square, 1001 Bishop Street, ASB Tower 970 • Honolulu, Hawaii 96813

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March 4, 2015

The Honorable Sylvia Luke, Chair  
The Honorable Scott Y. Nishimoto, Vice Chair  
Honorable Members  
House Committee on Finance  
Hawaii State Capitol, Room 306  
415 South Beretania Street  
Honolulu, Hawaii 96813

Re: **HB No. 813, HD 2, Relating to the Code of Ethics**

Hearing: Wednesday, March 4, 2015, 1:30 p.m.  
State Capitol, Conference Room 308

Testifying: Susan D. Yoza, Associate Director  
Hawaii State Ethics Commission

The State Ethics Commission supports HB No. 813, HD 2, Relating to the Code of Ethics, which amends the exemption from the State Ethics Code's fair treatment law, HRS section 84-13, applicable to legislators.

In 2012, the legislature amended the State Ethics Code to exempt members of task forces from many of the sections contained therein. More specifically, because of the exemptions, task force members may misuse their positions on the task force to give themselves or their private employer an unwarranted advantage or preferential treatment; task force members can take action in their official capacities that affect their own private businesses; task force members can use confidential state information that they obtain through their service on the task force and which is not available to the public to benefit themselves or their private employer.

In addition to exempting task force members from the fair treatment law, HRS section 84-13, the legislature also greatly expanded the exemption applicable to legislators. The fair treatment law, generally, prohibits a legislator or a state employee from using or attempting to use his official position "to secure or grant unwarranted privileges, exemptions, advantages, contracts, or treatment, for oneself or others."

Prior to the amendment, legislators were exempt from the fair treatment law when exercising their "legislative function." The exemption was consistent with and intended to mirror the privilege afforded legislators in the State Constitution, which protects legislators from liability "for any statement made or action taken in the exercise of the member's

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legislative functions.”<sup>1</sup> Generally, the phrase “legislative function” has been construed to relate to the enactment of laws and includes activities such as voting on bills and speeches made on the floor of the body or during committee hearings. The phrase does not include all of the activities that a legislator may deem to be part of his duties, such as constituent services.

In 2012, the fair treatment law was amended to exempt legislators from its provisions when taking “official action.” The phrase “official action” is much broader than “legislative function” and includes activities that are well-beyond those relating to the making of laws.

Under the current exemption, a legislator, for example, may be able to “coerce” a private business to take certain action on behalf of a constituent, claiming that such “coercion” was taken in his capacity as a legislator and therefore was “official action.” Similarly, a legislator may be able to demand “preferential treatment” for himself (e.g., first class seating or free meals) when meeting with constituents or engaged in some other activity in his “official” capacity.

In both examples, the Commission very likely would closely examine whether such activities were and reasonably should be construed to be “official action;” however, the expanded exemption may allow a legislator to assert that his actions are exempt from the Commission’s authority. Under the earlier, narrower exemption, such conduct most likely violates the State Ethics Code, and the legislator would be subject to the Commission’s jurisdiction.

The Commission believes that the expanded exemption is inconsistent with and directly contrary to the purpose of the State Ethics Code: to preserve the public’s confidence in public servants.<sup>2</sup> The Commission respectfully suggests that the Committee should be mindful of the express statutory purpose (and the State Constitutional mandate).<sup>3</sup> In the Commission’s view, the statute’s purpose dictates that the exemption be narrow and, absent extraordinary circumstances, should not be expanded.

The Commission urges the Committee to restore the exemption afforded legislators to be consistent with the Constitutional privilege which is limited to when a legislator is exercising his “legislative function.” The Commission further suggests that the Committee consider amending the bill to reverse the exemptions given to members of task forces.

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<sup>1</sup> State Constitution, Art. III, Sec. 7.

<sup>2</sup> HRS chapter 84, Preamble.

<sup>3</sup> State Constitution, Art. XIV.

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In the Commission's opinion, the exemptions for task force members similarly are contrary to the clear statutory purpose and erode -- not preserve -- the public's confidence that state business is being done for the "right" reasons.

If the Committee decides to maintain the status quo for members of task forces, i.e., to preserve the multiple exemptions from the State Ethics Code described above, the Commission requests that the requirement that task force members "file a full and complete public disclosure of the nature and extent of the interest or transaction which the task force member or task force member's designee or representative believes may be affected by the task force member's official action" be clarified. If the intent is for task force members to file the financial disclosure statement pursuant to section 84-17, the section of the State Ethics Code identifying the persons whose disclosures are public, i.e., section 84-17(d), should be amended to include "members of task forces."

Thank you for considering the State Ethics Commission's testimony.



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## COMMITTEE ON JUDICIARY

Wednesday, March 4, 2015, 1:30 p.m., Room 308  
HB 813, HD2 RELATING TO THE CODE OF ETHICS  
TESTIMONY

Janet Mason, Co-Chair, Legislative Committee, League of Women Voters of Hawaii

Chair Rhoads, Vice-Chair San Buenaventura and Committee Members:

**The League of Women Voters of Hawaii supports HB 813, HD2** which clarifies that legislators are not prohibited by the State Ethics Code from taking action in the exercise of the legislator's functions. The bill also proposes to amend the Ethics Code to require that a state Task Force member should file a full and complete public disclosure of the nature and extent of interests or transactions which the task force member believes may be affected by the task force member's official actions. We suggest a further amendment to the bill.

In 2012 the Legislature passed a bill amending our State Ethics Code to exempt members of temporary task forces (except those who are already state employees) from sections of the Code. But Act 208 -- in seeking to create an exemption for task force members -- inadvertently created a loophole which "exempted legislators from section 84-13, Hawaii Revised Statutes, allowing legislators, in their official capacity, to use their position to secure unwarranted privileges, advantages, or treatment for themselves or others..." Act 208 created a broad exemption to the fair treatment law for legislators. HB813 makes it clear that legislators are exempt from the fair treatment law "only in the exercise of the legislator's functions." It is certainly in the public interest to make this change.

Regarding task force members in 2012 the League of Women Voters strongly opposed and continues to oppose giving task force members certain exemptions from the State Ethics Code. We understand that citizens with the expertise that gets them appointed to a task force to begin with usually acquire knowledge and experience by working in the private sector on issues which the public sector needs to address.

We do not believe this exemption is necessary to attract people to serve on Task Forces, as the 2010 "Mortgage Foreclosure Task Force" that gave rise to this special exemption showed. We conclude and it remains our position that there is no reason for this task force exemption.

In contrast to voluntary service on task forces, voluntary service on Boards and Commissions is longer-term and authority for decision-making is part of the job. Yet a private sector-individual lending their best professional advice to the State by serving on a Task Force faces similar ethical choices because of his or her "dual capacity" situation. Such considerations as "what is my duty of loyalty to my employer compared with my duty to the State," or "how much care should I take in my voluntary service compared with the care I exercise in my professional employment" apply to both types of service. In an ethics context service on a Board or Commission is not substantially different from that provided on a Task Force, and last year



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the legislature ***unanimously*** passed Act 230, requiring financial disclosure for members of 15 State Boards and Commissions.

The language of the bill needs to be clarified to make it clear whether the “complete public disclosure required” of task force members is referring to financial disclosure statements. Fixing the errors and the task force loophole in our ethics law would clear up any uncertainty about what’s expected from our legislators and task force members when it comes to the State Ethics Code.

Thank you for the opportunity to submit testimony.



House Finance Committee  
Chair Sylvia Luke, Vice Chair Scott Y. Nishimoto

Wednesday, 03/04/2015 at 1:30 PM in Room 308  
HB813 HD2 – Relating to the Code of Ethics

TESTIMONY OF SUPPORT  
Carmille Lim, Executive Director, Common Cause Hawaii

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Dear Chair Luke, Vice Chair Nishimoto, and members of the House Finance Committee:

**Common Cause Hawaii supports HB813 HD2.**

HB813 attempts to clarify that legislators are not prohibited by Hawaii's State Ethics Code from taking action in the exercise of a legislator's functions. Additionally, HB813 also amends the Ethics Code to require Task Force members to file a "full and complete public disclosure" on interests or transactions that may be affected by the task force member's official actions.

The intent of this bill is to clear up legislators' exemptions from the Fair Treatment Code brought about in 2012 – Act 208, which inadvertently created a loophole that exempted legislators from the Hawaii Revised Statutes section 84-13, thus allowing legislators to essentially use their official capacity for personal gain. Simply put: Act 208 gave legislators a broad exemption from the Fair Treatment Code. HB813 clarifies that legislators are exempt from the fair treatment law "only in the exercise of the legislator's functions."

Thank you for the opportunity to offer testimony **supporting HB813 HD2.**