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LEGISLATIVE REFERENCE BUREAU
State of Hawaii
State Capitol, Room 446
415 S. Beretania Street
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Written Comments

SB891 SD1 RELATING TO THE HAWAIIAN HOMES COMMISSION ACT

Charlotte A. Carter-Yamauchi, Director
Legislative Reference Bureau

Presented to the Senate Committees on Ways and Means and Judiciary

Tuesday, February 16, 2021, 10:40 a.m.
Via Videoconference

Chairs Dela Cruz and Rhoads and Members of the Committees:

Good morning Chairs Dela Cruz and Rhoads and members of the Committees, my name is Charlotte Carter-Yamauchi and I am the Director of the Legislative Reference Bureau. Thank you for providing the opportunity to submit written **comments** on S.B. No. 891, S.D. 1, Relating to the Hawaiian Homes Commission Act.

The purpose of this measure is to make the Hawaiian Homes Commission more representative of, and more responsive to, the beneficiaries of the Hawaiian Home Lands Trust. More specifically, the measure:

- (1) Requires that a majority of the members of the Hawaiian Homes Commission be beneficiaries and on the Department's waitlist for Hawaiian Home Lands;
- (2) Requires the Department of Hawaiian Home Lands to report quarterly to the Legislature and beneficiaries on land dispositions made during the previous quarter;
- (3) Authorizes the Governor to establish an inter-agency council to address the purposes of the Hawaiian Homes Commission Act, and if convened, to meet at least three times per year;

- (4) Requires an annual accounting of any funding receipts and expenditures made by the Department pursuant to resolving controversies relating to the Hawaiian Home Lands Trust and covered under Act 14, Special Session Laws of Hawaii 1995;
- (5) Allows the Hawaiian Homes Commission to retain separate counsel from the Attorney General to provide service to the Commission and beneficiaries; and
- (6) Requires the Legislative Reference Bureau to conduct a study on the implications of creating a position of Director of Hawaiian Home Lands that is separate from the Chairperson of the Hawaiian Homes Commission.

The Bureau takes no position on this measure but submits the following comments for your consideration.

With regard to the study required of the Bureau under section 7 of the bill, we note that the Bureau has no specific expertise or particular experience in matters relating to the Hawaiian Homes Commission or to Hawaiian Home Lands, or with respect to executive department organizational structure or personnel issues. We note that the Senate Draft 1 of the measure attempts to meet the Bureau's concerns that the study parameters are too vague, as we voiced in our testimony to the Senate Standing Committee on Hawaiian Affairs. However, the Senate Draft 1 still requires the Bureau to make a number of unguided organizational assumptions that would, in essence, substitute the Bureau's own ideas on what the Legislature's intent is in attempting to structurally reorganize the administration of the Department of Hawaiian Home Lands and Hawaiian Homes Commission.

Again, while we appreciate the previous Senate Committee's attempt to add clarity, unfortunately, the amendments to the study provisions do not fully address our concerns, and in some cases, make conducting the study even more difficult by including seemingly contradictory baseline assumptions on organizational structure.

For example, in our previous testimony on this measure, we noted that the term "implications" is used to frame the study parameters. This term still has not been clarified in the Senate Draft 1. Without further explicit guidance on the study provision's intent, the Bureau would be hard-pressed to be able to determine what "implications" the Legislature would like studied.

In addition, Section 7(a)(1) establishes that the Governor is to appoint the Chairperson of the Hawaiian Homes Commission, yet Section 7(a)(4) establishes that the position of the Chairperson of the Hawaiian Homes Commission is to be determined by the Commission. Furthermore, Section 7(a)(2) states that "director of the department of Hawaiian home lands shall constitute one member of the Hawaiian homes commission," but Section 7(a)(3) declares that the "director of the department of Hawaiian home lands shall not be eligible to

be considered as the Hawaiian homes commission." These provisions seem to directly conflict with each other and would make the study impossible to complete if not amended.

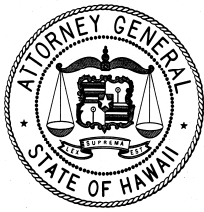
The study provisions also require the Bureau to "consider the effectiveness, cost, and potential conflicts of interests (e.g., contested case hearings), and with other issues that may arise from this change in the governance structure of the department of Hawaiian home lands." However, the Senate Draft 1 version, like the original version of the measure, does not indicate if one or both the Director and Chairperson positions are to be paid a salary, nor does it clearly delineate the position responsibilities of the Director or Chairperson. The lack of guidance on this and similar matters directly impacts how costs would be estimated. Finally, it is unclear what scenarios the proponents of the study are foreseeing that may pose potential conflicts of interest in a contested case setting. If required to conduct the study, the Bureau would just be guessing, with very little experience or information, on what conflicts may arise.

The lack of clarity will make performing such a study difficult, if not impossible, and may result in the Bureau providing a study product with little meaningful findings and recommendations for the Legislature to consider when rendering policy decisions on this issue.

For these reasons, the Bureau respectfully requests that, if this measure is to move on in the legislative process, amendments be made to section 7 of the bill to:

- (1) Clarify what is meant by "implications of creating a position for the director of the department of Hawaiian home lands that is separate from the chairperson of the Hawaiian homes commission;" and
- (2) Provide explicit guidance through the inclusion of a comprehensive proposed organizational structure for the Department of Hawaiian Home Lands and the Hawaiian Homes Commission, job responsibilities for the Director and Chairperson positions, list of cost elements to consider, examples of potential conflicts of interest necessitating contested case hearings under the new organizational structure, and parameters upon which to rely in conducting the study.

Thank you again for the opportunity to submit written comments.



**WRITTEN TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
THIRTY-FIRST LEGISLATURE, 2021**

ON THE FOLLOWING MEASURE:

S.B. NO. 891, S.D. 1, RELATING TO THE HAWAIIAN HOMES COMMISSION ACT.

BEFORE THE:

SENATE COMMITTEES ON WAYS AND MEANS AND ON JUDICIARY

DATE: Tuesday, February 16, 2021 **TIME:** 10:40 a.m.

LOCATION: State Capitol, Room 211, Via Videoconference

TESTIFIER(S): **WRITTEN TESTIMONY ONLY.**
(For more information, contact Craig Y. Iha or Ryan K. P.
Kanaka'ole, Deputy Attorneys General, at 587-2978)

Chairs Dela Cruz and Rhoads and Members of the Committees:

The Department of the Attorney General opposes this bill with respect to section 6.

The purposes of sections 1, 2, 3, 4, and 7 of this bill are to: require at least five members of the Hawaiian Homes Commission (HHC) to be beneficiaries of the Hawaiian Home Lands Trust; establish reporting requirements for the Department of Hawaiian Home Lands (DHHL); allow the Governor to establish an inter-agency council to study the purposes of "this chapter"; require DHHL to implement a loan servicing manual; and order the Legislative Reference Bureau to study and report on creating a DHHL director position that is separate from the position of the HHC Chair.

The purpose of Section 6 of this bill is to allow DHHL to hire its own attorneys without the approval or participation of the Attorney General or the Governor. This bill provides DHHL the discretion to use the services of the Attorney General if the interests of the State and DHHL are "aligned." This bill also requires the State to pay the legal fees owed to the attorneys hired by DHHL.

The Attorney General serves as legal counsel to the State of Hawai'i, which legal obligation includes providing legal services to state agencies. Because it is the largest legal entity in the State, with a number of diverse divisions, the Attorney General is best suited to provide legal advice to its state clients on a broad array of matters and

therefore, as a general matter, state agencies should be advised by deputy attorneys general. By locating attorneys representing state agencies within the Department of the Attorney General, state agencies benefit from the wide range of experience and expertise in a cost effective and conflict-free manner. Private attorneys retained by the DHHL would not possess the necessary breadth of knowledge and experience available within the Department of the Attorney General. Additionally, because state agencies are regulated by a variety of laws not applicable in private practice – including the Procurement Code, the Sunshine Law, and the Uniform Information Practices Act – the Attorney General’s expertise representing state agencies in these areas would be difficult for private attorneys to duplicate, and certainly not without additional expense. Finally, because deputy attorneys general are separate and apart from the agencies they represent, they are insulated from political issues that may arise within an agency. This insulation permits the Department of the Attorney General to provide objective and high-quality legal counsel.

The Department of the Attorney General is also unique in its ability under the law to undertake concurrent representation of multiple state agencies that may have conflicting interests, something that private attorneys are not able to do under the Hawaii Rules of Professional Conduct, the rules governing lawyers. In State v. Klattenhoff, 71 Haw. 598 (1990), the Hawai’i Supreme Court ruled that the Department of the Attorney General may assign deputies to represent agencies that have competing interests as long as it establishes appropriate firewalls between those attorneys and takes steps to ensure that no prejudice is suffered by the clients. The Department of the Attorney General has done this in past cases to ensure that all client agencies are vigorously, and separately, represented. We have provided, and will continue to provide, vigorous and objective legal representation to DHHL.

Notwithstanding the prohibition against employing or retaining private attorneys, state agencies may submit a waiver request to the Attorney General pursuant to section 28-8.3, Hawaii Revised Statutes (HRS). Under this provision, the Attorney General may determine that circumstances exist whereby representation by private attorneys is appropriate. In such circumstances, an agency may retain or employ its own attorney,

provided that the Governor also waives section 28-8.3, HRS. Indeed, this avenue has been exercised by DHHL in the past without incident.

For the foregoing reasons, we respectfully request that this bill be amended to delete section 6 in its entirety.

Thank you for considering our comments.

DAVID Y. IGE
GOVERNOR
STATE OF HAWAII

JOSH GREEN
LT. GOVERNOR
STATE OF HAWAII



WILLIAM J. AILA, JR.
CHAIRMAN
HAWAIIAN HOMES COMMISSION

TYLER I. GOMES
DEPUTY TO THE CHAIRMAN

**STATE OF HAWAII
DEPARTMENT OF HAWAIIAN HOME LANDS**

P. O. BOX 1879
HONOLULU, HAWAII 96805

TESTIMONY OF WILLIAM J. AILA, JR, CHAIRMAN
HAWAIIAN HOMES COMMISSION
BEFORE THE SENATE COMMITTEES ON WAYS AND MEANS & JUDICIARY
DECISION MAKING ON FEBRUARY 16, 2021 AT 10:40AM VIA VIDECONFERENCE

SB 891, SD1 RELATING TO THE HAWAIIAN HOMES COMMISSION ACT

February 16, 2021

Aloha Chair Dela Cruz, Chair Rhoads, and members of the Committee:

The Department of Hawaiian Home Lands (DHHL) submits comments on this bill that provides for a definition of beneficiary consultation; requires that a majority of the members of the Hawaiian Home Commission (HHC) be beneficiaries and on the waitlist; requires quarterly reporting to the legislature and beneficiaries on land dispositions made during the quarter; authorizes the Governor to establish an inter-agency council; requires a full accounting of Act 14, Special Session Laws of Hawaii 1995, expenditures within one year; requires the Department to develop and implement a loan servicing manual; allows the HHC to retain separate counsel from the Attorney General to provide service to the Commission and beneficiaries; and requires the Legislative Reference Bureau to conduct a study on the implications of creating a position for the Director of DHHL that is separate from the Chairperson of the HHC.

Section 1 of the bill amends section 201 of the Hawaiian Homes Commission Act (HHCA) by codifying Rule 10-4-60, Hawaii Administrative Rules, within the definition of beneficiary consultation. Since DHHL adopted administrative rules defining beneficiary consultation that became effective on August 25, 2018 after beneficiary consultation and public hearings, this section of the bill is unnecessary.

Section 2 of the bill amends section 202 of the HHCA to require that a majority of the members of the HHC be beneficiaries and on the waitlist. DHHL supports increasing the members from four to five of nine that are descendants of not less than one-fourth part of the blood of the races inhabiting the Hawaiian Islands previous to 1778. This increase aligns with the amendment to the HHCA made by Congress in 1935 providing that at least three of the five members shall be descendants of not less than one-fourth part of the blood of the races inhabiting the Hawaiian Islands previous to 1778. Nevertheless, DHHL suggests that the proposed amended language on page 4, lines 1-2 "and beneficiaries of the trust" be deleted because the Hawaiian Home Lands Recovery Act defines a beneficiary as native Hawaiian under section 201(7) of the HHCA or any descendant of not less than one-half part of the blood of the races

inhabiting the Hawaiian Islands previous to 1778. By requiring these five members to be beneficiaries, the provision in the HHCA allowing for descendants of not less than one-fourth part of the blood of the races enacted by Congress would be rendered useless. Finally, DHHL supports representation on the HHC by those on the waitlist for Hawaiian Home Lands keeping in mind that those on the waitlist for Hawaiian home lands are native Hawaiian or any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778.

Section 2 of the bill also adds language to section 202 of the HHCA to require DHHL to distribute by email or its website a quarterly report. This proposed amendment is unnecessary since DHHL prepares extensive reports on a monthly basis to the HHC. An example from January 2021 can be viewed here: <https://dhhl.hawaii.gov/wp-content/uploads/2021/01/January-19-20-2021-HHC-Packet-opt-1.pdf>.

Section 2 of the bill finally adds language to section 202 of the HHCA to allow the Governor to establish an inter-agency council to address the purposes of the HHCA. DHHL does not object to this proposed language.

Section 3 of the bill adds language to section 213.6 to require that annual reports include a full accounting of all Act 14, Special Session Laws of Hawaii 1995, funding receipts and expenditures. DHHL prepares annual reports that can be viewed here: <https://dhhl.hawaii.gov/newsroom/annual-reports/> and an independent financial and compliance audit of DHHL is being completed annually and the most recent audit of for the year ended June 30, 2019 can be accessed here: <https://investorrelations.hawaii.gov/dhhl/wp-content/uploads/sites/4/2020/04/DHHL-2019.pdf>.

Section 4 of the measure would amend section 216 of the HHCA requiring DHHL to develop and implement a loan servicing manual, subject to commission approval, to standardize loan loss mitigation policies, procedures, and methods. These proposed amendments are unnecessary since DHHL has written loan servicing guidelines and Department staff work one-on-one with lessees who are experiencing challenges in paying their mortgages. These challenges may include, but are not limited to, job loss, a medical emergency, or a family crisis. In addition, loan officers with DHHL provide payment options and financial counseling paid for by the Department. To ensure the availability of adequate assistance, lessees are contacted by postal mail, phone, e-mail, and through in-person visits, if necessary.

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Section 6 of the bill adds language to section 28-8.3(a), HRS to allow DHHL to retain separate counsel from the Attorney General's office. DHHL supports this section of the measure.

Section 7 of the bill requires the Legislative Reference Bureau to conduct a study on the implications of creating a position for the Director of DHHL separate from the Chairperson of the HHC. DHHL does not object to this proposed language.

Thank you for your consideration of our testimony.

COUNTY COUNCIL

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February 12, 2021

TESTIMONY OF KIPUKAI KUALII
COUNCILMEMBER, KAUAI COUNTY COUNCIL
ON
SB 891, SD1, RELATING TO THE HAWAIIAN HOMES COMMISSION ACT
Senate Committee on Ways and Means
Senate Committee on Judiciary
Tuesday, February 16, 2021
10:40 a.m.
Via Videoconference
Conference Room 211

Dear Chair Dela Cruz, Chair Rhoads, and Members of the Committees:

Thank you for this opportunity to provide testimony in support of SB 891, SD1, Relating to the Hawaiian Homes Commission Act. My testimony is submitted in my individual capacity as a Member of the Kaua'i County Council, Chair of the Kaua'i County Council's Housing & Intergovernmental Relations Committee, Vice Chair of the Kaua'i County Council's Finance & Economic Development Committee, Co-Chair of SCHHA's Policy Board, longtime advocate for Department of Hawaiian Homelands (DHHL) waitlistees, an Anahola homesteader, and an Anahola agricultural lot waitlistee.

SB 891, SD1, is critical to ensuring that the next 100 years is greatly different from the failure of the last 100 years—the failure of getting more land to more trust beneficiaries, and the failure of allowing even one trust beneficiary to die while waiting.

The Department of Hawaiian Home Lands (DHHL) becoming more transparent and accountable to Trust Beneficiaries, as well as to the State Legislature, will inevitably move to the win-win solutions many advocates like myself have been seeking for many years. Trust Beneficiaries deserve to be at the table when decisions are being made about our Land Trust. Trust Beneficiaries are indeed the leading experts who can, if given the chance, be a part of the solutions we so desperately need.

Mahalo for this opportunity to provide testimony. Should you have any questions, please feel free to contact me or Council Services Staff at (808) 241 4188 or via E-mail to cokcouncil@kauai.gov.

Sincerely,

KIPUKAI KUALII
Councilmember, Kaua'i County Council

AMK:lc