

TWENTY-THIRD DAY

Wednesday, February 22, 2023

The Senate of the Thirty-Second Legislature of the State of Hawai'i, Regular Session of 2023, convened at 11:34 a.m. with the President in the Chair.

The Roll was called showing all Senators present, with the exception of Senator Ihara who was excused.

The President announced that he had read and approved the Journal of the Twenty-Second Day.

At this time, Senator Kanuha welcomed Stephanie Iona from Kaaui, a board member of the Hawai'i Tourism Authority, who was present in the gallery.

HOUSE COMMUNICATIONS

The following communications from the House (Hse. Com. Nos. 17 to 19) were read by the Clerk and were disposed of as follows:

Hse. Com. No. 17, transmitting H.B. No. 136, H.D. 1, which passed Third Reading in the House of Representatives on February 21, 2023, was placed on file.

On motion by Senator Wakai, seconded by Senator DeCoite and carried, H.B. No. 136, H.D. 1, entitled: "A BILL FOR AN ACT RELATING TO LEGISLATIVE ALLOWANCE," passed First Reading by title and was referred to the Committee on Judiciary.

Hse. Com. No. 18, transmitting H.B. No. 146, H.D. 1, which passed Third Reading in the House of Representatives on February 21, 2023, was placed on file.

On motion by Senator Wakai, seconded by Senator DeCoite and carried, H.B. No. 146, H.D. 1, entitled: "A BILL FOR AN ACT RELATING TO THE STATE FIRE COUNCIL," passed First Reading by title and was referred jointly to the Committee on Public Safety and Intergovernmental and Military Affairs and the Committee on Water and Land, then to the Committee on Ways and Means.

Hse. Com. No. 19, transmitting H.B. No. 1514, H.D. 1, which passed Third Reading in the House of Representatives on February 21, 2023, was placed on file.

On motion by Senator Wakai, seconded by Senator DeCoite and carried, H.B. No. 1514, H.D. 1, entitled: "A BILL FOR AN ACT MAKING APPROPRIATIONS TO PROVIDE FOR THE EXPENSES OF THE LEGISLATURE, THE AUDITOR, THE LEGISLATIVE REFERENCE BUREAU, THE OMBUDSMAN, AND THE ETHICS COMMISSION," passed First Reading by title and was referred to the Committee on Ways and Means.

SENATE RESOLUTION

The following resolution (S.R. No. 20) was read by the Clerk and was deferred:

S.R. No. 20 "SENATE RESOLUTION AMENDING THE RULES OF THE SENATE TO ESTABLISH THAT A FAILURE TO SUBMIT TO A BREATHALYZER TEST, BLOOD TEST, OR FIELD SOBRIETY TEST DURING A LAWFUL STOP SHALL BE GROUNDS FOR EXPULSION."

Offered by: Senator Awa.

ORDER OF THE DAY

THIRD READING

Stand. Com. Rep. No. 657 (S.B. No. 835):

Senator Dela Cruz moved that Stand. Com. Rep. No. 657 be adopted and S.B. No. 835, having been read throughout, pass Third Reading, seconded by Senator Keith-Agaran.

Senator Dela Cruz rose to speak in support of the measure as follows:

"This measure repeals a statutorily mandated general fund budget appropriation formulation for the University of Hawai'i. My office requested an opinion by the attorney general's office, which found that a provision in section 304A-2101, which requires further legislative action to actually appropriate moneys, cannot bind successive legislatures to make particular appropriations, does not require the Legislature to appropriate a specific amount, and serves only as an intention by the Legislature to appropriate moneys in the future. As such, to clarify the appropriation process and to prevent future confusion, the provision should be repealed. I ask that the attorney general's opinion be inserted into the Senate Journal. And I'd just like to ensure that the Senate does stand in support of the University and wants to assure that, by this action, we are correcting a constitutional flaw in the statute as advised by the attorney general and that we continue our goal to support and fund the UH and its community colleges and all of its campuses to achieve a first-class institution. I ask my colleagues to support this measure."

The Chair having so ordered, the opinion from the attorney general is identified as "**ATTACHMENT A**" to the Journal of this day.

Senator Moriwaki rose to speak in support of the measure as follows:

"I would like the previous speaker's remarks to be inserted into the Senate Journal as my own. Thank you." (The Chair so ordered, by reference only.)

The motion was put by the Chair and carried, Stand. Com. Rep. No. 657 was adopted and S.B. No. 835, entitled: "A BILL FOR AN ACT RELATING TO GENERAL FUND BUDGET APPROPRIATIONS FOR THE UNIVERSITY OF HAWAII," having been read throughout, passed Third Reading on the following showing of Ayes and Noes:

Ayes, 24. Noes, none. Excused, 1 (Ihara).

RE-REFERRAL OF SENATE BILLS

The Chair re-referred the following Senate bills that were introduced:

S.B. No.:	Re-referred to:
S.B. No. 838	Jointly to the Committee on Higher Education and the Committee on Ways and Means
S.B. No. 839, S.D. 1	Committee on Energy, Economic Development, and Tourism, then jointly to the Committee on Commerce and Consumer Protection and the Committee on Ways and Means

MESSAGE FROM THE GOVERNOR

The following message from the Governor (Gov. Msg. No. 524) was read by the Clerk and was disposed of as follows:

Gov. Msg. No. 524, submitting for consideration and confirmation as Chairperson of the Department of Hawaiian Homelands, the nomination of KALI WATSON, term to expire December 31, 2026, was referred to the Committee on Hawaiian Affairs.

At this time, Senator Gabbard rose on a point of personal privilege to extend happy birthday wishes to Senator Richards.

Senator Kanuha introduced two staff members from U.S. Senator Brian Schatz's Washington, D.C., office. Seated in the gallery were administrative director Alex Hetherington and chief of staff Eric Einhorn.

ADJOURNMENT

At 11:40 a.m., on motion by Senator Wakai, seconded by Senator DeCoite and carried, the Senate adjourned until 11:30 a.m., Thursday, March 2, 2023.

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on a formula tied to the amount of regular tuition and related fee revenues estimated for a particular fiscal year.

As we were about to issue our advice in response to your memorandum, your office contacted us on August 23, 2022 and informed us there were other statutes similar to section 304A-2101, HRS in that they also imposed budgetary appropriation requirements on the Legislature. Your office then requested we include in our advice, consideration of these other statutes.

I. Section 304A-2101, Hawaii Revised Statutes.

We first focus on the original subject of the advice request, section 304A-2101, HRS. Section 304A-2101(a) provides that the Legislature shall appropriate to the University general fund budget appropriations in an amount "not less than three times and not greater than five times the amount of regular tuition and related fee revenues estimated for that fiscal year."

In applying this budgetary formula to fiscal year 2022-2023, we note that the University estimated its regular tuition and related fee revenues to be \$218,970,107.² Consequently, under the section 304A-2101(a)'s budget formula, the University's share should be at least \$656,910,321 and not more than \$1,094,850,535. However, the Legislature only appropriated \$567,098,868.³

Nonetheless, we conclude the Legislature did not violate the statute when it underfunded the University because adherence to the formula is not a requirement. Section 304A-2101 and other similar statutes directing specific appropriations do not require the Legislature to appropriate general funds according to the statutory provisions. There is no effect in the Legislature's failure to comply with statutory mandates such as section 304A-2101 because such sections: (1) require further legislative action to actually appropriate moneys; (2) cannot bind successive Legislatures to make particular appropriations; (3) does not require the Legislature to appropriate a specific amount; and (4) serves only as an intention by the Legislature to appropriate moneys in the future.

A. Section 304A-2101 is not an appropriation.

First, section 304A-2101 does not make an appropriation of general funds. Appropriations are made, not in general law⁴ such as section 304A-2101, but through the

² University of Hawaii System Annual Report, Report to the 2022 Legislature, Annual Report on Non-General Funds, Act 87, Session Laws of Hawaii 2021, October 2021, p. 222.

³ Act 248, Session Laws of Hawaii 2022, the Supplemental Appropriations Act of 2022.

⁴ A "general law" is one which applies uniformly throughout all political subdivisions of the state. *Bulgeo v. County of Maui*, 50 Haw. 51, 430 P.2d. 321, 326 (1967).



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September 13, 2022

The Honorable Donovan M. Dela Cruz
Chair, Senate Committee on Ways and Means
State Capitol, Room 208
Honolulu, Hawaii | 96813

Dear Senator Dela Cruz:

Re: Statutorily Mandated Budget Appropriations

This is in response to your August 1, 2022 memorandum requesting our advice regarding statutes that impose budgetary appropriation requirements on the Legislature. We understand your concern is what happens when such statutory mandates are not met. In particular, you cited section 304A-2101,¹ Hawaii Revised Statutes ("HRS"), which requires the Legislature to appropriate general funds to the University of Hawaii ("University") based

¹ Section 304A-2101 states:

§304A-2101. General fund budget appropriations; formulation. (a) The general fund budget appropriations for the university shall be an amount not less than three times and not greater than five times the amount of regular tuition and related fee revenues estimated for that fiscal year.

(b) Any general fund budget appropriation for the university for operating purposes for any fiscal year shall include the consideration of:

- (1) The fiscal condition of the State;
- (2) Enrollment;
- (3) Access to educational opportunity;
- (4) The mix of resident and nonresident students; and
- (5) Community service and noninstruction programs.

(c) No revenue received by the university pursuant to the University of Hawaii tuition and fees special fund established under section [304A-2153] may be used by the governor or the director of finance as a justification for reducing any budget request or allotment to the university unless the university requests such a reduction.

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Section 304A-2101 does not authorize the expenditure of moneys for the University. It merely provides a formula for the general fund budget appropriation for the University. While section 304A-2101 describes the components of the budget formula, it is not an expenditure authority. The general fund appropriation for the University for fiscal year 2022-2023 was made by the Legislature through the Supplemental Appropriations Act of 2022.

Thus, a general law like section 304A-2101 is not the vehicle by which general funds are appropriated to the University. section 304A-2101 merely provides guidance to the Legislature regarding the general fund appropriations to the University based on its formula components. It still requires an appropriation by the Legislature in order to be implemented.

B. One Legislature Cannot Bind Another.

Second, section 304A-2101 is not a mandate which requires the appropriation of moneys at the designated levels because "one Legislature may not bind a successor Legislature (or even itself) to make an appropriation."⁶ Town of Milton, 623 N.E.2d at 484. Article III, section 1 of the Hawaii State Constitution states:

⁶ The issue of whether one Legislature may bind another Legislature to appropriate funds has been addressed in other jurisdictions. For example:

1. "[A]bsent a constitutional restriction on the legislative power, one legislature cannot restrict or limit the right of a succeeding legislature to exercise the power of legislation." State ex. rel. Stenberger v. Menge, 344 N.W. 2d 344, 349 (Neb. 1996).
2. "The Legislature cannot, through enactment of an act or statute, bind itself or its successor to make a particular appropriation." Associated Industries v. Secretary of Com., 395 N.E. 2d 262, 286-287 (Mass. 1992) (citations omitted).
3. "One legislature cannot limit the power of successor legislatures to appropriate funds." Frederick v. Presque Isle Cty. Cir. Judge, 476 N.W. 2d 142, 148 (Mich. 1991) (citations omitted).
4. "One legislature cannot impose a legal obligation to appropriate money upon succeeding legislatures." Maine State Housing Authority v. Depositors Trust Co., 278 A. 2d 699, 707 (Me. 1971) (citation omitted).
5. "The authority of a legislature is limited to the period of its own existence. One general assembly cannot bind a future one." Frost v. State, 172 N.W.2d 575, 583 (Iowa 1969) (citations omitted).
6. One Legislature "cannot tie the hands of its successors, or impose upon them conditions with reference to subjects upon which they have equal power to legislate." Village of North Atlanta v. Cook, 133 S.E. 2d 585, 589 (Ga. 1963) (citations omitted).
7. "One Legislature cannot obligate succeeding Legislatures to make appropriations." Opinion of the Justices, 79 A.2d 753, 756 (Me. 1951).

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budget and appropriation process. Town of Milton v. Commonwealth, 623 N.E.2d 482, 484 (Mass. 1993). Article VII, section 5 of the Hawaii State Constitution provides that "[n]o public money shall be expended except pursuant to appropriations made by law." In addition, article VII, section 9 of the Hawaii State Constitution prescribes the appropriation process.⁵ Among other things, article VII, section 9 of the Hawaii State Constitution requires appropriation measures to be submitted to the Governor by bill.

An appropriation is the setting "apart from the public revenue a certain sum of money for a specified object, in such manner that the executive officers of the government are authorized to use that money, and no more, for that object, and for no other." Opinion of Justices, 79 N.E.2d 881, 882 (Mass. 1948) (citations omitted). See also Op. Att'y Gen. 72-6 (1972) (a bill constituted an appropriations bill if it authorized the expenditure of money and stipulated the amount, manner and purpose of the various items of expenditure).

⁵ Article VII, section 9 of the Hawaii State Constitution provides:

LEGISLATIVE APPROPRIATIONS; PROCEDURES; EXPENDITURE CEILING

Section 9. In each regular session in an odd-numbered year, the legislature shall transmit to the governor an appropriation bill or bills providing for the anticipated total expenditures of the State for the ensuing fiscal biennium. In such session, no appropriation bill, except bills recommended by the governor for immediate passage, or to cover the expenses of the legislature, shall be passed on final reading until the bill authorizing operating expenditures for the ensuing fiscal biennium, to be known as the general appropriations bill, shall have been transmitted to the governor.

In each regular session in an even-numbered year, at such time as may be provided by law, the governor may submit to the legislature a bill to amend any appropriation for operating expenditures of the current fiscal biennium, to be known as the supplemental appropriations bill, and bills to amend any appropriations for capital expenditures of the current fiscal biennium, and at the same time the governor shall submit bills or bills providing for any added or changed expenditures that may be required. In each regular session in an even-numbered year, bills may be introduced in the legislature to amend any appropriation or bond authorization act of the current fiscal biennium or prior fiscal periods. In any such session in which the legislature submits to the governor a supplemental appropriations bill, no other appropriation bill, except bills recommended by the governor for immediate passage, or to cover the expenses of the legislature, shall be passed on final reading until such supplemental appropriations bill shall have been transmitted to the governor.

GENERAL FUND EXPENDITURE CEILING

Notwithstanding any other provision to the contrary, the legislature shall establish a general fund expenditure ceiling which shall limit the rate of growth of general fund appropriations, excluding federal funds received by the general fund, to the estimated rate of growth of the State's economy as provided by law. No appropriations in excess of such ceiling shall be authorized during any legislative session unless the legislature shall, by a two-thirds vote of the members to which each house of the legislature is entitled, set forth the dollar amount and the rate by which the ceiling will be exceeded and the reasons therefor.

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The legislative power of the State shall be vested in a legislature, which shall consist of two houses, a senate and a house of representatives. Such power shall extend to all rightful subjects of legislation not inconsistent with this constitution or the Constitution of the United States.

Thus, the Legislature has complete legislative authority and may enact legislation as it determines except as limited by the Hawaii State Constitution or the Constitution of the United States. See, e.g., *State ex. rel. Stenbjerg*, 544 N.W.2d at 349; *Opinion of the Justices*, 623 A.2d 1258, 1262 (Me. 1993). Consequently, to read HRS section 304A-2101 as requiring the Legislature to appropriate funds as specified in its provisions would violate article III, section 1 of the Hawaii State Constitution by attempting to restrict the power of a subsequent Legislature to legislate.

The issue of restricting a subsequent Legislature's right to legislate was addressed in the *Opinion of the Justices*, 673 A.2d 693 (Me. 1996). The Supreme Judicial Court of Maine, when asked by the House of Representatives of Maine if the courts would enforce a bill which becomes law, but that law is not followed by subsequent Legislatures, stated:

The answer to this question is clearly in the negative. This bill, if enacted, will be on equal footing with every other law passed by the Legislature: subsequent sessions of the Legislature may choose to follow it, or they may choose to repeal it, either expressly or by implication. See *Manigault v. Springs*, 199 U.S. 473, 487, 26 S.Ct. 127, 133, 50 L.Ed. 274 (1905) (bill requiring Legislature to give direct notice to all interested parties and to publish the notice in a major newspaper, prior to the granting of a private right or privilege by special bill, could be "repealed, amended, or disregarded by the Legislature" and was "not binding upon any subsequent legislature."), cited by *Sierra Club v. Froehlike*, 816 F.2d 205, 215 (5th Cir. 1987) ("courts cannot set aside legislation because it is inconsistent with prior legislation"), cited also in *Peterson v. United States Department of the Interior*, 899 F.2d 799, 808 (9th Cir. 1990) (upholding Congressional alteration of a previously enacted government contract, recognizing "the fundamental principle that Congress always has the power to amend, repeal or ignore legislation passed by earlier congresses"). To read this statute as binding upon future Legislatures is to read it as an attempt to amend the Constitution of the State of Maine through improper means. Such a bill would not be enforced by the courts against future Legislatures.

Id. at 696.

Further, as a matter of statutory construction, we should avoid construing a statute in a manner which would render it unconstitutional when an alternative construction is reasonably presented. *Maine State Housing Authority*, 278 A.2d at 707-708. In this instance, by

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construing section 304A-2101 as advisory in nature, we avoid the constitutional conflict with article III, section 1 of the Hawaii State Constitution, and are able to harmonize the statute with the constitution.

C. Reading Section 304A-2101 as an Appropriation is an Absurd Result.

Third, the Legislature is presumed not to intend an absurd result, and legislation will be construed to avoid, if possible, inconsistency, contradiction, and illogicality. *State v. Malufai*, 80 Hawai'i 126, 137, 906 P.2d 612, 623 (1995) (citation and internal quotation marks omitted). In interpreting a statute, the foremost obligation of the court is to ascertain and give effect to the intention of the Legislature, which is to be obtained primarily from the language contained in the statute itself. *State v. Toyomura*, 80 Hawai'i 8, 18, 904 P.2d 893, 904 (1995) (citation and internal quotation marks omitted). The court may resort to extrinsic aids in determining the legislative intent. One avenue is the use of legislative history as an interpretive tool. 80 Hawai'i at 19, 904 P.2d at 904 (citation and internal quotations marks omitted).

While section 304A-2101 uses the word "shall," it is a directory statute, not a mandatory statute. A statute is directory if the observance of the provision is not necessary to the validity of the proceedings. A statute is mandatory if the failure to follow it will render the proceedings to which it relates illegal and void. *Jack Endo Electric, Inc. v. Lear Siegler, Inc.*, 59 Haw. 612, 585 P.2d 1265, 1269 (1978).

The use of the word "shall" in the statute is not dispositive of the issue of whether the statute is mandatory rather than directory. While the word "shall" is generally regarded as mandatory, in certain situations it may properly be given a directory meaning. In determining whether a statute is mandatory or directory the intention of the legislature must be ascertained. The legislative intent may be determined from a consideration of the entire act, its nature, its object, and the consequences that would result from construing it one way or the other. In general, a statute is directory rather than mandatory if the provisions of the statute do not relate to the essence of the thing to be done or where no substantial rights depend on compliance with the particular provisions and no injury can result from ignoring them.

Id. (citations, internal quotation marks, and ellipsis points omitted).

To determine the Legislature's intent of section 304A-2101, we may look to "the consequences that would result from construing it one way or the other." We conclude that section 304A-2101 is a directory statute because this construction will not render the regular general fund appropriation made to the University illegal and void, the outcome if section 304A-2101 were construed as a mandatory statute.

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Section	Title
23-3	Salary of the auditor and appropriations.
26-35.5(i)	Members of boards and commissions; immunity from or indemnification for civil liability; defense of members.
27-26	Junior police officer training programs.
46-74.2	Public land or land exempt from taxation, etc.; cost otherwise assessable against borne by city and county.
88-16	Bonus; appropriation.
88-101	Payment of existing pensions.
128E-06	Funds for operation.
142-28.5	Animal quarantine special fund.
201C-3	Financial assistance program; source of funds.
201H-151(k)	State mortgage guarantee.
206-41	Source of operating funds; disposition of unencumbered funds.
206M-15(a)	Technology research and development loans and grants.
206M-15.1	Manufacturing development program; established.
231-23	Adjustments and refunds.
255-1	Adoption of compact.
268-4	Appropriation; personnel.
302D-3(f)	State public charter school commission; establishment; appointment.
302D-28(b)	Funding and finance.
304A-2101	General fund budget appropriations; formulation.
323F-58(a)	Operating support.
325-6	Epidemic control.
326-27	Kalaupapa store; loans for operation and maintenance.
346-9	Workshop program.
346-59	Medical care payments.
382-5	Stevardoring fund; compensation for appropriation and use.
431.2-307.5	Reimbursement and compensation of examiners; source of funds; disposition of receipts.

We have reviewed the list of these statutes and note they appear to be facially similar to section 304A-2101 in that they appear to require the Legislature to appropriate funds to a particular entity and/or for a particular purpose. However, we are reluctant to automatically consider them as having the same effect as section 304A-2101, that is, that they are serve only as expressions of legislative intent and require further legislation to actually appropriate moneys. To reach a determination of each statute would require the same degree of review as was done of section 304A-2101, which included research of the statute's legislative history and of the particular facts and historical treatment of the statute since its enactment.

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D. Section 304A-2101 Represents an Intention of the Legislature.

Fourth, consistent with our reading that section 304A-2101 is a directory statute, we conclude it acts only as an intention by the Legislature to appropriate funds in the future.

In a case similar to our situation, the Michigan Supreme Court determined that statutory language which purported to fiscally bind successive Legislatures only acted as an intention to appropriate, rather than a mandate to do so. *Board of Education of Oakland Schools v. Porter*, 221 N.W.2d 345, 349 (Mich. 1974).

At issue in *Oakland Schools* was a statutory provision which purportedly required the appropriation of moneys in future years to school districts. A year after the statute was enacted, the Michigan Legislature attempted to effectuate this statutory provision by making an appropriation for it. However, the Governor exercised his item veto power and disapproved the appropriation. The Oakland schools then filed suit arguing that the Governor's veto of the subsequent bill did not affect the validity of the existing statute, which, they contended, required the Legislature to appropriate the moneys pursuant to the terms of the statute. *Id.* at 345-346.

The Michigan Supreme Court concluded that the statute at issue expressed only a desire to appropriate in the future. This construction avoids any conflict with the constitutional requirements binding upon both the Legislature and the Governor, and, in our opinion, furthers the comity between these two branches that is necessary for the responsible functioning of the State government.

Id. (emphasis in original).

In summary, to read section 304A-2101 as requiring the Legislature to appropriate funds pursuant to its budget formula would cause the Legislature to be in conflict with the Hawaii State Constitution, render a portion of the general appropriation bill superfluous, create an absurd result, and allow one Legislature to bind a successor Legislature. Thus, section 304A-2101 has no effect to bind the Legislature to a particular level of appropriations and acts only as an intention by the Legislature to appropriate funds in the future.

II. Statutes Similar to Section 304A-2101, Hawaii Revised Statutes.

In addition to section 304A-2101, the Senate Majority Research Office has identified the following HRS sections that require the Legislature to make appropriations for a particular amount (attached):

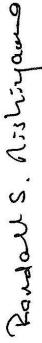
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As such, while we can agree the other statutes listed above appear to be functionally similar to section 304A-2101, we cannot conclude their effects to be the same without a more in depth analysis of each statute; such a review of almost thirty statutes would exceed the time allowed for this response. We suggest that if there is a continuing concern about these statutes, the Legislature could take action to repeal them.

Please feel free to contact us should you have any questions about this response.

Very truly yours,



Randall S. Nishiyama
Deputy Attorney General

APPROVED:



Holly T. Shikada
Attorney General

Attachment