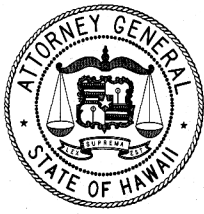


SB 2994



TESTIMONY OF THE DEPARTMENT OF THE ATTORNEY GENERAL TWENTY-EIGHTH LEGISLATURE, 2016

ON THE FOLLOWING MEASURE:

S.B. NO. 2994, RELATING TO HAWAIIAN HOMES.

BEFORE THE:

SENATE COMMITTEES ON HAWAIIAN AFFAIRS AND ON
JUDICIARY AND LABOR

DATE: Monday, February 8, 2016 **TIME:** 1:15 p.m.

LOCATION: State Capitol, Room 016

TESTIFIER(S): Douglas S. Chin, Attorney General, or
Diane Erickson, Deputy Attorney General

Chairs Shimabukuro and Keith-Agaran and Members of the Committees:

The Department of the Attorney General opposes this bill.

The purpose of this bill is to amend section 3 of Act 92, Session Laws of Hawaii 2015 (Act 92). Section 3 of Act 92, which takes effect on July 1, 2016, currently allows the Office of Information Practices (OIP) to hire its own attorneys without the approval or participation of the Attorney General or the Governor. This bill would amend Act 92 to allow the Department of Hawaiian Home Lands (DHHL) to hire its own attorneys without the approval or participation of the Attorney General or the Governor. The bill would also allow DHHL to use the services of the Department of the Attorney General as needed when the interests of the State of Hawai'i and DHHL are "aligned." Finally, the bill would require the State of Hawai'i to pay legal fees owed to outside legal counsel retained by DHHL. This bill raises several concerns.

As a general matter, state agencies should be advised by deputy attorneys general. By locating the attorneys for state agencies within a single department, we are able to provide a wide range of experience and expertise to those agencies. Private attorneys retained by DHHL are unlikely to acquire the necessary breadth of knowledge and experience that the Department of the Attorney General already has. Additionally, because state agencies are regulated by a variety of laws, such as the Procurement Code, the Sunshine Law, and the Uniform Information Practices Act, not applicable to private practice, the Department of the Attorney General has a depth of expertise in representing state agencies that would be difficult to duplicate by private attorneys, and certainly not without additional expense. Finally, deputy attorneys general, being

separate and apart from the state agencies they represent, are insulated from political issues that may arise within a state 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 Hawai'i Rules of Professional Conduct, the rules governing lawyers. In State v. Klattenhoff, 71 Haw. 598, 801 P.2d 548 (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 erects 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 an attorney, when the Attorney General declines to provide representation to a state agency, that agency may retain or employ its own attorney if the Attorney General, for reasons determined to be good and sufficient, waives section 28-8.3, Hawaii Revised Statutes (HRS), provided that the Governor also waives HRS § 28-8.3.

For the foregoing reasons, we respectfully request that this bill be held in committee.

DAVID Y. IGE
GOVERNOR
STATE OF HAWAII

SHAN S. TSUTSUI
LT. GOVERNOR
STATE OF HAWAII



JOBIE M. K.
MASAGATANI

WILLIAM J. AILA, JR.
DEPUTY TO THE CHAIRMAN

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

P. O. BOX 1879
HONOLULU, HAWAII 96805

**TESTIMONY OF JOBIE M. K. MASAGATANI, CHAIRMAN
HAWAIIAN HOMES COMMISSION
BEFORE THE JOINT COMMITTEES ON HAWAIIAN AFFAIRS AND
JUDICIARY AND LABOR**

IN SUPPORT OF

SB 2994 RELATING TO INDEPENDENT COUNSEL

February 8, 2016

Aloha Chairs Shimabukuro, Keith-Agaran and members of the Joint Committees:

The Department of Hawaiian Home Lands (DHHL) has a trust duty to its beneficiaries and in the fulfillment of its trust obligations may at times be at odds with the interests of the State. It is at these times that the Hawaiian Homes Commission (HHC) must be assured that its counsel provides legal guidance strictly in the interest of its client, the HHC and/or DHHL. Independent counsel that is hired and retained by DHHL eliminates any cloud of uncertainty that there is a conflict of interest that DHHL is represented by the Attorney General's office that also represents the State of Hawaii.

SB 2994 grants to DHHL the authority to hire and retain legal counsel for the purpose of representing the department in litigation, rendering legal counsel, and drafting legal documents.

DHHL requests that the Joint Committees on Hawaiian Affairs and Judiciary and Labor pass SB 2994 out of Committee.

Thank you for your consideration of our testimony



Association of Hawaiian Civic Clubs

P. O. Box 1135
Honolulu, Hawai'i 96807

SB2994 RELATING TO HAWAIIAN HOMES

SENATE COMMITTEES ON HAWAIIAN AFFAIRS AND JUDICIARY AND LABOR

Monday, 02/08/16; 1:15pm; Room 016

Aloha Madam Chair Shimabukuro and Chairman Keith –Agaran of the Senate committee on Hawaiian Homes and Judiciary and Labor. I am Annelle Amaral, president of the Association of Hawaiian Civic Clubs (AHCC) and we support this bill. I regret that I am unable to be present at the hearing today as I am a delegate to the Native Hawaiian `Aha currently in session. Thank you for hearing this bill.

There is a sibling relationship between the civic clubs and the Hawaiian Home Lands as both were established through the work of Prince Kuhio when he was a Delegate to the US Congress. Many of the resolutions that come before the AHCC in convention, in addition to Hawaiian issues in general, have had to do with Hawaiian Homes – the Department, the beneficiaries and the Commission.

The AHCC has consistently advocated for independent counsel for the commission and beneficiaries similar to that existing in the Office of Hawaiian Affairs. Any hint of bias between the State Attorneys General and HHL Commissioners or beneficiaries on adversarial issues must be removed. Independent counsel hired by the commission to serve their interests would go a long way toward resolving lingering doubts that on occasion have resulted in law suits.

This bill is long overdue and we urge its passage. Once again, thank you for giving this bill a hearing and thank you for the opportunity to testify.

Contact: Jalna.keala2@hawaiiantel.net

From: mailinglist@capitol.hawaii.gov
To: [HWNTestimony](#)
Cc: bokahui@laiopua.org
Subject: Submitted testimony for SB2994 on Feb 8, 2016 13:15PM
Date: Thursday, February 04, 2016 6:38:34 PM

SB2994

Submitted on: 2/4/2016

Testimony for HWN/JDL on Feb 8, 2016 13:15PM in Conference Room 016

Submitted By	Organization	Testifier Position	Present at Hearing
Craig "Bo" Kahui	Villages of Laiopua Association	Support	No

Comments: In Support SB 2994 relating to Independent Counsel The State and the HHC are frequently at odds on important policy issues that affect native Hawaiian beneficiaries. In order to avoid a conflict of interest, it is important for the deputy AG's assigned to the HHC to defer when important issues arise that would need independent legal counsel to address. Making the hiring of independent counsel subject to the approval of the AG has simply not worked to alleviate this critical problem. The HHC, as a trustee for native Hawaiians, must have good, objective legal advice in order to proceed in their best interest. The costs of hiring legal counsel is a necessary and legitimate expenditure of state general funds because it is clearly an administrative expense which the Legislature should regularly cover in the DHHL's A&O budget requests. The HHC has acted upon too many issues with the clouded advice of the AG's office which has resulted in expensive legal costs to remedy. Beneficiaries are deserving of independent legal counsel for their trustees on the HHC so they can be assured of strict adherence to a duty of loyalty to beneficiaries. The HHC is deserving of this authority even more so than most if not all of the agencies identified in the statute granting those agencies this same authority to hire independent counsel, e.g., OHA, real estate commission, contractors licensing board, UH, insurance division, etc.). On behalf of the Villages of Laiopua Homestead Association, we support SB 2994 that Allows the Hawaiian homes commission or the department of Hawaiian home lands to retain independent legal counsel as needed. Mahalo Craig "Bo" Kahui Chairperson, Hawaiian Affairs Committee Villages of Laiopua Homestead Association

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Senate Committee on Hawaiian Affairs

Chair: Maile S.L. Shimabukuro

Members: J. Kalani English (Vice Chair), Lorraine R. Inouye, Donna Mercado Kim, Sam Slom

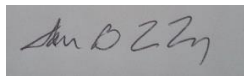
SUBJECT: **STRONG SUPPORT SB2994**

Aloha Chair Shimabukuro and Members of the Senate Committee on Hawaiian Affairs,

Mahalo for the opportunity to submit testimony in STRONG SUPPORT of SB2994.

As a Hawaiian Homes Commissioner representing East Hawaii, 2011-2013, I have first-hand experience for the need of this piece of legislation. The Hawaiian Homes Commission (HHC) must have the autonomy to select legal counsel as it weighs issues that place the needs of beneficiaries against the policies of the State. I have witnessed the State Attorney General and his deputies provide opinions to the HHC that conflicted with interests of beneficiaries, leaving beneficiaries no other remedy to bring suit against the HHC and the State. The HHC will be better equipped to serve and fulfill its duties with the provisions within SB2994.

Mahalo nui,

A handwritten signature in dark ink, appearing to read "Ian B. Lee Loy", is displayed within a light gray rectangular box.

Ian B. Lee Loy

Hawaiian Homes Lessee

Former Hawaiian Homes Commissioner

Moku o Keawe Homestead Alliance, Director

From: mailinglist@capitol.hawaii.gov
To: [HWNTestimony](#)
Cc: dkanealii02@gmail.com
Subject: Submitted testimony for SB2994 on Feb 8, 2016 13:15PM
Date: Sunday, February 07, 2016 2:10:12 PM

SB2994

Submitted on: 2/7/2016

Testimony for HWN/JDL on Feb 8, 2016 13:15PM in Conference Room 016

Submitted By	Organization	Testifier Position	Present at Hearing
Diane Kanealii	Kailapa Community Association	Support	No

Comments: Please support the Department of Hawaiian Homelands ability to hire their own legal counsel in instances where there is a conflict of interest with the State Attorney General who represents that State of Hawaii's interest and therefore cannot act in the interest of the beneficiaries on Hawaiian Homelands. It is not possible for one person (AG) to represent 2 sides at the same time. Support DHHL's request for independent counsel. Mahalo

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From: mailinglist@capitol.hawaii.gov
To: [HWNTestimony](#)
Cc: keao@me.com
Subject: *Submitted testimony for SB2994 on Feb 8, 2016 13:15PM*
Date: Wednesday, February 03, 2016 7:33:40 AM

SB2994

Submitted on: 2/3/2016

Testimony for HWN/JDL on Feb 8, 2016 13:15PM in Conference Room 016

Submitted By	Organization	Testifier Position	Present at Hearing
Agnes Marti Kini	Individual	Support	No

Comments:

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From: mailinglist@capitol.hawaii.gov
To: [HWNTestimony](#)
Cc: hynmahi@yahoo.com
Subject: Submitted testimony for SB2994 on Feb 8, 2016 13:15PM
Date: Sunday, February 07, 2016 8:43:37 AM

SB2994

Submitted on: 2/7/2016

Testimony for HWN/JDL on Feb 8, 2016 13:15PM in Conference Room 016

Submitted By	Organization	Testifier Position	Present at Hearing
carol lee kamekona	Individual	Support	No

Comments: I strongly support the ability of the Hawaiian Homes Commission of the Department of Hawaiian Home Lands to acquire independent counsel as needed. DHHL is a state agency, therefore under the purview of the State of Hawaii. The Hawaiian Homes Commission and DHHL exist to provide for the betterment of the beneficiaries of the Hawaiian Homes Commission Act of 1920.

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To: [HWNTestimony](#)
Cc: kappywhite808@gmail.com
Subject: *Submitted testimony for SB2994 on Feb 8, 2016 13:15PM*
Date: Saturday, February 06, 2016 10:16:01 PM

SB2994

Submitted on: 2/6/2016

Testimony for HWN/JDL on Feb 8, 2016 13:15PM in Conference Room 016

Submitted By	Organization	Testifier Position	Present at Hearing
charlie white	Individual	Support	No

Comments:

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From: mailinglist@capitol.hawaii.gov
To: [HWNTestimony](#)
Cc: naregion9@gmail.com
Subject: *Submitted testimony for SB2994 on Feb 8, 2016 13:15PM*
Date: Tuesday, February 02, 2016 7:02:20 PM

SB2994

Submitted on: 2/2/2016

Testimony for HWN/JDL on Feb 8, 2016 13:15PM in Conference Room 016

Submitted By	Organization	Testifier Position	Present at Hearing
Derek Kimura	Individual	Support	No

Comments:

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To: [HWNTestimony](#)
Cc: dkanealii02@gmail.com
Subject: Submitted testimony for SB2994 on Feb 8, 2016 13:15PM
Date: Tuesday, February 02, 2016 8:31:54 PM

SB2994

Submitted on: 2/2/2016

Testimony for HWN/JDL on Feb 8, 2016 13:15PM in Conference Room 016

Submitted By	Organization	Testifier Position	Present at Hearing
Diane Kanealii	Individual	Support	No

Comments: Please note that the state's political priorities often compete and conflict with the priorities and interests of native Hawaiian beneficiaries; Currently the State AG has the sole discretion to allow the hiring of independent counsel when crucial questions arise in instances where the state and HHC interests can diverge: in the past, when dozens of illegal transactions resulted in the loss of trust lands from the DHHL inventory under gubernatorial executive orders that conflicted with provisions of the HHCA; where general fund budget appropriation are insufficient for the DHHL to operate effectively and the Governor or Budget and Finance do not agree where beneficiaries want to pursue commercial and business opportunities on HHCA trust lands as allowed under both sections 204 and 207, but state officials, including the Governor, have attempted to block such transactions; Other agencies with similar or lesser opportunities for experiencing conflicts of interest with state government have the right to hire independent counsel without prior approval of the State AG: e.g., OHA, Real Estate Commission, Insurance Division, Public Utilities Commission The State has expended millions of dollars litigating issues like the above, unnecessarily, had the HHC been given independent legal advice; The trust responsibility the State owes to beneficiaries demand this right to independent counsel at state expense

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From: mailinglist@capitol.hawaii.gov
To: [HWNTestimony](#)
Cc: mkhan@hawaiiantel.net
Subject: *Submitted testimony for SB2994 on Feb 8, 2016 13:15PM*
Date: Monday, February 08, 2016 6:57:37 AM

SB2994

Submitted on: 2/8/2016

Testimony for HWN/JDL on Feb 8, 2016 13:15PM in Conference Room 016

Submitted By	Organization	Testifier Position	Present at Hearing
Leimomi Khan	Individual	Support	No

Comments:

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Marion K A Kapuniai
P. O. Box 6753
Kamuela, Hawaii 96743

February 6, 2016

COMMITTEE ON HAWAIIAN AFFAIRS and COMMITTEE ON JUDICIARY AND LABOR

Hearing: Monday, February 8, 2016 1:15 p. m.

Conference Rm: 016 State Capitol, Hawaii

TESTIMONY ON SB 2994

RELATING TO HAWAIIAN HOMES

Allows the Hawaiian homes commission or the department of Hawaiian home lands to retain independent legal counsel, as needed. Authorizes the Hawaiian homes commission and the department of Hawaiian home lands to use the services of the attorney general as needed and when the interests of the State, Hawaiian homes commission and the department of Hawaiian home lands are aligned. Provides that funds paid to independent legal counsel shall be paid by the State. Effective June 30, 2016.

I testify to SUPPORT SB 2994 with amendment.

In my humble opinion, the Attorney General's Office has not done an exemplary job in advising the Department of Hawaiian Homes Lands nor the Hawaiian Homes Commissioners on approval for action items which directly conflict with the law. One example I refer to, action taken December, 2014, Item F-7:

*The Discussion and Proposed Revocable Permit Program submission **only stated portions of HHCA, Section 204(a) and HRS Section 171-55**, to justify approval of the following position statement:*

- 1) *All available Hawaiian home lands that are not immediately required for native Hawaiian homesteading, general leasing, and/or other purposes for long-term durations **shall be available to the general public** for month-to-month tenancy through the issuance of revocable permits;
WRONG!!!! UNACCEPTABLE!!!*

The department included this statement in their 2014 Annual Report, Land Management Division, without having conducted Beneficiary Consultation as directed and without Final approval of the Revocable Permit Program, by the Hawaiian Homes Commission.

In my humble opinion, the testimony provided for HB2178 by THE DEPARTMENT OF THE ATTORNEY GENERAL, RELATING TO INDEPENDENT LEGAL COUNSEL is condescending. In the above example of ineptness, which ultimately decreases rights of beneficiaries of the HHCA, vigorous representation of the law, experience, and expertise was not exemplified. Private attorneys **fight for their clients**, within the confines of the law. **Actually, the bill should be amended to include independent counsel for the Hawaiian Homes Commission, the Beneficiary Class, and the Department of Hawaiian Homes Lands, to dispel any cloud of conflict of interest.**

We have identical kuleana – to SERVE and REPRESENT, WITHIN THE CONFINES OF THE LAW.

It is my kuleana (responsibility, right, and privilege) to participate!

Thank You, M Kapuniai,
Waimea, Moku O Keawe

Phone: (808) 936-0157
Email: duke@sandwichisles.net

From: mailinglist@capitol.hawaii.gov
To: [HWNTestimony](#)
Cc: moikehajr@gmail.com
Subject: Submitted testimony for SB2994 on Feb 8, 2016 13:15PM
Date: Sunday, February 07, 2016 2:13:13 PM

SB2994

Submitted on: 2/7/2016

Testimony for HWN/JDL on Feb 8, 2016 13:15PM in Conference Room 016

Submitted By	Organization	Testifier Position	Present at Hearing
Roger Kanealii	Individual	Support	No

Comments: The Department of Hawaiian Homelands needs to have the ability to hire their own legal counsel in instances where there is a conflict of interest. Support DHHL's request for independent counsel. Mahalo

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