TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
THIRTIETH LEGISLATURE, 2019

ON THE FOLLOWING MEASURE:
S.B. NO. 921, S.D. 2, RELATING TO THE DEPARTMENT OF THE ATTORNEY GENERAL.

BEFORE THE:
HOUSE COMMITTEE ON JUDICIARY

DATE: Thursday, March 21, 2019 **TIME:** 2:05 p.m.

LOCATION: State Capitol, Room 325

TESTIFIER(S): Clare E. Connors, Attorney General, or
Ryan K. P. Kanaka'ole, Deputy Attorney General,

Chair Lee and Members of the Committee:

The Department of the Attorney General (Department) appreciates the intent of this bill but has strong concerns.

The bill amends section 26-7, Hawaii Revised Statutes (HRS), to create a division within the Department that is required to be staffed with attorneys and others with formal education in Hawaiian language and culture, to provide legal advice on Hawaiian shoreline public access rights.

Section 26-7 designates the Attorney General as the single executive responsible for the Department that administers and renders state legal services, including the management of Department personnel tasked with providing these services. By requiring specific staffing with particular qualifications, S.B. No. 921 would impinge upon this authority and unnecessarily restrict the Attorney General's management of the Department.

We acknowledge that an understanding of Hawaiian language and culture may at times be necessary to analyze certain issues encountered by the Department. That is why, in the event shoreline access issues require specialized knowledge in Hawaiian language and culture, we have and will continue to rely on the expertise of personnel already employed by the Department or other state agencies. If necessary, the

Department could also retain expert consultants and witnesses on a case-by-case basis.

We respectfully ask that the Committee recognize and support the management authority of the Attorney General and hold this bill.

Thank you for the opportunity to provide these comments.

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Unity, Equality, Aloha for all

To: HOUSE COMMITTEE ON JUDICIARY

For hearing Thursday, March 21, 2019

Re: SB 921 SD2 RELATING TO THE DEPARTMENT OF THE ATTORNEY GENERAL.
Creates a division within the Department of the Attorney General to provide legal advice regarding Hawaiian shoreline public access rights. Makes an appropriation. Effective 3/15/2094. (SD2)

TESTIMONY IN OPPOSITION

The primary purpose of this bill is found in Section 2(d), proposing to establish a new division in the department of the attorney general, headed by at least 3 deputy AGs, specifically to focus on advising and enforcing shoreline access rights and "the traditional Hawaiian rights to gather firewood, house timber, aho cord, thatch, and ki leaf; to access

drinking water and running water; to have right of way to the ocean and shoreline; any other such rights so recognized; and any related or similar rights." The 3 new deputy AGs must each have "at least four years of formal education in the Hawaiian language and Hawaiian culture. The division shall also have one or more staff members who have at least a baccalaureate degree in Hawaiian studies, Hawaiian history, or the equivalent, to assist the division's attorneys."

WOW!

The main reason for opposing this bill is that it FALSELY presumes that shoreline access and gathering rights are racially exclusive or race-based. Most of this testimony will focus on that issue.

A second reason for opposing this bill is that there is no evidence that there is current litigation on shoreline access or the PASH gathering rights that would make it necessary to have three permanent highly-paid deputy AGs focused on this area of the law; and it seems unlikely that there would be such a large volume of litigation in the foreseeable future that would warrant creating such a bloated bureaucracy.

A third reason for opposing this bill is that the PASH decision of 1995 was written in English. There's nothing in it that requires the use of Hawaiian language.

Shoreline access is a right long enjoyed by ALL HAWAII'S PEOPLE REGARDLESS OF RACE. There's no need to adopt a racist attitude toward it. Instead of interpreting the gathering rights described in PASH to be based on race, why not regard those rights as belonging to all Hawaii's people. The PASH gathering rights were practiced by native Hawaiians before Captain Cook arrived, and continued to be available to all residents including newcomers of Caucasian, Asian, and African ancestry. Those rights run with the land, not with any racial group exclusively.

Should Hawaii now become like Mississippi and Alabama during the era of Jim Crow laws, when there were drinking fountains and lunch counters with signs saying "Whites only"? Here in Hawaii will we think it's OK to ask people for proof they are racially Hawaiian before we allow them to go to the beach or to gather fiber, flowers or ferns?

Shoreline access and gathering rights were affirmed by the Hawaii Supreme Court in the PASH decision of 1995 (Public Access Shoreline Hawaii). According to that decision Native Hawaiians have a right to access the shoreline, or to gather certain plants, even if doing so is accomplished by trespassing through undeveloped or partially developed land, subject to regulation by the State. But there's nothing in that decision that restricts shoreline access or gathering rights to the racial group who are descendants of residents from before Captain Cook's arrival. The PASH decision recognizes that that racial group has those rights, but the decision does not prohibit the interpretation that those rights run with the land regardless of the race of the land owner or the race of the person seeking access or gathering; and the PASH decision certainly does not prohibit the State from extending such rights to everyone. DO NOT ALLOW RACIAL APARTHEID IN OUR ALOHA STATE.

The PASH decision is based on the concept that the bundle of rights obtained when purchasing fee-simple land in Hawaii (including the right to exclude trespassers) is limited by the rights possessed by tenants (residents) of the ahupua'a before Captain Cook's arrival, or certainly before the Mahele started in 1848. When land is sold or inherited, the land comes infused with the rights granted to tenants in the Mahele; and those special rights make land ownership in Hawaii very different from the other 49 states.

The word for "tenant" under the Mahele is "hoa'aina" which has no racial designation. It literally means "friend of the land" or refers to someone familiar with the land; i.e., a resident of the ahupua'a rather than an outsider. There is no such thing as "NATIVE tenant rights"

despite attempts by sovereignty activists to insert the racial designator.

We are free to adopt the realization that access and gathering rights under the PASH decision belong to all Hawaii's people equally regardless of race. So far as I am aware there has never been a court decision saying that PASH rights are exclusively for ethnic Hawaiians. The demand to have racial exclusivity has not been the focus of litigation, simply because racial exclusivity has been the automatically presumed default in Hawaii. How sad! For further analysis of the PASH decision see Paul M. Sullivan, Esq., "Customary Revolutions -- The Law of Custom and the Conflict of Traditions in Hawaii" published at 20 University of Hawaii Law Review 99 (1998); available at https://tinyurl.com/23668n

If rights are deemed to be officially and explicitly granted to only one group of people, does that prohibit those rights from being extended also to all the rest of the people? The ruling in a Hawaii lawsuit (Day v. Apoliona) says there's no problem in extending the rights. Because if the rights are given to everyone, then those rights will thereby be given to the particular group originally designated to have them.

If a law or regulation provides money explicitly for the benefit of native Hawaiians with native blood quantum higher than 50%, is it lawful to provide that money to Native Hawaiians whose blood quantum is below 50%? Hawaii courts have ruled that it's OK to do that. If benefits are designated for a smaller group, then it's perfectly legal to provide those benefits to a more inclusive larger group which includes that smaller group inside it. Presumably the same legal arguments would allow the State to extend the same benefits to all citizens regardless of race, because the set of all citizens includes the subset of all Native Hawaiians regardless of blood quantum, which in turn includes the sub-subset of all native Hawaiians with blood quantum higher than 50%.

The lawsuit Day v. Apoliona arose because Section 5(f) of the Hawaii Statehood Act of 1959 required that ceded land revenues could be spent for any one or more of 5 purposes. One of those purposes was "the betterment of native Hawaiians as defined in the Hawaiian Homes Commission Act of 1920" (i.e., at least 50% native blood quantum). When OHA was created in the State Constitutional Convention of 1978, the legislature then funded OHA by giving it 20% of all revenue from the ceded lands. But as time went by OHA was spending that money on projects for all Native Hawaiians regardless of blood quantum -- such projects as creating a racial registry, lobbying for the Akaka bill, loans for small-business, etc. A group of high-quantum native Hawaiians filed a lawsuit saying that spending ceded land money on low-quantum Hawaiians violated the Statehood Act. But the courts ruled it was OK, because the high-quantum beneficiaries were included as a subgroup of all Native Hawaiians. See "Day v. Apoliona" at https://tinyurl.com/yo2ovk

Please stop enacting racist laws. The U.S. Constitution 14th Amendment Equal Protection Clause, and the 5th Amendment, and the Civil Rights Act of 1964, and many other federal laws guarantee equal rights under the law for all persons in the U.S. regardless of race. The Supremacy clause of the U.S. Constitution says that whenever a federal law conflicts with a state law, the federal law takes priority and renders any conflicting state law moot.

But must we make legal arguments and threaten litigation? Surely there's a better way. We in Hawaii claim to be governed by a higher moral and spiritual concept -- The Aloha Spirit. It is contrary to the Aloha Spirit to demand that traditional and customary practices are the exclusive property of any racial group and should be denied to others who lack a drop of the magic blood. Only a heart filled with hate would contemplate racial exclusivity or apartheid.

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Testimony for JUD on 3/21/2019 2:05:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Benton Kealii Pang, Ph.D.	Individual	Support	No

Comments: