



**TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
KA 'OIHANA O KA LOIO KUHINA
THIRTY-SECOND LEGISLATURE, 2024**

ON THE FOLLOWING MEASURE:

S.B. NO. 2655, RELATING TO THE HAWAIIAN HOMES COMMISSION.

BEFORE THE:

SENATE COMMITTEE ON HAWAIIAN AFFAIRS

DATE: Tuesday, January 30, 2024 **TIME:** 1:00 p.m.

LOCATION: State Capitol, Room 224 and Videoconference

TESTIFIER(S): Anne E. Lopez, Attorney General, or
Jordan A. K. Ching, Deputy Attorney General

Chair Shimabukuro and Members of the Committee:

The Department of the Attorney General opposes this bill.

The purpose of this bill is to allow the Hawaiian Homes Commission (HHC) to hire its own attorneys without the approval or participation of the Attorney General or the Governor. This bill also requires the HHC to pay the legal fees owed to the attorneys it hires with general funds appropriated by the Legislature. The bill also appropriates an unspecified amount of general funds for fiscal year 2024-2025 to pay the independent legal counsel hired by the HHC.

The Attorney General serves as legal counsel to the State of Hawai'i, which statutory legal obligation includes providing legal services to state agencies. Because it is the largest legal entity of the State, with a number of diverse divisions, the Department of 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 utilizing attorneys representing state agencies within the Department of 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 HHC would not possess the necessary breadth of knowledge and experience available with the Department of the Attorney General. Additionally, because the 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 Hawaiian Home Lands (DHHL), which is headed by the HHC, is also one of the nineteen principal departments of the executive branch of state government. The exposure to liability as a result of actions taken by departments on matters with significant legal and financial implications to the State makes it essential that the Department of the Attorney General be able to provide the necessary representation and counsel.

The Department of the Attorney General is also unique in its ability under the law to undertake concurrent representation of multiple state agencies or parties 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 or employees that have competing interests as long as it establishes appropriate safeguards, such as 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 the HHC and DHHL.

Notwithstanding the prohibition against employing or retaining private attorneys, state agencies may submit a waiver request to the Attorney General under section 28-8.3(a)(24), 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,

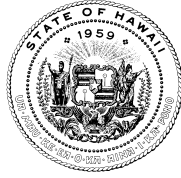
provided that the Governor also waives the provision of section 28-8.3, HRS. Indeed, this avenue has been exercised by the DHHL in the past, without incident.

Further, the HHC is not an independent legal entity separate from DHHL. Rather, the HHC is the government board that heads DHHL. See section 202, Hawaiian Homes Commission Act, and section 26-17, HRS (DHHL “shall be headed by an executive board to be known as the Hawaiian homes commission.”). This is the same as other State departments headed by executive boards, such as the Department of Education (section 26-12, HRS), Department of Land and Natural Resources (section 26-15, HRS), and the Department of Agriculture (section 26-16, HRS). The HHC therefore cannot be an expending agency of a general fund appropriation.

For these reasons, we respectfully request that this bill be held in committee. Thank you for the opportunity to testify.

JOSH GREEN, M.D.
GOVERNOR
STATE OF HAWAII
*Ke Kia'āina o ka Moku'āina 'o
Hawaii*

SYLVIA J. LUKE
LT. GOVERNOR
STATE OF HAWAII
*Ka Hope Kia'āina o ka Moku'āina
'o Hawaii*



KALI WATSON
CHAIRMAN, HHC
Ka Luna Ho'okele

KATIE L. DUCATT
DEPUTY TO THE CHAIRMAN
Ka Hope Luna Ho'okele

STATE OF HAWAII
DEPARTMENT OF HAWAIIAN HOME LANDS

Ka 'Oihana 'Āina Ho'opulapula Hawaii'i

P. O. BOX 1879
HONOLULU, HAWAII 96805

**TESTIMONY OF KALI WATSON, CHAIRMAN
HAWAIIAN HOMES COMMISSION
BEFORE THE SENATE COMMITTEE ON HAWAIIAN AFFAIRS
HEARING ON JANUARY 30, 2024 AT 1:00PM IN CR 224**

SB 2655, RELATING TO THE HAWAIIAN HOMES COMMISSION

January 30, 2024

Aloha Chair Shimabukuro, Vice Chair Fevella, and members of the Committee:

The Department of Hawaiian Home Lands (DHHL) strongly supports this bill which 1) allows the Hawaiian Homes Commission (HHC) to retain independent legal counsel, 2) authorizes the HHC to use the services of the Attorney General as needed, and 3) provides that funds owed to independent legal counsel be paid by the HHC with general funds appropriated by the legislature.

The HHC has a trust duty to its beneficiaries and in the fulfillment of this trust obligation, the HHC may at times be at odds with the interests of the State. It is at these times that the HHC must be assured that its counsel provides legal advice strictly in the interest of its client. Independent counsel that is hired and retained by the HHC eliminates any cloud of uncertainty that there is a conflict of interest as a result of representation by the Attorney General's office that also represents the State of Hawaii.

The HHC is unique in its genesis through the Hawaiian Homes Commission Act, 1920, as amended, enacted by Congress, and subsequently incorporated as a provision of the State Constitution as a condition of statehood. Because of this history, the HHC should be allowed to retain independent legal counsel to ensure the trust obligation is being upheld and not be subject to seeking a waiver request each time the need for independent counsel arises.

At the same time, allowing the HHC to use the services of the Attorney General as needed provides the HHC the benefit of the Attorney General's expertise representing state agencies that are regulated by a variety of laws including but not limited to the Procurement Code, the Sunshine Law, and the Uniform Information Practices Act.

Thank you for your consideration of our testimony.

SB-2655

Submitted on: 1/29/2024 3:18:33 PM

Testimony for HWN on 1/30/2024 1:00:00 PM

Submitted By	Organization	Testifier Position	Testify
De MONT Kalai Manaole	Testifying for Ho'omana Pono, LLC	Support	In Person

Comments:

We **STRONGLY SUPPORT** this bill, as it will finally remove the CLEAR conflict of interest with the AG's office representing both DHHL & the HCC.

SB-2655

Submitted on: 1/27/2024 9:33:58 AM

Testimony for HWN on 1/30/2024 1:00:00 PM

Submitted By	Organization	Testifier Position	Testify
Kenneth R. Conklin, Ph.D.	Testifying for Center for Hawaiian Sovereignty Studies	Comments	Written Testimony Only

Comments:

Amend to delete "funds owed to independent legal counsel shall be paid by the State." Yes DHHL as a government agency should be allowed to use the services of the Attorney General. However, the reason for them wanting to hire independent counsel is if they are suing the state, which is what would cause a conflict of interest. In that case, let them pay their own way -- this would incentivize them to resolve their dispute through either mediation or arbitration.