



TESTIMONY OF THE STATE ATTORNEY GENERAL TWENTY-FOURTH LEGISLATURE, 2008

ON THE FOLLOWING MEASURE:

S.B. NO. 3200, S.D. 1, RELATING TO GOVERNMENTAL RETENTION OF ATTORNEYS.

BEFORE THE:

HOUSE COMMITTEE ON JUDICIARY

DATE: Tuesday, March 25, 2008 **TIME:** 4:05 PM

LOCATION: State Capitol Room 325

Deliver to: , Room 302, 5 copies

TESTIFIER(S): Mark J. Bennett, Attorney General
or Charleen M. Aina, Deputy Attorney General

Chair Waters and Members of the Committee:

The Attorney General opposes the passage of this bill.

This bill forces the Attorney General to represent a state department, board, commission, agency, bureau, or officer of the State, including the Legislature and the Judiciary, at the expense of the Department of the Attorney General, irrespective of whether (1) the department or officer is authorized by section 28-8.3, Hawaii Revised Statutes, to contract for legal services directly, or (2) the requested representation is inconsistent with the rules relating to conflicts of interest under the Rules of Professional Conduct or would foreclose the Attorney General from presenting a different position on behalf of the State, another state department or officer, or in the "public interest," in the future.

The bill also leaves departments without separate authority to employ or retain an attorney, with no means of retaining one, when the Attorney General declines to represent them for reasons other than a conflict. This is because the bill's approach is to essentially repeal an existing provision - for no apparent reason - instead of just leaving that provision alone, and adding a new section to the existing statute, if such a new section is really necessary.

If the objective of this bill is to provide independent counsel for state departments and officers when the Attorney General is barred by a conflict from advising or representing them, this bill is unnecessary, as the Judiciary and the Legislature already have the independent authority to retain attorneys without the consent of the Attorney General, and Executive Branch departments are permitted to hire their own attorneys if the Attorney General and the Governor agree.

To serve effectively as the State's chief legal officer, the Attorney General must be able to independently determine when he or she is permitted under the Rules of Professional Conduct to represent a department or officer of the State, and how the resources appropriated to the department will be used to further those interests. The budget of the Department of the Attorney General cannot be put at the mercy of another department or agency, and the Attorney General's ability to perform the statutory and common law duties of the office should not be limited or compromised by even an attempt to divert those resources for other purposes.

Thus, while we would prefer no bill, if this Committee is nonetheless inclined to pass out a bill with provisions similar to those it included in H.B. No. 3386, H.D. 1, rather than require the Attorney General to retain an attorney for the Judiciary or the Legislature at the Attorney General's expense, the Attorney General respectfully suggests the following revisions to S.B. No. 3200, S.D. 1, to permit the court, or judicial or legislative office to retain and pay for an attorney's services directly. First, only section 28-8.3(a)(2), Hawaii Revised Statutes, should be amended and only to provide as follows:

- (2) By any court or judicial or legislative office of the State; provided that, if the court or office is required to retain an attorney because the attorney general has declined to provide representation on the grounds of a conflict of interest, to the extent funds appropriated for

this purpose are available, the attorney general shall transfer funds appropriated to the attorney general for this purpose to the court or office to pay for the services of the attorney the court or office retains; Second, a new section 2 should be added to the bill to include an appropriation to pay for the services of private counsel should the Attorney General be precluded by a conflict of interest from representing the Judiciary or the Legislature, and hiring private counsel to act in the Attorney General's place:

SECTION 2. There is appropriated out of the general revenues of the State of Hawaii the sum of \$ or so much thereof as may be necessary for fiscal year 2008-2009 to pay for the services of attorneys retained directly by a court or office pursuant to section 28-8.3(a)(2), Hawaii Revised Statutes, in the event the attorney general declines to provide representation on the grounds of a conflict of interest.

The sum appropriated shall be expended by the department of the attorney general exclusively to implement the provisions of section 28-8.3(a)(2) and only by transferring amounts to a court or judicial or legislative office for that purpose.

If, however, this approach is also unacceptable, we favor a bill as limited in scope as possible, that provides at least some checks and balances to any requirement that unlimited resources of the Department of the Attorney General be placed at the direction of other departments.



TESTIMONY OF MARION M. HIGA, STATE AUDITOR, ON SENATE BILL NO. 3200,
SENATE DRAFT 1, RELATING TO GOVERNMENT RETENTION OF ATTORNEYS

House Committee on Judiciary
March 25, 2008

Chair Waters and Members of the Committee:

Thank you for this opportunity to testify in support of this bill, which clarifies responsibilities in certain limited instances. The bill would require the Department of the Attorney General to retain counsel for a department in the event of a conflict situation—that is, if the attorney general declines representation in the face of a conflict, the department may waive the conflict and require the attorney general's representation. And, if the attorney general declines representation and the department does not waive the conflict, the attorney general will be required to retain counsel for the department, subject to the department's approval. For the purposes of this section of the statutes, "department" is defined to include the Legislature and the Judiciary.

We support this bill because it would address situations we have encountered in our work. For example, when we have audited the Department of the Attorney General and its attached agencies, we have faced issues that required legal consultation. The Child Support Enforcement Agency audits come easily to mind. In another example, as part of our staff work last year for the Joint Senate-House Investigative Committee on the Bureau of Conveyances, we found ourselves very much at odds with the position of the attorney general over our access to records and the entire issue of privilege.

This is not to say, however, that in every instance is there a need for non-AG counsel. Over the years, the Department of the Attorney General has willingly provided its deputy attorneys general to assist us in legal matters, especially where there is no conflict issue, and we believe we have been ably advised.

Although the statutes already allow us to hire our own attorneys, and we do, we are not routinely budgeted for nor do we have on staff the kind of specialized expertise that complex or protracted litigation would require. In such situations, the statutory change as proposed in this bill would clarify that the responsibility to serve as the State's attorney rests with the attorney general but also gives the affected department some say in securing the alternate counsel.

For the reasons above, I urge your favorable consideration of S.B. 3200, S.D. 1.