

HB 1728



**TESTIMONY OF THE STATE ATTORNEY GENERAL
TWENTY-FIFTH LEGISLATURE, 2009**

LATE

ON THE FOLLOWING MEASURE:

H.B. NO. 1728, H.D. 1, S.D. 1, RELATING TO FEES.

BEFORE THE:

SENATE COMMITTEE ON WAYS AND MEANS

DATE: Friday, April 3, 2009 **TIME:** 9:45 AM

LOCATION: State Capitol, Room 211

TESTIFIER(S): WRITTEN TESTIMONY ONLY

(For further information, please contact James F. Nagle,
Deputy Attorney General, at 586-1197.)

Chair Kim and Members of the Committee:

The Department of the Attorney General has concerns regarding this bill.

This bill attempts to address concerns arising from the recent Hawaii Supreme Court case of *Hawaii Insurers Council v. Lingle*, ___ Hawai'i ___, 2008 WL 5255926 (Hawai'i) (hereinafter "*Hawaii Insurers Council*"). In *Hawaii Insurers Council*, in pertinent part, the Hawaii Supreme Court determined that the Legislature did not have the power to transfer \$3.5 million in regulatory fees, set by the Insurance Division, from the Compliance Resolution Fund to the general fund. The Court found that, by transferring those moneys, the Legislature treated those regulatory fees as general tax revenues and that the transfer of those moneys violated the separation of powers doctrine.

The power of taxation is a legislative power, whereas the executive branch has the power to assess regulatory fees but not to tax. *Hawaii Insurers Council* at 7. The Court found that the Legislature's transfer sought to transform \$3.5 million of legitimate regulatory fees into general tax revenues, thus resulting in an "impermissible blurring of the distinction between the executive power

to assess regulatory fees and the legislative power to tax for general purposes." *Hawaii Insurers Council* at 20.

This bill attempts to address this issue by having the Legislature determine the amounts of departmental and agency fees. By having the Legislature, rather than the departments and agencies, set the fees, this bill attempts to address the separation of powers doctrine to ensure that fee moneys may be transferred to the general fund in the future.

However, the bill's approach to this issue may create further problems. The bill attempts to impose a one-size-fits-all type of fee. This approach may not work. There may be instances where the fee imposed by this bill does not adequately cover the costs of the services that are provided by the department or agency. The department or agency might then run into a deficit position during the next fiscal year. Alternatively, the generic type of fee set in this bill may be quite disproportionate when applied to different situations. For example, the licensing fee set in section 1(2) of the bill appears to be the same for beauty operators and medical doctors.

Also, although section 41 of this bill contains a type of "savings clause" that attempts to maintain the status quo, that may not be enough. There may in fact be conflicts between the administrative fees that remain in effect versus the statutory fees that are imposed by this bill. In that instance, the statutory fees would take precedence over the current administrative fees.

It is important that any fee set this way be carefully targeted and not conflict with the existing fee structure, which section 41 attempts to maintain, at least in the short term.