



**TESTIMONY OF  
THE DEPARTMENT OF THE ATTORNEY GENERAL  
TWENTY-FIFTH LEGISLATURE, 2010**

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**ON THE FOLLOWING MEASURE:**

H.B. NO. 1034, RELATING TO CIVIL ACTIONS.

**BEFORE THE:**

HOUSE COMMITTEE ON JUDICIARY

**DATE:** Tuesday, February 23, 2010 **TIME:** 2:00 p.m.

**LOCATION:** State Capitol, Room 325

**TESTIFIER(S):** Mark J. Bennett, Attorney General, or  
Charleen M. Aina, Deputy Attorney General, or  
Dierdre Marie-Iha, Deputy Attorney General

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Chair Karamatsu and Members of the Committee:

The Attorney General strongly supports this bill.

The Hawaii Supreme Court has repeatedly held that the State is protected by its sovereign immunity except where there has been a "clear relinquishment of immunity and the State has consented to be sued." See, e.g., Pele Defense Fund v. Paty, 73 Haw. 578, 607, 837 P.2d 1247, 1265 (1992).

This bill amends section 661-1 (1), Hawaii Revised Statutes, by adding a proviso to more clearly say that claims for damages that are based on a state statute can be made against the State, only if the Legislature includes language in that statute that "clearly relinquish[es the State's] sovereign immunity," Office of Hawaiian Affairs v. State, 110 Haw. 338, 357-58 (2006), and permits the State to be sued for damages.

The amending language is completely consistent with this firmly established principle that only "statutory text" enacted by the Legislature can manifest and define the State's waiver of sovereign immunity. OHA v. State, 110 Haw. at 357-358 (2006); Chun v. Board of Trustees of the ERS, 106 Haw. 416, 432 (2005); Taylor-Rice v. State, 105 Haw. 104, 110 (2004).

The provisions of this section shall not apply to attorney's fees imposed as sanctions pursuant to court rules."

Including this section in chapter 661, Hawaii Revised Statutes, will assure that decisions to subject the State's treasury to claims and obligations to pay attorney's fees or judgment interest, are made by the Legislature, and only by duly enacted statutes. It will also rescind the Supreme Court's recent adoption of the private attorney general doctrine as the common law of the State.

This bill reaffirms the well-established principle of separation of powers that only the Legislature may waive the State's inherent sovereign immunity from suits for money damages, attorney's fees, and judgment interest.

The Attorney General respectfully urges that this bill be passed with the recommended amendments.

The amendment should eliminate any need for a court to infer that the State's sovereign immunity has been waived, or to extend a waiver beyond the limits the Legislature determined was appropriate. There also should be fewer occasions for litigants and the courts to interpret or apply a statute in ways neither intended, nor contemplated by the Legislature.

Because these principles are equally applicable to awards of attorney's fees and interest against the State, see Chun v. ERS, we respectfully request that a new section 2 be added to this bill for the purpose of including an equally clear statement in chapter 661, that the courts may award attorney's fees or assess judgment interest against the State, only when the Legislature has enacted a statute that expressly permits fees or interest to be assessed. We suggest the Committee use the following language for that purpose:

SECTION 2. Chapter 661, Hawaii Revised Statutes, is amended by adding a new section to be appropriately designated and to read as follows:

**"§661- Award of attorney's fees or interest against the State.** Any law, including any common-law principle of law, to the contrary notwithstanding, no attorney's fees or interest may be assessed or recovered from the State, its agencies, or its officials in any civil or administrative action or proceeding unless an award or a recovery is specifically authorized by a statute that both explicitly waives the State's sovereign immunity and expressly permits the award or recovery of attorney's fees or interest as the case may be, irrespective of whether the attorney's fees or interest are awarded or assessed (1) as damages, costs, a reimbursement, or an offset; (2) pursuant to the private attorney general doctrine; or (3) by any other means.