

**TESTIMONY OF ROBERT TOYOFUKU ON BEHALF OF THE HAWAII  
ASSOCIATION FOR JUSTICE (HAJ) formerly known as the CONSUMER  
LAWYERS OF HAWAII (CLH) IN OPPOSITION TO H.B. NO. 1034**

February 23, 2010

To: Chairman Jon Riki Karamatsu and Members of the House Committee on Judiciary:

My name is Bob Toyofuku and I am presenting this testimony on behalf of the Hawaii Association for Justice (HAJ) in opposition to H.B. No. 1034.

The provisions of this bill significantly change the current law in Hawaii and do not merely make explicit the requirement of the Hawaii Supreme Court that a waiver of sovereign immunity be unequivocally stated in state statutes. The waiver of sovereign immunity based on state statutes is unequivocally stated in Section 661-1. Section 661-1 does not require that each underlying statute repeat the unequivocal waiver of sovereign immunity already contained in Section 661-1.

This measure would require that every state statute now contain an express unequivocal waiver of sovereign immunity. This would take an entire recodification of the Hawaii Revised Statutes to insert such unequivocal waivers of sovereign immunity in statutes that have heretofore been promulgated without such waivers because they would be redundant of the unequivocal waiver already found in Section 661-1.

As this committee knows, it is the current practice to instead expressly preserve immunity when it is intended that statutory provisions be exempt from the general waiver of sovereign immunity in Section 661-1. This Bill basically turns that practice upside down and will have the consequence of excluding statutes from Section 661-1 that were never intended to be excluded.

The Hawaii Supreme Court decision in *Chun v. Board of Trustees of the Employees' Retirement System*, 106 Hawaii 416 (2005), does not require that all state statutes unequivocally waive sovereign immunity in order to fall within the jurisdictional waiver of Section 661-1. The waiver of sovereign immunity contained in Section 661-1 is a sufficient unequivocal waiver **provided that the statute applies to the State**. In that regard, the decision held that “*statutory laws of general application are not applicable to the State unless the legislature in the enactment of such laws made then explicitly applicable to the State.*” 106 Hawaii at 433. Under longstanding practice, only statutes explicitly applicable to the state fall within the sovereign immunity waiver of Section 661-1; unless immunity has been preserved for specific statutes.

If this statutory framework is to be changed, then it should be done prospectively so the legislature can consider whether sovereign immunity should be waived or preserved as it considers future legislation. It should not have a retroactive application to statutes that were promulgated on the assumption that sovereign immunity was waived unless expressly preserved.

This bill is a radical change in policy and I urge this committee to do a thorough analysis to consider the need for such legislation, and if so, whether more specific and less drastic measures are more appropriate. Because of the reasons stated above, HAJ strongly opposes this bill and requests that it not pass out of this committee.

Thank you for the opportunity to testify.