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**A BILL FOR AN ACT**

RELATING TO ACTIONS BY AND AGAINST THE STATE.

**BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:**

1           SECTION 1. Section 661-1, Hawaii Revised Statutes, is  
2 amended to read as follows:

3           "§661-1 Jurisdiction. The several circuit courts of the  
4 State and, except as otherwise provided by statute or rule, the  
5 several state district courts shall, subject to appeal as  
6 provided by law, have original jurisdiction to hear and  
7 determine the following matters, and, unless otherwise provided  
8 by law, shall determine all questions of fact involved without  
9 the intervention of a jury[-]:

10           (1) All claims against the State founded upon any statute  
11 of the State; or upon any regulation of an executive  
12 department; or upon any contract, expressed or  
13 implied, with the State, and all claims which may be  
14 referred to any such court by the legislature;  
15 provided that no action shall be maintained, nor shall  
16 any process issue against the State, based on any  
17 contract or any act of any state officer which the  
18 officer is not authorized to make or do by the laws of

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1 the State, nor upon any other cause of action than as  
2 herein set forth[-]; and provided further that a claim  
3 founded upon a statute of the State is within the  
4 original jurisdiction of the courts only if, in the  
5 text of the separate statute upon which the claim is  
6 founded, the State has unequivocally waived its  
7 sovereign immunity for the claim.

8 (2) All counterclaims, whether liquidated or  
9 unliquidated, or other demands whatsoever on the part  
10 of the State against any person making claim against  
11 the State under this chapter."

12 SECTION 2. Statutory material to be repealed is bracketed  
13 and stricken. New statutory material is underscored.

14 SECTION 3. This Act shall take effect upon its approval.

15  
16 INTRODUCED BY: Calvin H. Day  
17 BY REQUEST

JAN 23 2012

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**Report Title:**

Actions By State; Actions Against State

**Description:**

Clarifies that section 661-1, Hawaii Revised Statutes, only waives the State's sovereign immunity with respect to a claim "founded upon a statute," if the Legislature has unequivocally waived the State's immunity in a separate statute.

*The summary description of legislation appearing on this page is for informational purposes only and is not legislation or evidence of legislative intent.*

JUSTIFICATION SHEET

DEPARTMENT: Attorney General

TITLE: A BILL FOR AN ACT RELATING TO ACTIONS BY AND AGAINST THE STATE.

PURPOSE: The purpose of this bill is to clarify that section 661-1, Hawaii Revised Statutes, only waives the State's sovereign immunity, with respect to a claim "founded upon a statute," if the Legislature has unequivocally waived the State's immunity in a separate statute. This bill preserves the separation of powers principle that only the Legislature may waive the State's inherent sovereign immunity from suits for retrospective money damages.

MEANS: Amend section 661-1, Hawaii Revised Statutes.

JUSTIFICATION: Section 661-1, Hawaii Revised Statutes, contains the Legislature's waiver of the State of Hawaii's sovereign immunity for "All claims against the State founded upon any statute of the State . . . ."

This bill specifically amends paragraph (1) of section 661-1 by adding the following clarifying language: "and provided further that a claim founded upon a statute of the State is within the original jurisdiction of the courts only if, in the text of the separate statute upon which the claim is founded, the State has unequivocally waived its sovereign immunity for the claim."

This bill thus clarifies that the "founded upon a statute" clause of section 661-1 is not itself an "immunity-waiving" provision; it does not, on its own, waive the State's immunity from all suits against the State for back damages. Rather, the State's

immunity is only waived when the Legislature unequivocally expresses its intent to waive the State's immunity in the language of the separate statute upon which the claim is founded.

In recent years, plaintiffs attempting to sue the State have commonly misread the "founded upon any statute" language as by itself waiving the State's immunity from suit for back damages, without looking to whether the Legislature has expressly waived the State's immunity from suit within the language of the separate statute pursuant to which the claim is brought. Whenever the statute is misread in this way, the door is opened to unnecessary litigation. The State must expend substantial money and allocate scarce resources to defend itself against these improper lawsuits. The proposed amendment will ensure that section 661-1 unequivocally says what the Legislature has intended it to mean, thus minimizing the potential for unnecessary lawsuits.

The proposed amendment to section 661-1 is consistent with the Hawaii appellate courts' correct statutory interpretation of the existing "founded upon any statute" language of this statute.

In Garner v. State of Hawaii, 122 Haw. 150, 223 P.3d 215 (2009), for example, the Intermediate Court of Appeals recently concluded that the State's waiver of immunity, pursuant to the "founded upon any statute" language, "does not extend to every claim that might be predicated upon any law. It applies only when the underlying law clearly and unequivocally mandates a waiver." Id. at 162, 227.

The Hawaii Supreme Court has consistently held that the State's liability is limited by its sovereign immunity, except where there has been a "clear relinquishment of immunity and the State has consented to be

sued." E.g., Pele Defense Fund v. Paty, 73 Haw. 607, 837 P.2d 1247, 1365 (1992). As to a waiver of immunity for a claim founded upon any statute, the Hawaii Supreme Court has repeatedly recognized that, among other things, "a waiver of sovereign immunity must be unequivocally expressed in statutory text." E.g., Chun v. Board of Trustees of the ERS, 106 Haw. 416, 106 P.3d 339 (Haw. 2005)

Impact on the public: This bill would unequivocally express the Legislature's intent to limit the State's waiver of immunity, pursuant to section 661-1's "founded upon any statute" language, to situations in which the State's waiver is expressly set forth in the separate statute upon which the claim is founded. This bill thus has the potential to prevent needless litigation, save a considerable amount of taxpayer dollars, and prevent unjustified judicial expansion of the limited waiver of immunity intended by the Legislature.

Impact on the department and other agencies: This bill would prevent the State and its agencies from having to defend itself from lawsuits based upon statutes from which the State has not waived its immunity. It would thus prevent needless interference with departmental operations, and may save the State and its client agencies from unnecessary legal expenses.

GENERAL FUND: None.  
OTHER FUNDS: None.  
PPBS PROGRAM DESIGNATION: None.  
OTHER AFFECTED AGENCIES: Judiciary.  
EFFECTIVE DATE: Upon Approval.