TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
TWENTY-SIXTH LEGISLATURE, 2012

ON THE FOLLOWING MEASURE:
H.B. NO. 2459, RELATING TO TORT LIABILITY.

BEFORE THE:
HOUSE COMMITTEE ON TRANSPORTATION

DATE: Monday, January 30, 2012 **TIME:** 9:00 a.m.

LOCATION: State Capitol, Room 309

TESTIFIER(S): David M. Louie, Attorney General, or
Caron Inagaki, Deputy Attorney General

Chair Souki and Members of the Committee:

The Department of the Attorney General strongly supports this bill.

This bill seeks to amend and clarify section 663-10.9(4), Hawaii Revised Statutes (HRS), which relates to tort actions arising out of motor vehicle accidents that relate to the maintenance and design of highways. The bill eliminates language that conflicts with existing law, and provides a clear definition of "similar circumstances" as used in this section.

A brief history of the Hawaii case law illustrates the need for this bill. Taylor-Rice v. State, 91 Haw. 60, 979 P.2d 1086 (1999), arose out of an accident in which a vehicle struck and ramped off a guardrail along Kuhio Highway on Kauai, then struck a utility pole. The vehicle had been speeding at 80 mph at the time of the accident. The driver's blood alcohol content level was more than twice the legal limit. Two passengers in the vehicle died. At trial, the following percentages of fault were assigned: 65 percent to the driver, 15 percent to the passengers, and 20 percent to the State. The trial court concluded that the State was jointly and severally liable with the driver. The Hawaii Supreme Court affirmed the trial court, and held that the State was jointly and severally liable under section 663-10.9(4), HRS, because the State had "reasonable prior notice of a prior occurrence under similar circumstances to the occurrence upon which the tort claim [was] based," even though the "prior occurrence" was a single prior accident that had occurred more than seven years before in the vicinity of, but not at the same location, and had not involved physical impact with the guardrail that was the subject in the Taylor-Rice case. There was no prior accident at the same location that involved impact with the subject guardrail.

Kaeo v. Davis, 68 Haw. 447, 719 P.2d 387 (1986), arose out of a single car accident in which the defendant drove into a utility pole located along Palolo Avenue in Honolulu. The driver had been drinking beer before the accident. At the time of the accident, the vehicle had been traveling in excess of the speed limit. Plaintiff-passenger offered evidence of four prior accidents that occurred near the site of the subject accident to show the existence of a dangerous condition, that the City had notice of a dangerous condition along the road, and as foundation for the testimony of her expert witness, but the trial judge excluded the accident reports.

The four accidents had occurred over the span of six years during which there were some modifications of signs and markers along the road. Further, none of the prior accidents was at the site of the subject accident. The Hawaii Supreme Court in Kaeo discussed at length the stricter requirement of "similarity of condition" to show the existence of a dangerous condition or causation, and concluded that the trial court had correctly excluded the evidence to show the existence of a dangerous condition. However, the Court concluded that due to the more relaxed requirement to show "notice," the trial court should have allowed the evidence to show that the prior accidents should have attracted the City's attention to a potentially dangerous condition.

Section 663-10.5, HRS, provides that joint and several liability is abolished as to any government tortfeasor where there is one or more other tortfeasors and the government tortfeasor is liable only for its percentage share of damages. The only exception under this statute is for "tort claims relating to the maintenance and design of highways pursuant to section 663-10.9."

This bill gives guidance to, and makes clear for the courts, that the one narrow exception to the limited liability mandated in section 663-10.5, is applicable only where it is shown that the government entities had "reasonable prior notice of a prior occurrence under similar circumstances to the accident upon which the tort claim is based" under section 663-10.9(4).

This bill then provides a clear definition of "similar circumstances" for the courts. The requirement of "similar circumstances" is only met when the prior occurrence is at the same location and involves the same highway-related device or condition and when the condition at the roadway is substantially similar to that at the time of the subject accident.

Absent such clarification, and with only Kaeo and Taylor-Rice for guidance, different juries or judges in different cases, will decide what "similar circumstances" means. For example, a trial judge in one case may decide that "similar circumstances" means a prior

accident one mile from the subject accident, at which there is a completely different road geometry. Another trial judge in a different case may decide that "similar circumstances" means a prior accident that involved absence of barriers, despite the fact that the subject accident involved the absence of signage. This lack of consistency makes it difficult for government entities to determine what conduct is expected of them.

In addition, it is a basic tenet of tort law that liability cannot be imposed on an owner of land where the owner has not been put on actual constructive notice of the unsafe condition or defect that causes a Plaintiff injury. See, e.g., Harris v. State, 1 Haw. App. 554, 557 (1981). As the law currently reads, section 663-10.9(4) creates liability by referencing section 663-10.9(3) even in the absence of "reasonable prior notice of a prior occurrence under similar circumstances." Deleting the language that makes reference to section 663-10.9(3) would eliminate the conflict between this language and long established principles of tort law.

This bill remedies the inherent unfairness that resulted from the confusion relating to the lack of clarity in the law. It also ensures that only when there is reasonable prior notice of a prior occurrence under similar circumstances will government entities be jointly and severally liable with other tortfeasors. Further, by clearly defining "similar circumstances" the bill provides government entities with guidance as to what conduct is expected of them regarding the maintenance of their highways.

We respectfully request that this bill be passed.