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

ON THE FOLLOWING MEASURE:
H.B. NO. 2464 RELATING TO LANDOWNER'S LIABILITY.

BEFORE THE:
HOUSE COMMITTEE ON WATER, LAND, AND OCEAN RESOURCES

DATE: Friday, February 3, 2012 **TIME:** 9:00 a.m.

LOCATION: State Capitol, Room 325

TESTIFIER(S): David M. Louie, Attorney General, or
Robin Kishi, Deputy Attorney General

Chair Chang and Members of the Committee:

The Department of the Attorney General strongly supports this bill.

The purpose of this bill is to amend section 520-2, Hawaii Revised Statutes (HRS), to include government lands by deleting "other than lands owned by the government" in the definition of "land."

Chapter 520 of the Hawaii Revised Statutes is often referred to as the "Recreational Use Statute." The purpose of this chapter is to encourage landowners to make their land available to the public for recreational purposes by limiting the landowners' liability to persons who enter the land for those purposes.

As originally drafted and enacted in 1969, the Hawaii Recreational Use Statute made no distinction between lands owned by private landowners and lands owned by the government. It was after the federal appellate court in Proud v. U.S., 723 F.2d 705 (9th Cir. 1984), held that the Hawaii Recreational Use Statute afforded the protection of the statute to government landowners (in that case the federal government) as well as private landowners, that the definition of land in chapter 520 was amended to exclude from the statutory protection "lands owned by the government." At the insistence of plaintiffs' advocacy groups and their attorneys, the statute was amended in 1997. Among the amendments was to exclude "lands owned by the government" from the protection of the statute.

As a result, the landowners with the largest acreage, and the most scenic natural beauty that the public seeks to use for recreational purposes, are the governmental entities that have no protection. The State has in excess of 33,000 acres within its parks system upon which people

hunt, fish, swim, camp, hike, study, picnic and otherwise recreate. The total acreage under the Department of Land and Natural Resource is in excess of one million acres.

But under section 662-2, HRS of the State Tort Liability Act, the State may be sued and held liable in the same manner and to the same extent as private individuals under like circumstances. The State is not, however, able to invoke the same defenses to and limitations on liability that private landowners would be able to invoke when sued by persons who sustain injury or death while recreating on their lands.

If the State is permitted to be sued for tort liability the same as private individuals under the same circumstances, then the State should have the same defenses to and limitations on liability as private individuals. Without the amendment, the State and its taxpayers will continue to be subject to large judgments awarded by judges arising out of accidents in which local residents and visitors recreate on State land -- accidents for which no private landowner in similar circumstances would be liable.

This is illustrated by a recent decision in Brem, et al. v. State of Hawaii, Civil No. 07-1-0176, Fifth Circuit Court, State of Hawaii, in which the Court found the State 100 percent at fault for the deaths of two tourists who attempted to climb down to the waterfall at Opaekaa Falls on Kauai. The path the tourists took was not an official trail maintained by the State. Instead, it was an area that had been left by the State in its natural condition. Although the damages portion of the trial has not yet begun, plaintiffs' experts in this case place the damages over $50,000,000.00.

The State has now officially closed this site to the public, and has posted signs to that effect. Notwithstanding the closure, people continue to access the site and climb to the bottom of the falls. Because of the terrain at the site, installation of a permanent fence is not practical.

The public will continue to seek adventures on State land. However, because many will fail to exercise due care, injuries and deaths will continue to occur. The State will be forced to close its most beautiful natural sites one-by-one. Eventually, the only land on which the public will be able to recreate will be privately owned land.

Some states expressly include governmental entities within the definition of the protected landowner, e.g., Alabama, Illinois and Ohio. Other states have gone beyond their recreational use statutes and enacted specific recreational liability immunity legislation specifically for their

governmental entitles, e.g., Virginia, Kansas, and Minnesota. Others, such as California have expressly provided immunity to governmental entities in their state tort claims act.

This bill is necessary to ensure that the State and counties, as landowners, can make their land available to the public for recreational purposes by limiting the State's and counties' liability to persons who enter the land for those purposes, thus fulfilling the original intent and purpose of chapter 520. It will also return the State to equal-footing, with private landowners.

We respectfully request that this bill be passed.

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February 2, 2012

The Honorable Jerry L. Chang, Chair
The Honorable Sharon E. Har, Vice Chair
and Committee Members
Committee on Water, Land, & Ocean Resources
House of Representatives
State Capitol
Honolulu, Hawaii 96813

Dear Chair Chang, Vice-Chair Har, and Committee Members:

Re: H. B. 2464, Relating to Landowners' Liability

The City and County of Honolulu ("City") strongly supports H.B. 2464 which seeks to amend Section 520-2, Hawaii Revised Statutes, to delete the exclusion of lands owned by the government in the definition of "land."

H.B. 2464 would provide the Counties with civil liability immunity when injuries occur on public trails and accesses used for recreational purposes and would encourage the Counties to provide additional trails and accesses on county lands. Passage of H.B. 2464 would provide the public with additional access to public trails and accesses while still providing the Counties with the same degree of immunity afforded to private landowners and the federal government. In Howard v. United States, 181 F.2d 1064 (9th Cir. 1999) and Palmer v. United States, 945 F.2d 1134 (9th cir. 1991), the Ninth Circuit of Appeals found that Hawaii's recreational immunity statute, Hawaii Revised Statutes Chapter 520, immunized the federal government from liability arising from injuries sustained by plaintiffs engaged in recreational activities while on federal property.

Thank you for the opportunity to provide our comments on this bill.

Very truly yours,

Kathleen Kelly for

ROBERT CARSON GODBEY
Corporation Counsel

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HB2464 TESTIMONY

TESTIMONY OF ROBERT TOYOFUKU ON BEHALF OF THE HAWAII ASSOCIATION FOR JUSTICE (HAJ) IN OPPOSITION TO H.B. NO. 2464

Date: Friday, February 3, 2012
Time: 9:00 am

To: Chairman Jerry Chang and Members of the House Committee on Water, Land, & Ocean Resources:

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. 2464, relating to Landowners' Liability.

Chapter 520, known as the Recreational Use law, grants private landowners limited liability from injuries and deaths that occur on private property if they open their lands to the public for recreational use at no charge. The purpose of the recreational use law is to encourage private landowners to open private lands to the public that would otherwise be unavailable for public use. It does not apply to government lands because public land is already open to the public and the additional incentive offered by the recreational use law is not needed.

Sound public policy requires that all landowners, private and governmental, exercise reasonable care in maintaining their property in a safe condition for those reasonably expected to be on the property for the safety of the general public. The recreational use exception was created to offset the loss of private property rights relinquished when landowners agree to open their property to the general public at no charge. It is a different story with government because maintaining public lands for public use is a core governmental function.

There are already statutory exceptions for specific circumstances where the burden or cost to the government outweighs the public's safety. For example, (1) government liability is limited in parks and recreational areas when adequate warning signs are posted pursuant to Act 82 (2003); (2) government liability is limited at beaches when adequate warning signs are posted pursuant to Act 170 (2002); (3) government liability is limited for injuries at public skateboard parks pursuant to Act 144 (2003); and (4) the State's liability is limited for injuries from unexploded ordnance on Kahoolawe and the surrounding ocean under Act 218 (2002).

If there are specific circumstances that merit exceptions to government's responsibility to properly design and maintain public premises, they should be addressed on their merits and dealt with individually as has been done in the past.

Thank you very much for allowing me to testify in OPPOSITION to this measure. Please feel free to contact me should you have any questions or desire additional information.