



**TESTIMONY OF  
THE DEPARTMENT OF THE ATTORNEY GENERAL  
TWENTY-SEVENTH LEGISLATURE, 2013**

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**ON THE FOLLOWING MEASURE:**

S.B. NO. 10, S.D. 1, RELATING TO THE HAWAIIAN HOMES COMMISSION.

**BEFORE THE:**

HOUSE COMMITTEE ON JUDICIARY

**DATE:** Tuesday, March 19, 2013

**TIME:** 2:00 p.m.

**LOCATION:** State Capitol, Room 325

**TESTIFIER(S):** David M. Louie, Attorney General, or  
Russell A. Suzuki, First Deputy Attorney General

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Chair Rhoads and Members of the Committee:

The Department of the Attorney General opposes this bill.

The purpose of this bill is to allow the Hawaiian Homes Commission and the Department of Hawaiian Homelands to hire their own attorneys without the approval or participation of the Attorney General or the Governor and to require that the State pay for the services of those attorneys.

As reported by the Senate Committees on Tourism and Hawaiian Affairs and Judiciary and Labor in Standing Committee Report No. 424, the underlying premise of this measure is to provide for "circumstances where the interests of the State and the Department of Hawaiian Home Lands may be adversarial." The committees further reported that, "it is vital and necessary to the Hawaiian Homes Commissions' fiduciary duties to retain independent counsel." Stand. Comm. Rep. No. 424, p.1. This premise assumes incorrectly that the Department of Hawaiian Home Lands (DHHL) is an entity independent from the State. To the contrary, DHHL is an instrumentality of the State and exists to satisfy the requirements section 4 of the Admissions Act. Further, the lands administered by the Department of Hawaiian Home Lands are state lands.

Similar to the Department of Land and Natural Resources and various state agencies, however, DHHL is governed by a board. That board is the Hawaiian Homes Commission which may, and has on occasion, taken a position that is not shared by the Department of the Attorney General. When acknowledged as appropriate, the Department has advised and allowed DHHL to engage independent counsel. In this regard, the Attorney General has respected differences of

opinion on matters of fundamental political significance. Notably, the DHHL is represented by separate counsel in the matter of Nelson, et al. v. Hawaiian Homes Commission, et al. based on this consideration.

Recently, however, DHHL requested independent counsel on a matter of procurement which was denied by the Attorney General.

With this as a backdrop, we identify the following as problematic:

1. This bill does not require that a conflict exist in order for DHHL to hire independent counsel;
2. Whether or not a conflict exists, State funds-- as opposed to DHHL trust funds-- are to be used to pay for those independent counsel expenses.

This bill arguably allows DHHL unfettered control over state fund expenditure for independent counsel fees, regardless of whether a conflict of interest exists. This would seem to violate section 5, article VII of the Constitution of the State of Hawaii which requires appropriations for expenditures.

Further, on a policy level, we think that the recognition of a conflict is properly vested in the State's Attorney General, who is required to enforce and defend the laws of the State of Hawaii. The Attorney General's ethical duties in relation to his responsibilities is regulated by the Supreme Court through its Code of Professional Conduct, in addition to the State's Ethics Commission and chapter 84, Hawaii Revised Statutes.

Based on the foregoing, this measure should be amended to place the determination of whether a conflict exists with the Attorney General and to clarify that independent counsel expenses will be paid with appropriated state funds. If these amendments are not made, the Attorney General asks that this measure be held.



STATE OF HAWAII  
DEPARTMENT OF HAWAIIAN HOME LANDS

P. O. BOX 1879  
HONOLULU, HAWAII 96805

COMMENTS OF JOBIE M. K. MASAGATANI, CHAIRMAN  
HAWAIIAN HOMES COMMISSION  
TO THE HOUSE COMMITTEE ON JUDICIARY

**SB 10 SD 1, RELATING TO THE HAWAIIAN HOMES COMMISSION**

March 19, 2013

Chair Rhoads, Vice-Chair Har, and Members of the Committee:

The Department of Hawaiian Home Lands (DHHL) supports the intent of this bill that would allow the Hawaiian Homes Commission to employ or retain an attorney separate from the attorney general to provide legal services to the commission.

In the past and currently, the Department of the Attorney General has permitted and permits the commission and our department to retain independent counsel in matters where there is a conflict between the interests of the state and the interests of the Hawaiian Homes Commission on behalf of our native Hawaiian beneficiaries. This measure would allow the commission greater discretion in retaining independent counsel. There are questions, however, that do require further clarification such as the liability of the commission, the obligation of the attorney general to represent the commission if a lawsuit is filed on a matter on which independent counsel provided legal services, the source of funds to pay for any court decisions

that go against the commission when it relied on the advice of independent counsel, etc.

Mahalo for the opportunity to provide these comments.

**SB10**

Submitted on: 3/17/2013

Testimony for JUD on Mar 19, 2013 14:00PM in Conference Room 325

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Olinda Aiwohi	Paukukalo Hawaiian Homes Community Association	Oppose	No

Comments: We oppose this bill and hope our voices are heard. All we ask is for a fair representation and legal action by lawyers who represent us the native Hawaiian people.

Please note that testimony submitted less than 24 hours prior to the hearing, improperly identified, or directed to the incorrect office, may not be posted online or distributed to the committee prior to the convening of the public hearing.

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**LATE**

Before the House of Representatives Committee on the Judiciary  
Testimony of Alan T. Murakami

RE: SB 10, SD 1

March 19, 2013

I testify in support of SB 10, SD 1, a measure long overdue. I do not offer my critique of the existing practice of providing legal representation to the Department of Hawaiian Home Lands (DHHL) and the Hawaiian Homes Commission (HHC) for any *personal* reason. Even as I have appeared many times in opposition to the Department of the Attorney General in cases involving the HHC/DHHL, there is nothing personal about the concerns I now raise. Rather, there are fundamental structural problems that cannot be resolved without this change so that the HHC has access to zealous legal representation.

SB 10 amends HRS §28-8.3 by authorizing the HHC/DHHL to retain legal counsel independent of the Department of the Attorney General (DAG). This authorization is necessary to preserve the integrity of the Hawaiian Home lands trust, as well as avoid systemic problems with conflicts of interests that arise by the legal representation the DAG provides to both the State of Hawai`i and the DHHL/HHC. This problem is particularly acute because the high fiduciary standards that HHC/DHHL trustees owe to native Hawaiians. Finally, the change is necessary to compel adherence to fundamental rules of professional conduct applicable to all attorneys, to avoid conflicts of interest.

The State of Hawai`i must faithfully implement the Hawaiian home lands trust under the high fiduciary standards by which it must act. *Ahuna v. Dep't of Hawaiian Home Lands*, 64 Haw. 327 (1982). A key factor in this scheme is for the HHC/DHHL have access to truly independent legal opinions to guide it so as to meet this standard of conduct. That access should NOT depend on approval of the State Attorney General, as is currently required.

The HHCA is incorporated into the constitution of the state, as a condition of statehood. It must be implemented with due regard to allowing the HHC/DHHL to act exclusively for the benefit of native Hawaiian beneficiaries. As trustees, the HHC/DHHL should have unfettered access, where its interests and duties do not align with the state, to independent legal counsel of its choice, unencumbered with the necessity for prior DAG approval, which history has demonstrated is not always objectively applied.

A sitting member of the Hawaiian Homes Commission testified to the Ocean, Marine Resources and Hawaiian Affairs Committee earlier, urging passage because, "[m]ore often than not," conflicts arise where the AG has primary responsibility to the State government, not beneficiaries of the HHCA trust. This statement is striking. It highlights a principal problem any legal professional covered by conflict of interest rules must face. A lawyer, including the deputy attorney general assigned to the HHC, **cannot** represent a client "if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person."

For example, in *Nelson v. Hawaiian Homes Commission*, 127 Haw. 185; 277 P.3d 279 (2012), the conflicting interests of the State and the HHC/DHHL were stark. The State did not want to provide general funds to the HHC/DHHL, yet the constitution required it and the HHC/DHHL would benefit from the extra funding. Even with the resulting explosion of the waiting list for Hawaiian homestead leases, the HHC, being counseled by the same legal counsel the state had, never even contemplated a lawsuit against the State to enforce the constitutional provision requiring funding. In comparison, under similar

circumstances, members of the Public Employee Retirement System board, as trustees, did not hesitate to sue the State for failing to meet certain funding requirements benefiting the system. *Kaho'ohanohano v. State*, 114 Hawai'i 302, 162 P.3d 696 (2007). In *Nelson*, the AG finally recognized the potential conflict and authorized the retention of separate and independent private counsel for the HHC/DHHL in that litigation, even when it had not done so for decades as DHHL waiting lists grew unchecked.

The shadow of this problem persisted in other lawsuits. *Aged Hawaiians v HHC* involved the plight of pastoral Hawaiian homestead applicants who could not apply for commercial size homestead leases. The DHHL/HHC, in the absence of contrary legal advice, perceived politically insurmountable State resistance to fund sufficient infrastructure to support sufficient numbers of commercial size pastoral leaseholds. With no access to other legal counsel but the DAG, the HHC simply took no action to create opportunities for pastoral homestead applicants to obtain more land, ultimately leading to the lawsuit.

This pattern of exclusive reliance on the DAG also crops up in a number of conflicts the HHC/DHHL has with its beneficiaries. In a recent conflict over the lease preference native Hawaiian beneficiary organizations have to secure trust lands for commercial purposes under HHCA §204(a)(2) and 207(c), the DAG, without any articulated legal authority, opined that the HHC/DHHL does not have the legal authority to enter into such arrangements. However, HHCA §204(a)(2) and 207(c) says the opposite.<sup>1</sup>

When the HHC asked for independent counsel to get a second opinion, ***the DAG refused to approve the request***, as it is empowered to do under HRS §28-8.3. Yet, in proceeding as the exclusive legal representative of the HHC, the DAG never consulted with the HHC and obtained its consent as required under Hawai'i Rules of Professional Conduct 1.7(b)(2). In fact, the DAG didn't even bother to provide an articulated basis for rendering that defective opinion. Such a circumstance presents major risks of breaching the Hawaiian home lands trust.

SB 10 would remove that awkward discretion to authorize independent counsel, so it is clear that this HHCA trust program can have the same access to independent legal counsel as do many other state entities with less justification for this authorization, e.g., the Hawai'i Tourism Authority, the insurance division of DCCA, the real estate commission, and a host of other entities. Moreover, if the office of Hawaiian affairs is entitled to this same right, HRS §28-8.3(a)(7), the HHC/DHHL surely has more justification for being able to retain separate counsel so it can assert its rights when they are not aligned with the State, as is too often the case.

Accordingly, given to the past experience with circumstances that appear to compromise the ability of the HHC/DHHL to act as truly independent fiduciaries when implementing the terms of the HHCA, and the actual and potential conflicts of interest of the DAG, it is imperative to give the HHC/DHHL adequate and zealous legal representation and advice to guide its conduct independent of what considerations the DAG must give to protecting the interests of the State of Hawai'i. See, excerpt of *Chun v. Board of Employment Retirement System*, attached.

Please pass SB 10 and save the State from the costs of unnecessary litigation, while assuring adherence to professional standards for legal representation.

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<sup>1</sup> The Homestead Community Development Corporation, a nonprofit which sought the lease of trust lands infested with noxious Albizia trees that precluded its use as an agricultural homestead area, asked for a HHC lease to use a biomass operation to fund the removal of those trees, an arrangement that Congress initially intended to allow for native Hawaiian businesses.

## *Chun v Employee Retirement System*

87 Haw. 152, 173-75; 952 P.2d 1215, 1236-38 (1998)

### An Excerpt

We are aware that this court has recognized that, "due to the [Attorney General's] statutorily mandated role[s] in our legal system, we cannot mechanically apply the [Hawai'i] Code of Professional Responsibility [(HCPR)] to the [Attorney General's] office." *Klattenhoff*, 71 Haw. at 603, 801 P.2d at 551. The proposition applies equally to the HRPC, which, by order of this court, replaced the HCPR effective January 1, 1994. In large part, this is because "defining precisely the identity of the client and prescribing the resulting obligations of [government] lawyers may be more difficult in the government context," comment [7] to HRPC 1.13 (1995), given the fact--as noted above--that "when the client is a governmental organization, . . . in some circumstances the client may be a specific [officer,] agency, [or instrumentality,]" while in other circumstances the client is "the government as a whole." *Id.*

Accordingly, in *Klattenhoff*, we held that the attorney general

may represent a state employee in civil matters while investigating and prosecuting him in criminal matters, so long as the staff of the [department of the attorney general] can be assigned in such a manner as to afford independent legal counsel and representation in the civil matter, and so long as such representation does not result in prejudice in the criminal matter to the person represented.

*Id.* at 605, 801 P.2d at 552. In other words, "separate units of a government agency, such as the office of attorney general, may undertake concurrent representation that would otherwise offend [the provisions of the HRPC governing conflicts of interest, including HRPC 1.7, see *infra*], so long as no prejudice is suffered by any of the clients." Comment [4] to HRPC 1.10 (1995) (emphasis added).

We have never held, however, that the Attorney General is relieved of all obligations to conform her conduct to the HRPC, which are applicable to all lawyers licensed to practice in the courts of this state. HRPC Rule 1.7 (1995), for example, provides:

#### **Conflict of interest: General Rule.**

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) each client consents after consultation.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:



- (1) the lawyer reasonably believes the representation will not be adversely affected; and
- (2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

Moreover, comment [4] to Rule 1.7 (1995) explains, inter alia, that

loyalty to a client is . . . impaired when a lawyer cannot consider, recommend[,] or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests. The conflict in effect forecloses alternatives that would otherwise be available to the client. Paragraph (b) addresses such situations. . . . The critical questions are the likelihood that a conflict will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client. . . .

Indeed, the legislature implicitly foresaw the likelihood of conflicts "eventuating" in connection with the Attorney General's multiple roles, duties, and functions when it enacted HRS § 28-8.3 in 1995, see supra note 18, conferring upon the attorney general the prerogative, "for reasons deemed . . . good and sufficient," to decline "to employ or retain an attorney" to represent "any department, board, commission, agency, bureau, or officer of the State" and, in that event, authorizing the state instrumentality--with the concurrence of the governor--to retain legal counsel on its own initiative for the purpose of securing such representation. See HRS §§ 28-8.3(a)(16) and (b).

Accordingly, in order to insure compliance with HRPC 1.7, we expressly approve and adopt the following views, as expressed by the West Virginia Supreme Court of Appeals in *Manchin*:

The Attorney General is required to exercise her independent professional judgment on behalf of a state officer [or instrumentality] for whom she is bound to provide legal counsel. In this regard[,] her duty is to analyze and advise her clients as to the permissible alternative approaches to the conduct of the litigation. The Attorney General should inform her client of the different legal strategies and defenses available and of her professional opinion as to the practical effect and probability of the outcome of each alternative, so as to enable the officer [or instrumentality] to make an intelligent decision with respect to how the litigation could be conducted. She should then stand aside and allow her client to exercise his [or her] independent judgment on which course to pursue. We emphasize the importance of this independent judgment because "advice of counsel" is not a defense to civil or criminal liability for nonfeasance, misfeasance[,] or malfeasance in office. Once the state officer [or instrumentality] whom the Attorney General represents has determined the course he [or she] desires the litigation to take, it is the duty of the Attorney General to zealously advocate the public policy positions of her client in pleadings, in negotiations, and in the courtroom and to avoid even the appearance of impropriety by appearing to be in conflict with the desires of her client.

In summary, the Attorney General's statutory authority to prosecute and defend all actions brought by or against any state officer [or instrumentality] simply provides such officer [or instrumentality] with access to [the Attorney General's] legal services and does not authorize the Attorney General "to assert his vision of state interest." *Motor Club of Iowa v. Dept. of Transportation*, 251 N.W.2d 510, 514 (Iowa 1977). The Attorney General stands in a traditional

attorney-client relationship to a state officer [or instrumentality] she is required by statute to defend. Her authority to manage and control litigation on behalf of a state officer is limited to her professional discretion to organize legal arguments and to develop the case in the areas of practice and procedure so as to reflect and vindicate the lawful public policy of the officer [or instrumentality] she represents. The Attorney General is not authorized in such circumstances to place herself in the position of a litigant so as to represent her concept of the public interest, but she must defer to the decisions of the officer [or instrumentality] whom she represents concerning the merits and the conduct of the litigation and advocate zealously those determinations in court.

*Manchin*, 296 S.E.2d at 920-21 (emphasis in original) (footnote omitted).

**SB10**

Submitted on: 3/18/2013

Testimony for JUD on Mar 19, 2013 14:00PM in Conference Room 325

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Jared Aiwohi	Individual	Support	No

Comments: I represent the majority of the Hawaiian Homesteads on Maui as the Moku of Maui as a SCHHA memeber. Eight of nine Hawaiian Homesteads are members of the Sovereign Council of Hawaiian Homestead Associations here on Maui. As the Moku we support the bill to give the DHHL legal representation which will help to alleviate the states hand in DHHL. Better representation for the native Hawaiians by the DHHL. Mahalo, Jared Aiwohi

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**SB10**

Submitted on: 3/16/2013

Testimony for JUD on Mar 19, 2013 14:00PM in Conference Room 325

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Jeannine Johnson	Individual	Support	No

Comments:

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**SB10**

Submitted on: 3/18/2013

Testimony for JUD on Mar 19, 2013 14:00PM in Conference Room 325

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Linda Aiwohi	Individual	Support	No

Comments:

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**LATE**

**SB10**

Submitted on: 3/19/2013

Testimony for JUD on Mar 19, 2013 14:00PM in Conference Room 325

Submitted By	Organization	Testifier Position	Present at Hearing
Ian B. Lee Loy	Individual	Support	No

Comments: Aloha Chairman Rhoads and members of the Senate Judiciary Committee, I submit this testimony supporting your consideration for independent counsel for the Hawaiian Homes Commission and Department of Hawaiian Home Lands as needed, including provisions for funding and continued use of the State Attorney General's Office in pursuit of fulfilling the Hawaiian Homes Commission Act.

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**SB10**

Submitted on: 3/19/2013

Testimony for JUD on Mar 19, 2013 14:00PM in Conference Room 325

Submitted By	Organization	Testifier Position	Present at Hearing
Kama Hopkins	Individual	Support	No

Comments: Aloha Chair Rhoads, Vice Chair Har and members of the committee, My name is Kama Hopkins and I am testifying in support of SB 10. I am a member of the Hawaiian Homes Commission and there are times when I feel that the state's interests, the Commission's interests, the DHHL's interests and the beneficiary's interests are not aligned. The Commission, who heads the DHHL through policy and budget direction, needs to have the ability to put the interests of the beneficiary and the Trust assets before those of the state when allowable by law. This Bill would allow us to do that. We budget approximately \$500,000 a year for the services of the Attorney General. However, no disrespect intended, the Attorney General does not always have a great track record in defending the commission and the department in court. I attribute some of this to the fact that the state's interests are usually placed before the beneficiary's interests. The Attorney General has stated that he has many attorneys at his disposal with all different types of expertise. While this is true, should this expertise be needed in defense of a beneficiary's interests vs. the state's interests, the latter usually wins out, in my observation. I would prefer having the authority to hire an attorney that works for the interests of the beneficiaries whom we serve when the interests of the state are in conflict. At present, the Attorney General makes that determination. I believe that the Hawaiian Homes Commission, by a simple majority vote, should have that authority. This Bill essentially does that. This is not a personal attack on the Attorney General's office. In fact, I have a great deal of respect for three Deputy Attorney Generals whom we work with on a regular basis as well as the other Deputies we interact with and who defend us on occasional basis. However, I again share my mana'o with this committee that I support SB 10 and urge you to pass this measure. Mahalo for the opportunity to testify.

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