



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

ON THE FOLLOWING MEASURE:

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

BEFORE THE:

HOUSE COMMITTEE ON OCEAN, MARINE RESOURCES, AND HAWAIIAN AFFAIRS

DATE: Wednesday, March 13, 2013 **TIME:** 9:45 a.m.
LOCATION: State Capitol, Room 325
TESTIFIER(S): David M. Louie, Attorney General, or
Russell A. Suzuki, First Deputy Attorney General

Chair Hanohano 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 AG 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 AG.

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 AG'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 AG and to clarify that independent counsel expenses will be paid with appropriated state funds. If these amendments are not made, the AG asks that this measure be held.