

**TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
TWENTY-EIGHTH LEGISLATURE, 2016**

ON THE FOLLOWING MEASURE:

S.B. NO. 2815, S.D. 2, H.D. 1, RELATING TO PROFESSIONALLY LICENSED OR CERTIFIED GOVERNMENT EMPLOYEES.

BEFORE THE:

HOUSE COMMITTEE ON JUDICIARY

LATE

DATE: Tuesday, March 22, 2016

TIME: 2:00 p.m.

LOCATION: State Capitol, Room 325

TESTIFIER(S): Douglas S. Chin, Attorney General, or
Kendall J. Moser, Deputy Attorney General

Chair Rhoads and Members of the Committee:

The Department of the Attorney General supports Senate Draft 2, House Draft 1, with comments.

The purpose of House Draft 1 is to mitigate the personal monetary risk of professionally licensed or certified state and county employees.

The original bill referenced only state employees. State employees are generally afforded qualified immunity for torts as a result of actions taken while in the course and scope of their State employment, affording them protection from individual liability. In the recent case of Slingsluff v. State of Hawai'i, et al., 131 Hawai'i 239, 317 P.3d 683 (App. 2013), however, the Intermediate Court of Appeals held that prison physicians are not entitled to qualified immunity for the exercise of their professional medical judgment. The Court's reasoning that these employees exercise judgment for which they are specially licensed, therefore making their judgment separate and distinct from governmental judgment, could be argued to extend to any other professionally licensed or certified employee of the State, including nurses, attorneys, engineers, and other professionals.

The potential for personal liability prevents good, well-qualified professionals from applying for jobs with the government. To address the ramifications of Slingsluff, and in an effort to attract and retain physicians and other professionally licensed or certified state employees, it is proposed that section 662-14, Hawaii Revised Statutes, be amended to clarify that the exclusive remedy for injury or loss of property, or personal injury or death, arising from the act or

omission of a professionally licensed or certified employee of the State acting within the scope of the employee's office or employment shall be against the State alone.

We understand that the Hawaii Association for Justice is opposed to House Draft 1 because it includes the counties. The Department of the Attorney General takes no position on the inclusion of the counties. However, if the Committee decides to remove the language involving county employees then we respectfully ask the Committee to amend the bill back to the wording in Senate Draft 2.

DAVID Y. IGE
GOVERNOR



NOLAN P. ESPINDA
DIRECTOR

Cathy Ross
Deputy Director
Administration

Jodie F. Maesaka-Hirata
Deputy Director
Corrections

Shawn H. Tsuha
Deputy Director
Law Enforcement

LATE

STATE OF HAWAII
DEPARTMENT OF PUBLIC SAFETY
919 Ala Moana Boulevard, 4th Floor
Honolulu, Hawaii 96814

No. _____

TESTIMONY ON SENATE BILL 2815, SENATE DRAFT 2, HOUSE DRAFT 1
RELATING TO PROFESSIONALLY LICENSED OR CERTIFIED
GOVERNMENT EMPLOYEES.

By

Nolan P. Espinda, Director

House Committee on Judiciary
Representative Karl Rhoads, Chair
Representative Joy A. San Buenaventura, Vice Chair

Tuesday, March 22, 2016; 2:00 p.m.
State Capitol, Conference Room 325

Chair Rhoads, Vice Chair San Buenaventura, and Members of the Committee

The Department of Public Safety (PSD) **strongly supports** Senate Bill (SB) 2815, Senate Draft (SD) 2, House Draft (HD) 1 which would amend HRS Chapter 662-14 to allow the State to invoke exclusive liability in actions or proceedings naming a State employee individually. The action or proceeding would then proceed against the State alone.

In the *Slingluff v. State of Hawaii* decision, the Intermediate Court of Appeals (ICA) withheld qualified privileges and immunities from PSD physicians and ruled that the qualified privilege did not apply to the named physicians, since these physicians are subject to separate professional standards and were exercising their professional medical discretion and not their governmental discretion. The analysis set forth by the ICA does not limit its application to just physicians, as personal liability may be imposed on any state employee who is also a professional. In this decision, the ICA created an artificial distinction between medical discretion and governmental discretion that did not previously exist in Hawaii law.

PSD has always found it difficult to recruit and retain qualified physicians, psychiatrists, and advance practice registered nurses because of typically lower government salaries than in the private sector. In addition, knowing that their personal assets may be at risk has further discouraged candidates from even applying for positions

Testimony on SB 2815, SD2, HD1
March 22, 2016
Page 2

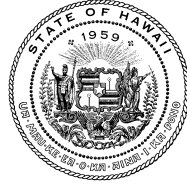
with the State. A malpractice insurance policy had to be obtained to ensure that PSD physicians and other medical professionals would not be personally harmed.

It is critical that this bill be passed to counter the harsh and unfair results of the *Slingluff* decision by the ICA, which, by ignoring existing Hawaii law, unnecessarily puts the PSD physicians at personal financial and professional risk. This bill would return the law to its original state before *Slingluff* by providing for the State's exclusive liability.

Thank you for the opportunity to testify on this measure.

DAVID Y. IGE
GOVERNOR

SHAN TSUTSUI
LT. GOVERNOR



STATE OF HAWAII
DEPARTMENT OF TAXATION
P.O. BOX 259
HONOLULU, HAWAII 96809
PHONE NO: (808) 587-1540
FAX NO: (808) 587-1560

MARIA E. ZIELINSKI
DIRECTOR OF TAXATION

JOSEPH K. KIM
DEPUTY DIRECTOR

To: The Honorable Karl Rhoads, Chair
and Members of the House Committee on Judiciary

Date: March 22, 2016

Time: 2:00 P.M.

Place: Conference Room 325, State Capitol

From: Maria E. Zielinski, Director
Department of Taxation

Re: S.B. 2815, S.D. 2, H.D. 1, Relating to Professionally Licensed or Certified Government Employees.

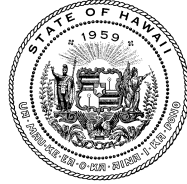
The Department of Taxation (Department) supports S.B. 2815, S.D. 2, H.D. 1, and offers the following comments for your consideration.

The Department has numerous employees who are also professionals and who are directly affected by the holding in *Slingluff v. State of Hawaii*. This measure will help the Department recruit and retain professional employees by ensuring those professional employees cannot be held personally liable for actions they carry out in the course and scope of their government employment.

Thank you for the opportunity to provide comments.

DAVID Y. IGE
GOVERNOR

SHAN TSUTSUI
LT. GOVERNOR



STATE OF HAWAII
DEPARTMENT OF TAXATION
P.O. BOX 259
HONOLULU, HAWAII 96809
PHONE NO: (808) 587-1540
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MARIA E. ZIELINSKI
DIRECTOR OF TAXATION

JOSEPH K. KIM
DEPUTY DIRECTOR

To: The Honorable Mark M. Nakashima, Chair
and Members of the House Committee on Labor & Public Employment

Date: March 15, 2016
Time: 10:30 A.M.
Place: Conference Room 309, State Capitol

From: Maria E. Zielinski, Director
Department of Taxation

Re: S.B. 2815, S.D. 2, Relating to Professionally Licensed or Certified Government Employees.

The Department of Taxation (Department) supports S.B. 2815, S.D. 2, and offers the following comments for your consideration.

The Department has numerous employees who are also professionals and who are directly affected by the holding in *Slingluff v. State of Hawaii*. This measure will help the Department recruit and retain professional employees by ensuring those professional employees cannot be held personally liable for actions they carry out in the course and scope of their government employment.

Thank you for the opportunity to provide comments.



STATE OF HAWAII
DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES
P.O. BOX 119, HONOLULU, HAWAII 96810-0119

WRITTEN TESTIMONY
OF
DOUGLAS MURDOCK, COMPTROLLER
DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES
TO THE
HOUSE COMMITTEE
ON
JUDICIARY
ON
MARCH 22, 2016

S.B. 2815, SD2, HD1

RELATING TO PROFESSIONALLY LICENSED OR CERTIFIED GOVERNMENT EMPLOYEES.

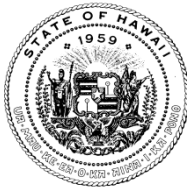
Chair Rhoads and members of the Committee, thank you for the opportunity to submit written testimony on S.B. 2815, SD2, HD1.

The Department of Accounting and General Services (DAGS) strongly supports this bill and offers the following comments for your consideration.

DAGS has multiple divisions and attached agencies who rely on the work of employees that are licensed professionals who are directly affected by the holding in *Slingluff v. State of Hawaii*. This measure will help DAGS recruit and retain professional employees by ensuring those professional employees cannot be held personally liable for actions they carry out in the course and scope of their government employment. Without this provision, current and future State employees who require professional licensing to qualify for employment would find federal and private sector work that affords the proposed protection much more attractive. This bill will help DAGS to attract, hire, and retain qualified licensed professionals.

Thank you for the opportunity to submit written testimony on this matter.

DAVID Y. IGE
GOVERNOR



Testimony by:
FORD N. FUCHIGAMI
DIRECTOR

Deputy Directors
JADE T. BUTAY
ROSS M. HIGASHI
EDWIN H. SNIFFEN
DARRELL T. YOUNG

IN REPLY REFER TO:

LATE

STATE OF HAWAII
DEPARTMENT OF TRANSPORTATION
869 PUNCHBOWL STREET
HONOLULU, HAWAII 96813-5097

March 22, 2016
2:00 p.m.
State Capitol, Room 325

S.B. 2815, S.D. 2, H.D. 1
RELATING TO PROFESSIONALLY LICENSED OR CERTIFIED GOVERNMENT
EMPLOYEES

House Committee on Judiciary

The Department of Transportation (DOT) **strongly supports** this Administration bill which affords the same privileges and immunities to professionally licensed or certified state employees who are afforded to other employees.

DOT has multiple divisions who rely on the work of employees who are licensed or certified professionals. This bill will help us recruit and retain licensed employees by ensuring they cannot be held personally liable for actions they carry out in the scope of their employment.

Thank you for the opportunity to provide testimony.

BOARD OF WATER SUPPLY

CITY AND COUNTY OF HONOLULU
630 SOUTH BERETANIA STREET
HONOLULU, HI 96843




March 22, 2016

KIRK CALDWELL, MAYOR

DUANE R. MIYASHIRO, Chair
ADAM C. WONG, Vice Chair
DAVID C. HULIHEE
KAPUA SPROAT
BRYAN P. ANDAYA

ROSS S. SASAMURA, Ex-Officio
FORD N. FUCHIGAMI, Ex-Officio

ERNEST Y. W. LAU, P.E.
Manager and Chief Engineer

ELLEN E. KITAMURA, P.E.
Deputy Manager and Chief Engineer 

LATE

The Honorable Karl Rhoads, Chair
and Members
Committee on Judiciary
House of Representatives
Hawaii State Capitol, Room 325
415 South Beretania Street
Honolulu, Hawaii 96813

Dear Chair Rhoads and Members:

Subject: Senate Bill 2815, SD2, HD1 Relating to Professionally Licensed or Certified Government Employees

We support Senate Bill 2815, SD2, HD1, and offer the following comments.

The Board of Water Supply has numerous employees who are professionally licensed or certified and who are directly impacted by the holding in Slingsluff v. State of Hawaii. This measure will assist us in recruiting and retaining professional employees by ensuring those professional employees cannot be held personally liable for actions carried out in the course and scope of their government employment.

Thank you for your consideration of our testimony on Senate Bill 2815, SD2, HD1.

Very truly yours,

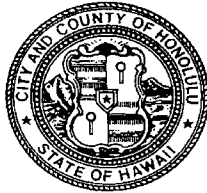


for ERNEST Y. W. LAU, P.E.
Manager and Chief Engineer

DEPARTMENT OF HUMAN RESOURCES
CITY AND COUNTY OF HONOLULU

650 SOUTH KING STREET 10TH FLOOR • HONOLULU, HAWAII 96813
TELEPHONE: (808) 768-8500 • FAX: (808) 768-5563 • INTERNET: www.honolulu.gov/hr

KIRK CALDWELL
MAYOR



CAROLEE C. KUBO
DIRECTOR

NOEL T. ONO
ASSISTANT DIRECTOR

March 22, 2016

The Honorable Karl Rhoads, Chair
The Honorable Joy San Buenaventura, Vice Chair
and Members of the Committee
on Judiciary
The House of Representatives
State Capitol, Room 325
415 South Beretania Street
Honolulu, Hawaii 96813

Dear Chair Rhoads, Vice Chair San Buenaventura, and Members of the Committee:

Subject: Senate Bill No. 2815, SD2, HD1
Relating to Professionally Licensed or Certified Government
Employees

The City and County of Honolulu ("City"), Department of Human Resources ("DHR"), supports SB 2815, SD2, HD1. DHR believes such protections are necessary, so that the City is not disadvantaged in attracting and hiring employees who are specially-licensed or certified to perform services that are essential to good government.

Thank you for the opportunity to testify.

Sincerely,

A handwritten signature in black ink that reads "Carolee C. Kubo".

Carolee C. Kubo
Director

**TESTIMONY OF ROBERT TOYOFUKU ON BEHALF OF THE HAWAII
ASSOCIATION FOR JUSTICE (HAJ) IN OPPOSITION TO S.B. NO. 2815, H.D.1**

Date: Tuesday, March 22, 2016

Time: 2:00 pm

Room: 325

To: Chairman Karl Rhoades and the Members of the House Committee on Labor:

My name is Bob Toyofuku and I am presenting testimony on behalf of the Hawaii Association for Justice (HAJ) in OPPOSITION to S.B. No. 2815, S.D.1, relating to Professionally Licensed or Certified Government Employees.

The Department of the Attorney General and HAJ have worked together to reach consensus on this measure. There was agreement in concept and tweaking of the language remained a work in progress. We anticipate that the remaining language difference can be resolved with the following proposed amendment to page 4, line 6:

“Any civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee’s estate, in the capacity of a state official or employee for which the state is liable, shall be precluded without regard to when the act or omission occurred.”

There are situations where the state contracts with a private employer to provide services where the employee is considered to be an employee of both the private contractor and the state.

Plaintiffs have settled with the state for a reduced amount with the intent to pursue the private employer for the remaining balance in these situations. This benefits the state and the plaintiff.

The state benefits by being able to negotiate a smaller settlement. The plaintiff benefits by receiving a guaranteed amount no matter what happens with claims against the private employer.

The private employer is ultimately held to contribute its fair share that would otherwise be paid

by the state. This additional language clarifies that, in these cases, a settlement with the state does not absolve another employer from its share of responsibility.

The labor committee added counties to this measure as section 2 of the H.D.1. HAJ objects to the addition of counties and asks that they be deleted from this measure. This measure addresses unique factors associated with the State Tort Liability Act based on waiver of the state's sovereign immunity. The counties are not included in the State Tort Liability Act because they have no sovereign immunity and the issues inherent in the Slingluff case, which is the impetus for this measure, simply have no application to the counties.

The only connection counties have to the State Tort Liability Act is in the limited circumstance where county lifeguards serve at state beach parks; and are therefore considered state employees for liability purposes. This measure does not deal with that situation.

Thank you very much for considering this testimony regarding this measure. Please feel free to contact me should you have any questions or desire additional information.

LATE TESTIMONY

SUPPLEMENTAL TESTIMONY OF ROBERT TOYOFUKU ON BEHALF OF THE HAWAII ASSOCIATION FOR JUSTICE (HAJ) IN OPPOSITION TO S.B. NO. 2815, S.D.2, H.D.1

Date: Tuesday, March 22, 2016
Time: 2:00 pm
Room: 325

To: Chairman Karl Rhoades and the Members of the House Committee on Judiciary:

My name is Bob Toyofuku and I am presenting testimony on behalf of the Hawaii Association for Justice (HAJ) in OPPOSITION to S.B. No. 2815, S.D.1, relating to Professionally Licensed or Certified Government Employees.

This testimony supplements my testimony submitted earlier.

The Department of the Attorney General and HAJ have worked together to reach consensus on this measure. HAJ requests, and the Attorney General does not object to, the following proposed addition at the end of section 3, on page 4, line 11:

“This section does not apply to conduct or liability outside the scope of an employee’s office or employment.”

This is to address situations where the state contracts with a private employer to provide services where the employee of a private contractor may be covered by the State Tort Liability Act; and also by insurance for the private contractor under conventional employer tort law. Plaintiffs may settle with the state for a reduced amount with the intent to pursue the private employer for the remaining balance in these situations. This benefits the state and the plaintiff. The state benefits by being able to negotiate a smaller settlement. The plaintiff benefits by receiving a guaranteed amount no matter what happens with claims against the private employer. The private employer is ultimately held to contribute its fair share that would otherwise be paid by the state. This additional language clarifies that, in these cases, a settlement with the state does not absolve another employer from its share of responsibility.

This amendment also addresses the situation where an employee may have engaged in both negligent and intentional conduct. This section would apply to the negligent conduct which is included within the State Tort Liability Act, but not apply to the conduct that was intentional and thus not included within the State Tort Liability Act.

HAJ’s objection to the addition of counties remains and we ask that counties be deleted from this measure.

Thank you very much for considering this testimony regarding this measure. Please feel free to contact me should you have any questions or desire additional information.



HAWAII GOVERNMENT EMPLOYEES ASSOCIATION
AFSCME Local 152, AFL-CIO

RANDY PERREIRA, Executive Director • Tel: 808.543.0011 • Fax: 808.528.0922



The Twenty-Eighth Legislature, State of Hawaii
House of Representatives
Committee on Judiciary

Testimony by
Hawaii Government Employees Association
March 22, 2016

S.B. 2815, S.D 2, H.D. 1 – RELATING TO
PROFESSIONALLY LICENSED OR CERTIFIED
GOVERNMENT EMPLOYEES

The Hawaii Government Employees Association, AFSCME Local 152, AFL-CIO supports the purpose and intent of S.B. 2815, S.D 2, H.D. 1. This important legislation amends Chapter 662, HRS by providing professionally licensed or certified employees employed by the State of Hawaii liability protection when exercising their professional discretion within the course and scope of their government employment.


More specifically, S.B. 2815, S.D 2, H.D. 1 clarifies that the State shall be exclusively liable for claims for injury or loss of property, or personal injury or death, resulting from the negligent or wrongful act or omission of any professionally licensed or certified employee of the State while acting within the scope of the employee's office or employment. It also establishes that any civil action or proceeding for money damages arising out of or related to the same subject matter against the employee shall be precluded.

An important addition to this measure is the provision specifying that the counties shall be exclusively liable for the torts of their own professionally licensed or certified employees in the same manner as the State of Hawaii. This bill will protect physicians, psychiatrists and nurses, and other licensed professionals such as engineers who work for the State of Hawaii and the four counties.

The HGEA represents many of these employees in various state and county departments. S.B. 2815, S.D 2, H.D. 1, if enacted, will enable Hawaii's public employers to attract and retain these employees who provide essential services to the public.

Thank you for the opportunity to testify in support of S.B. 2815, S.D 2, H.D. 1.

Respectfully submitted,


fr Randy Perreira
Executive Director