



**TESTIMONY OF  
THE DEPARTMENT OF THE ATTORNEY GENERAL  
THIRTIETH LEGISLATURE, 2019**

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**LATE**

**ON THE FOLLOWING MEASURE:**

S.B. NO. 921, RELATING TO THE DEPARTMENT OF THE ATTORNEY GENERAL.

**BEFORE THE:**

SENATE COMMITTEE ON WATER AND LAND

**DATE:** Wednesday, January 30, 2019      **TIME:** 1:15 p.m.

**LOCATION:** State Capitol, Room 229

**TESTIFIER(S):** Clare E. Connors, Attorney General, or  
Ryan K. P. Kanakaole, Deputy Attorney General

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Chair Kahele and Members of the Committee:

The Department of the Attorney General (Department) appreciates the intent of this bill but provides the following strong concerns.

S.B. No. 921 amends section 26-7, Hawaii Revised Statutes (HRS), to create a division within the Department that is required to be staffed with attorneys and others with formal education in Hawaiian language and culture, to provide legal advice on Hawaiian shoreline public access rights.

HRS section 26-7 designates the Attorney General as the single executive responsible for the Department that administers and renders state legal services, including the management of Department personnel tasked with providing these services. By requiring specific staffing with particular qualifications, S.B. No. 921 would impinge upon this authority and unnecessarily restrict the Attorney General's management of the Department.

We acknowledge that an understanding of Hawaiian language and culture may at times be necessary to analyze certain issues encountered by the Department. That is why, in the event shoreline access issues require specialized knowledge in Hawaiian language and culture, we have and will continue to rely on the expertise of personnel already employed by the Department or other state agencies. If necessary, the Department could also retain expert consultants and witnesses on a case-by-case basis.

Further, Section 3 of the bill requires the Department, “beginning with the 2020-2021 fiscal year. . . to request as a separate line item in the budget the sum of \$400,000 or so much thereof as may be necessary per fiscal year to fund the annual operating costs of the division. . .” Requiring the Department to request funding for a specific budget line item would violate the separation of powers doctrine. Article V, section 6, of the Hawaii Constitution places the Department, along with all other principal departments, under the supervision of the Governor. This includes supervisory power over budgeting funds that have been appropriated by the Legislature. The bill therefore would violate the separation of powers doctrine by requiring a principal department of the State to request specific, line-item funds, regardless of the Governor’s budget decisions.

We respectfully ask that the Committee recognize and support the management authority of the Attorney General and hold this bill.

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Unity, Equality, Aloha for all



To: SENATE COMMITTEE ON WATER AND LAND

For hearing Wednesday, January 30, 2019

Re: SB 921 RELATING TO THE DEPARTMENT OF THE ATTORNEY  
GENERAL.

Creates a division within the Department of the Attorney General to  
provide legal advice regarding Hawaiian shoreline public access rights.

TESTIMONY IN OPPOSITION

The entire purpose of this bill is found in Section 2(d), proposing to establish a new division in the department of the attorney general, headed by at least 3 deputy AGs, specifically to focus on advising and enforcing shoreline access rights and "the traditional Hawaiian rights to gather firewood, house timber, aho cord, thatch, and ki leaf; to access drinking water and running water; to have right of way to the ocean and shoreline; any other such rights so recognized; and any related or similar rights." The 3 new deputy AGs must each have "at least four years of formal education in the Hawaiian language and Hawaiian culture. The division shall also have one or more staff members who have at least a baccalaureate degree in Hawaiian studies, Hawaiian history, or the equivalent, to assist the division's attorneys."

WOW! Shoreline access is a right long enjoyed by all Hawaii's people regardless of race. There's no need to adopt a racist attitude toward it. The PASH decision of 1995 was written in English. There's nothing in it that requires the use of Hawaiian language. Instead of interpreting the gathering rights described in PASH to be based on race, why not regard those rights as belonging to all Hawaii's people. The PASH gathering rights were practiced by native Hawaiians before Captain Cook arrived, and continued to be available to all residents including newcomers of Caucasian, Asian, and African ancestry. Those rights run with the land, not with any racial group exclusively.

Shoreline access and gathering rights were affirmed by the Hawaii Supreme Court in the PASH decision of 1995 (Public Access Shoreline Hawaii). According to that decision Native Hawaiians have a right to access the shoreline, or to gather certain plants, even if doing so is accomplished by trespassing through undeveloped or partially developed land, subject to regulation by the State. But there's nothing in that decision that restricts shoreline access or gathering rights to the racial group who are descendants of residents from before Captain Cook's arrival. The PASH decision recognizes that that racial group has those rights, but the decision does not prohibit the interpretation that

those rights run with the land regardless of the race of the land owner or the race of the person seeking access or gathering; and the PASH decision certainly does not prohibit the State from extending such rights to everyone.

The PASH decision is based on the concept that the bundle of rights obtained when purchasing fee-simple land in Hawaii (including the right to exclude trespassers) is limited by the rights possessed by tenants (residents) of the ahupua'a before Captain Cook's arrival, or certainly before the Mahele started in 1848. When land is sold or inherited, the land comes infused with the rights granted to tenants in the Mahele; and those special rights make land ownership in Hawaii very different from the other 49 states.

The word for "tenant" under the Mahele is "hoa'aina" which has no racial designation. It literally means "friend of the land" or refers to someone familiar with the land; i.e., a resident of the ahupua'a rather than an outsider. There is no such thing as "NATIVE tenant rights" despite attempts by sovereignty activists to insert the racial designator. We are free to adopt the realization that access and gathering rights under the PASH decision belong to all Hawaii's people equally regardless of race. So far as I am aware there has never been a court decision saying that PASH rights are exclusively for ethnic Hawaiians. The demand to have racial exclusivity has not been the focus of litigation, simply because racial exclusivity has been the automatically presumed default in Hawaii. How sad! For further analysis of the PASH decision see Paul M. Sullivan, "Customary Revolutions -- The Law of Custom and the Conflict of Traditions in Hawaii" published at 20 University of Hawaii Law Review 99 (1998); available at <https://tinyurl.com/23668n>

If rights are deemed to be officially and explicitly granted to only one group of people, does that prohibit those rights from being extended also to all the rest of the people? The ruling in a Hawaii lawsuit (Day v.

Apoliona) says there's no problem in extending the rights. Because if the rights are given to everyone, then those rights will thereby be given to the particular group originally designated to have them.

If a law or regulation provides money explicitly for the benefit of native Hawaiians with native blood quantum higher than 50%, is it lawful to provide that money to Native Hawaiians whose blood quantum is below 50%? Hawaii courts have ruled that it's OK to do that. If benefits are designated for a smaller group, then it's perfectly legal to provide those benefits to a more inclusive larger group which includes that smaller group inside it. Presumably the same legal arguments would allow the State to extend the same benefits to all citizens regardless of race, because the set of all citizens includes the subset of all Native Hawaiians regardless of blood quantum, which in turn includes the subset of all native Hawaiians with blood quantum higher than 50%.

The lawsuit *Day v. Apoliona* arose because Section 5(f) of the Hawaii Statehood Act of 1959 required that ceded land revenues could be spent for any one or more of 5 purposes. One of those purposes was "the betterment of native Hawaiians as defined in the Hawaiian Homes Commission Act of 1920" (i.e., at least 50% native blood quantum). When OHA was created in the State Constitutional Convention of 1978, the legislature then funded OHA by giving it 20% of all revenue from the ceded lands. But as time went by OHA was spending that money on projects for all Native Hawaiians regardless of blood quantum -- such projects as creating a racial registry, lobbying for the Akaka bill, loans for small-business, etc. A group of high-quantum native Hawaiians filed a lawsuit saying that spending ceded land money on low-quantum Hawaiians violated the Statehood Act. But the courts ruled it was OK, because the high-quantum beneficiaries were included as a subgroup of all Native Hawaiians. See "*Day v. Apoliona*" at <https://tinyurl.com/yo2ovk>

Please stop enacting racist laws. The U.S. Constitution 14th Amendment Equal Protection Clause, and the 5th Amendment, and the

Civil Rights Act of 1964, and many other federal laws guarantee equal rights under the law for all persons in the U.S. regardless of race. The Supremacy clause of the U.S. Constitution says that whenever a federal law conflicts with a state law, the federal law takes priority and renders any conflicting state law moot.

But must we make legal arguments and threaten litigation? Surely there's a better way. We in Hawaii claim to be governed by a higher moral and spiritual concept -- The Aloha Spirit. It is contrary to the Aloha Spirit to demand that traditional and customary practices are the exclusive property of any racial group and should be denied to others who lack a drop of the magic blood. Only a heart filled with hate would contemplate racial exclusivity or apartheid.

I see six signatures on this bill, but all of them are illegible. Perhaps those signers are ashamed to display their identities? They should be! But you can redeem yourselves. Has my testimony made anyone angry? Good. Harness that energy to rescind your support of this bill and restore your lokomaika'i and your embrace of pono. Do the right thing. Trash this bill.

**LATE**

**SB-921**

Submitted on: 1/29/2019 2:03:57 PM

Testimony for WTL on 1/30/2019 1:15:00 PM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Melodie Aduja	Testifying for O`ahu County Committee on Legislative Priorities of the Democratic Party of Hawai`i	Support	No

Comments:



**SB-921**

Submitted on: 1/29/2019 2:57:59 AM

Testimony for WTL on 1/30/2019 1:15:00 PM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Randy Gonce	Individual	Support	No

Comments:

**SB-921**

Submitted on: 1/29/2019 12:52:12 PM

Testimony for WTL on 1/30/2019 1:15:00 PM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Stanley Roehrig	Individual	Support	Yes

Comments:

Aloha Chairman Kahele and Committee members.

My name is Stanley H. Roehrig. I've been an attorney here in Hilo, for over 52 years. Although I am on the Board of Land and Natural Resources, I am writing in my private capacity as an attorney with special training in PASH Rights.

It has been my experience in private practice for many years that, when we have litigated Hawaiian Rights issues in cases in which the State is a party, the Attorney General's Office should have a PASH Rights division of lawyers to protect Hawaiian Rights preserved in **Art. XII Sec. 7** of the Hawaiian Constitution. PASH Rights issues are also very common before the Board of Land and Natural Resources. PASH Rights may conflict with other constitutional property rights that the Board of Land and Natural Resources is obligated to protect. The Attorney General's Office should give voice to the protection of them all.

Stanley H. Roehrig

**SB-921**

Submitted on: 1/29/2019 11:21:26 PM

Testimony for WTL on 1/30/2019 1:15:00 PM

**LATE**

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Erica Scott	Individual	Support	No

Comments: