



**TESTIMONY OF  
THE DEPARTMENT OF THE ATTORNEY GENERAL  
THIRTIETH LEGISLATURE, 2020**

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**ON THE FOLLOWING MEASURE:**

H.B. NO. 1784, RELATING TO LANDOWNER LIABILITY.

**BEFORE THE:**

HOUSE COMMITTEE ON WATER, LAND AND HAWAIIAN AFFAIRS

**DATE:** Wednesday, January 29, 2020      **TIME:** 10:00 a.m.

**LOCATION:** State Capitol, Room 325

**TESTIFIER(S):** Clare E. Connors, Attorney General, or  
Caron Inagaki, Deputy Attorney General

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Chair Yamane and Members of the Committee:

The Department of the Attorney General offers the following comments on this bill.

The purpose of this bill is to add a new chapter to title 28 to provide liability protections for public and private landowners who expressly allow access to, and use of, their lands to practitioners of Native Hawaiian traditional and customary practices for purposes of engaging in those practices.

However, the wording of the preamble on page 1, lines 4 – 9, appears to be in conflict with the stated purpose of the bill. Lines 4 – 9 state:

The legislature further finds that Native Hawaiians are legally entitled to engage in the reasonable exercise of these rights and associated practices on both publicly- and privately-owned lands that are less than fully developed, regardless of whether or not they are granted express permission by landowners.

At page 2, lines 12 – 16, the stated purpose of the bill is to provide liability protections to public and private landowners who give express permission to access and use their lands to practitioners of Native Hawaiian traditional and customary practices to engage in those practices.

Thus, because this apparent contradiction will likely cause confusion, we recommend that the sentence on page 1, lines 4 -9, be deleted.

DAVID Y. IGE  
GOVERNOR OF HAWAII



## STATE OF HAWAII

### DEPARTMENT OF LAND AND NATURAL RESOURCES

POST OFFICE BOX 621  
HONOLULU, HAWAII 96809

### Testimony of SUZANNE D. CASE Chairperson

### Before the House Committee on WATER, LAND, & HAWAIIAN AFFAIRS

Wednesday, January 29, 2020  
10:00 AM  
State Capitol, Conference Room 325

### In consideration of HOUSE BILL 1784 RELATING TO LANDOWNER LIABILITY

House Bill 1784 proposes to provide liability protections for public and private landowners who expressly allow access and use of their land to practitioners of Native Hawaiian traditional and customary practices. **The Department of Land and Natural Resources (Department) supports this measure and provides the following comments.**

The Department recognizes and upholds the legal exercise of Native Hawaiian traditional and customary practices on public lands managed by the Department. The Department notes that under Hawai'i state law, we have a duty to regulate certain activities on public lands in the public's interest. The Department may require permits, licenses, and/or lease agreements, which often include indemnification, for certain activities to fulfill statutory and constitutional duties. Thus, the Department is supportive of this measure provided that it's passage does not replace or adversely impact the Department's authority to regulate certain activities on public lands managed by the Department, as required under Hawai'i state law.

Thank you for the opportunity to comment on this measure

SUZANNE D. CASE  
CHAIRPERSON  
BOARD OF LAND AND NATURAL RESOURCES  
COMMISSION ON WATER RESOURCE MANAGEMENT

ROBERT K. MASUDA  
FIRST DEPUTY

M. KALEO MANUEL  
DEPUTY DIRECTOR - WATER

AQUATIC RESOURCES  
BOATING AND OCEAN RECREATION  
BUREAU OF CONVEYANCES  
COMMISSION ON WATER RESOURCE MANAGEMENT  
CONSERVATION AND COASTAL LANDS  
CONSERVATION AND RESOURCES ENFORCEMENT  
ENGINEERING  
FORESTRY AND WILDLIFE  
HISTORIC PRESERVATION  
KAHOOLAWE ISLAND RESERVE COMMISSION  
LAND  
STATE PARKS



**HB1784**  
**RELATING TO LANDOWNER LIABILITY**  
House Committee on Water, Land & Hawaiian Affairs

January 29, 2020

10:00 a.m.

Room 325

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The Office of Hawaiian Affairs (OHA) **STRONGLY SUPPORTS** HB1784, a bill in OHA's 2020 Legislative Package. HB1784 supports the interests of Native Hawaiian cultural practitioners who wish to exercise their place-based traditional and customary rights without the risk of confrontation or arrest, by addressing the concerns of private and government landowners who may refuse to accommodate practitioners' access to their lands, due to their perceived risk of liability.

Hawai'i's constitution, statutes, and case law have long established the right of Native Hawaiians to reasonably engage in traditional and customary practices on less-than-fully-developed lands, even when such lands are privately owned or closed to the general public. However, such rights are not consistently recognized or accommodated by landowners, who may erect fences or other barriers around their property, or otherwise refuse to grant practitioners access to their lands. In many cases, landowners have cited liability concerns as the main reason for their refusal to accommodate practitioners' access to their lands; in any case, such refusal may force practitioners to risk confrontation or even citation or arrest in order to exercise their constitutional traditional and customary rights, with arrested practitioners having to further bear the burden of proving their rights in court. In some cases, the risks faced by practitioners may even result in their discontinuation of place-specific traditional and customary practices, significantly undermining our state constitution, and resulting in the potential loss of cultural practices perpetuated since time immemorial.

By addressing landowners' liability concerns, HB1784 seeks to encourage the accommodation of Native Hawaiian practitioners' traditional and customary rights on both publicly and privately owned lands. The proposed statutory liability protections for private and public landowners who allow cultural practitioners to access their lands – substantially similar to existing protections for the provision of free recreational access to private lands – will address the primary reason cited by many landowners in refusing to accommodate practitioners' rights. Increased accommodation of practitioners and Native Hawaiian traditional and customary practices will in turn reduce the risks that practitioners may otherwise face in accessing lands without landowner permission, giving greater meaning and effect to Native Hawaiians' constitutional rights, and facilitating the perpetuation of cultural practices as well as the values, knowledge, and resources they depend upon.

OHA notes that this measure does not intend to force landowners to provide practitioners with access to their lands, nor does it intend to restrict or place any additional requirements on the exercise of Native Hawaiian traditional and customary rights. Instead, it seeks to encourage landowners to voluntarily accommodate practitioners who wish to avoid the risks associated with accessing lands without landowner permission, granting landowners with liability protection if they choose to allow such practitioners access to their lands.

OHA does respectfully request some technical amendments to the language of this measure, to better reflect its intended purpose.

First, in order to make clear that the liability protections in this measure are intended to only apply where landowners permit or invite practitioners to access their lands for the purpose of engaging in a Native Hawaiian traditional and customary practice, and in order to correct a reference to the statutory exceptions to such liability protections, OHA respectfully requests amending the language found on page 4, lines 8-18, to read as follows:

“§ -3 **Duty of care of owner limited.** (a) Except as specifically recognized by or provided in section -5, an owner of land owes no duty of care to keep the premises safe for entry or use by a cultural practitioner, or to give any warning of a dangerous condition, use, structure, or activity on the premises to any cultural practitioner, or to persons entering for a purpose in response to a cultural practitioner who requires assistance, either direct or indirect, including but not limited to rescue, medical care, or other form of assistance.”<sup>1</sup>

Second, in order to clarify that a practitioner need not specifically reveal the specific traditional and customary practice they seek to engage in, OHA respectfully requests amending the language found on page 5, line 2, to read as follows:

“that person is for the purpose of engaging in such practice.”<sup>2</sup>

Accordingly, OHA urges the Committee to **PASS** HB1784. Mahalo nui loa for the opportunity to testify on this measure.

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<sup>1</sup> The amended language replaces the reference to “section -6” with “section -5,” and clarifies that the limitations on a landowner’s duty of care is for cultural practitioners, defined in the previous section as a person who . . . “the owner of land either directly or indirectly invites or permits . . . entry onto the property for the purpose of engaging in a Native Hawaiian traditional practice” (emphasis added).

<sup>2</sup> The amended language replaces the word “that” with “such,” to avoid implying that a practitioner specifically identify the practice they seek to engage in.

**HB-1784**

Submitted on: 1/27/2020 2:22:48 PM

Testimony for WLH on 1/29/2020 10:00:00 AM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Donna K Santos	Individual	Support	No

Comments:

**HB-1784**

Submitted on: 1/27/2020 5:38:17 PM

Testimony for WLH on 1/29/2020 10:00:00 AM

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

Comments:

Dear Chair Yamane, Vice Chair Todd, and members of the Water, Land & Hawaiian Affairs Committee,

I respectfully urge your **STRONG SUPPORT** of this measure, which represents a win-win proposal for Native Hawaiians wishing to perpetuate their constitutionally protected practices on private and closed public lands, and landowners who would be willing to accommodate such practices, but for their liability concerns.

Mahalo nui loa for your careful consideration of this matter!

Wayne Tanaka

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Kenneth R. Conklin, Ph.D. Executive Director  
e-mail [Ken\\_Conklin@yahoo.com](mailto:Ken_Conklin@yahoo.com)  
Unity, Equality, Aloha for all



To: HOUSE COMMITTEE ON WATER LAND AND HAWAIIAN AFFAIRS

For hearing Wednesday January 29, 2020

Re: HB 1784 RELATING TO LANDOWNER LIABILITY.

Provides liability protections for public and private landowners who expressly allow access and use of their land to practitioners of Native Hawaiian traditional and customary practices.

TESTIMONY SUPPORTING THE INTENT BUT PROPOSING AMENDMENTS

This testimony supports the intent of this bill provided that it is amended to make clear that there is no requirement for practitioners to have any particular racial component in their heritage and that there is no requirement for any particular culture to be the one that the practitioners are engaging in.

It is a fundamental principle of civil rights that all people should be treated equally under the law regardless of race. Equal treatment under the law means there should be no special rights or government entitlement programs for one race preferentially or exclusively.

See the webpage "Four Fundamental Principles of Unity and Equality" at <https://tinyurl.com/yxg5plnb> and the version emailed to all legislators on January 6, 2020 preserved on Facebook at <https://tinyurl.com/yh32yex8>

Article 12 Section 7 of the Hawaii Constitution grants special rights to Native Hawaiians for “traditional and customary practices” interpreted to include trespassing for shoreline access, religious practices, or gathering certain materials. The pono way to honor that provision while also honoring equality under the law is to extend the traditional and customary rights of Native Hawaiians to all citizens. In the Kingdom those rights were for everyone regardless of race (“hoa’aina” meant “tenant” or “resident” and not race-specific “native tenant”; “kanaka” meant race-neutral “person”).

The general concept should be that landowners are protected against liability for injury or damage to the person(s) or property of practitioners who enter less than fully developed land, whether with or without landowner permission, when their entry is for the purpose of engaging in cultural practices; and that such protection from liability extends to all practitioners and cultures and does not depend upon which culture is being practiced nor which racial group(s) are contained in the genealogy of any practitioner.

The best improvement in this bill would be to waive all landowner liability for injury or property damage regarding any intruder who enters uninvited or without permission, regardless of motive or reason for entering; and then to extend the waiver of liability to apply even when an intruder has been invited or enters with permission provided that the intruder is engaged in cultural practices regardless of the particular culture being practiced or the race(s) of the practitioner.



Form Letter

I strongly support HB1784, a bill in OHA's 2020 Legislative Package. HB1784 supports the interests of Native Hawaiian cultural practitioners who wish to exercise their place-based traditional and customary rights without the risk of confrontation or arrest, by addressing the concerns of private and government landowners who may refuse to accommodate practitioners' access to their lands, due to the perceived risk of liability. Without access to place, place-based practices can be lost forever. HB1784 will support Native Hawaiians' constitutional right to access these places, therefore improving the conditions of Native Hawaiians. Therefore, I respectfully urge the Committee to PASS HB1784. Mahalo nui for the opportunity to testify in support of this bill.

Sincerely,

Tadia Rice	Individual
Heide Kila	Individual
Local Island Girl	Individual
Tom Lindsey	Individual
Constance Warrington	Individual
Jen Jenkins	Individual

DAVID Y. IGE  
Governor

JOSH GREEN  
Lt. Governor



PHYLLIS SHIMABUKURO-GEISER  
Chairperson, Board of Agriculture

MORRIS M. ATTA  
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TESTIMONY OF THE DEPARTMENT OF AGRICULTURE

BEFORE THE  
COMMITTEE ON WATER, LAND, & HAWAIIAN AFFAIRS

JANUARY 29, 2020  
10:00 AM  
CONFERENCE ROOM 325

HOUSE BILL NO. 1784  
RELATING TO LANDOWNER LIABILITY

House Bill 1784 proposes to provide liability protections for public and private landowners who expressly allow access and use of their land to practitioners of Native Hawaiian traditional and customary practices. The Department of Agriculture (Department) supports this measure and provides the following comments.

The Department recognizes the legal exercise of Native Hawaiian traditional and customary rights on public lands management by the Department. Under Hawai'i state law, the Department has a duty to regulate certain agricultural activities on public lands in the public's interest. The Department requires permits, licenses and/or lease agreements which include indemnification for agricultural and related activities to fulfill statutory and constitutional duties. Thus, the Department is supportive of this measure provided that its passage does not replace or adversely impact the Department's authority to regulate agricultural activities on public lands managed by the Department, as required under Hawai'i state law.

Thank you for the opportunity to comment on this measure.



**HB-1784**

Submitted on: 1/29/2020 12:08:05 AM

Testimony for WLH on 1/29/2020 10:00:00 AM

**LATE**

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Kama Hopkins	Individual	Support	No

Comments:

**TESTIMONY OF NAHELANI WEBSTER ON BEHALF OF THE HAWAII  
ASSOCIATION FOR JUSTICE (HAJ) IN OPPOSITION TO H.B. 1784**

Date: Wednesday, January 29, 2020

Time: 10:00 AM

**LATE**

**LATE**

To: Chair Ryan I. Yamane and Members of the House Committee on Water, Land, & Hawaiian Affairs:

My name is Nahelani Webster and I am presenting this testimony on behalf of Hawaii Association for Justice (HAJ) in OPPOSITION to H.B. 1784, relating to Landowner Liability.

While we appreciate the intent of this measure, we feel that it is unnecessary and may lead to reducing the equal rights and fair treatment for Native Hawaiians exercising their traditional and customary rights.

When removing liability for the landowner you also remove the opportunity for any recovery for the individual should they suffer injury or death on the property. For example, if an individual was exercising their traditional and customary rights upon entering the landowner's property and comes across a ledge with a sheer cliff that is not easily recognized for the inherent hazard it creates, they overstep and are either injured or die, then there is no opportunity for recovery. This also decreases the likelihood that corrective action will be taken to protect future individuals.

While this measure creates a new chapter to explicitly grant immunity to a landowner in order to offer additional protections for an already existing right to practice traditional and customary rights, it also takes away the right to potential recovery. This seems counterintuitive to the intent of the measure.

In effect, this creates a substandard class of rights for Native Hawaiian cultural practitioners, as they will not have the same rights to recover as other individuals do. We do not believe it is the intent of this legislation to limit the rights available to Native Hawaiians; therefore, we respectfully ask this committee to reconsider this measure.

Also, of great concern is Section 3 of the bill whereby the landowner is immune from any liability or duty of care even for emergency responders. For example, when an individual is exercising traditional and customary practices and is severely injured, the fire fighters who come onto the land to rescue the individual may in turn fall and injure themselves due to the negligence of the landowner and be unable to recover for any of the medical expenses they may incur. This passes the burden to the government who would have to make payment through workers compensation claims using tax payor dollars to foot the bill. Accordingly, landowners should not be worried about numerous/frivolous lawsuits from rescuers. However, we should not take away the right to recover in the small amount of cases under the right circumstances.

The use of the term “persons” is inconsistent throughout the bill. Recommend amending “persons” to “cultural practitioner” as referenced in the definitions section throughout the bill. For example, page 4, line 14 includes the words “persons entering” which implies that this chapter includes all persons and not only those uniquely exercising their traditional and customary practices. Our recommendation is to amend this line to replace “persons” with “cultural practitioner” and to delete the language relating to rescuers beginning on page 4, line 14 – 18.

If individuals are having difficulty getting onto private property because landowners claim fear of liability, then it is the best alternative to inform them of the already existing constitutional rights to exercise traditional and customary practices.

Much of this new language is modeled from Chapter 520, known as the Recreational Use law, which already 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. We raise the question as to whether 520 would already provide landowners the necessary protections that this bill is intending to achieve.

Finally, “public lands” should be removed from the language in this measure. The government has the responsibility to maintain our public areas in a safe and reasonable manner. In addition, this is not required to achieve the intent stated in the preamble of this measure. We respectfully ask the committee to remove public lands from the bill should the committee choose to advance this bill.

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