



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

ON THE FOLLOWING MEASURE:

S.B. NO. 1170, RELATING TO PROFESSIONALLY LICENSED OR CERTIFIED GOVERNMENT EMPLOYEES.

BEFORE THE:

SENATE COMMITTEE ON JUDICIARY

DATE: Friday, February 8, 2019

TIME: 9:00 a.m.

LOCATION: State Capitol, Room 016

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

Chair Rhoads and Members of the Committee:

The Department of the Attorney General supports this measure.

The purpose of this bill is to make the State exclusively liable for the negligent acts of professional licensed or certified employees of the State acting within the scope of the employee's office or employment and precluding civil actions or proceeding for money damages against the individual employee.

State employees are generally afforded a qualified privilege 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 case of Slingluff 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 a qualified privilege or 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.

We disagree with the holding in Slingluff. An employee who is employed by the State to perform tasks for which he or she is professionally licensed or certified, is

exercising judgment for which the State hired the employee and is therefore exercising governmental judgment and discretion.

To address the ramifications of Slingluff, and in an effort to attract and retain its doctors, the State has taken steps to obtain professional liability insurance covering claims of individual liability for its physicians in the Department of Public Safety. This comes at a cost. This cost is expected to rise over time as claims are made against such policies. The need for such insurance becomes unnecessary with the passage of this bill.

The potential for personal liability prevents good, well-qualified professionals from applying for jobs with the government. Even though the State may now carry insurance for its physicians in the Department of Public Safety, providing liability insurance for every licensed or certified professional employed by the State would come at an extraordinary, and unnecessary, cost.

This bill would amend section 662-14, Hawaii Revised Statutes, 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 and not the individual.

We respectfully ask that the Committee pass this bill.

DAVID Y. IGE
GOVERNOR

JOSH GREEN M.D.
LIEUTENANT GOVERNOR



LINDA CHU TAKAYAMA
DIRECTOR

DAMIEN A. ELEFANTE
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To: The Honorable Karl Rhoads, Chair
and Members of the Senate Committee on Judiciary

Date: Friday, February 8, 2019
Time: 9:00 A.M.
Place: Conference Room 016, State Capitol

From: Linda Chu Takayama, Director
Department of Taxation

Re: S.B. 1170, Relating to Professionally Licensed or Certified Government Employees

The Department of Taxation (Department) supports S.B 1170, an Administration measure, and offers the following comments for your consideration.

S.B. 1170 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 in the scope of the employee's office or employment.

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 testimony in support of this measure.

DAVID Y. IGE
GOVERNOR



STATE OF HAWAII
DEPARTMENT OF PUBLIC SAFETY
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No. _____

TESTIMONY ON SENATE BILL 1170
RELATING TO PROFESSIONALLY LICENSED OR CERTIFIED
GOVERNMENT EMPLOYEES.

by
Nolan P. Espinda, Director
Department of Public Safety

Senate Committee on Judiciary
Senator Karl Rhoads, Chair
Senator Glenn Wakai, Vice Chair

Friday, February 8, 2019; 9:00 a.m.
State Capitol, Conference Room 016

Chair Rhoads, Vice Chair Wakai and Members of the Committee:

The Department of Public Safety (PSD) supports Senate Bill (SB) 1170, which proposes to amend section 662-14 of the Hawaii Revised Statutes ("HRS") to clarify 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. PSD offers the following comments.

Under section 662-14, HRS, State employees are generally afforded qualified immunity for torts as a result of actions while in the course and scope of their employment. However, in Singluff v. State of Hawaii, the Intermediate Court of Appeals held that PSD physicians are not entitled to qualified immunity for exercising their professional medical judgment. The Court reasoned that these physicians were subject to separate professional standards for which they were specially licensed, and were exercising their professional medical judgment separate and distinct from their governmental judgment. The Court's ruling may

be argued to apply to not just physicians, as personal liability may be imposed on any state employee who is a professional, such as advanced practice registered nurses.

To address the consequences of Slingluff and in an effort to attract and retain its physicians, PSD obtained professional liability insurance covering claims of individual liability for its physicians. PSD expects insurance cost to rise overtime as claims are made against such policies.

Thank you for the opportunity to present this testimony.

TESTIMONY OF NAHELANI WEBSTER AND BOB TOYOFUKU ON BEHALF OF THE HAWAII ASSOCIATION FOR JUSTICE (HAJ) REGARDING S.B. 1170

Date: Friday, February 8, 2019

Time: 9:00 a.m.

Room: 016

To: Chair Karl Rhoads and Members of the Senate Committee on Judiciary:

We are presenting this testimony on behalf of the Hawaii Association for Justice (HAJ) regarding to S.B. 1170, Relating to Professionally Licensed or Certified Government Employees as currently drafted.

The following amendment is offered for clarification starting at page 2, line 17:

(b) The remedy against the State provided by this chapter and section 661-11 for injury or loss of property, or personal injury or death, arising or 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 shall be exclusive whenever the State agrees to be fully liable for the injuries, losses and damages caused by the professionally licensed or certified employee. 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 shall thereafter be precluded without regard to when the act or omission occurred; provided that claims based on liability other than an employee's scope of employment with the State or employment with an employer other than the State shall not be precluded. When an employee is named in an individual capacity, the State may notify all parties in

writing that the State is invoking exclusive liability by agreeing to be fully liable for the injuries, losses and damages caused by the professionally licensed or certified employee; and the action or proceeding shall thereafter proceed against the State alone. The employee shall remain a party for purposes of discovery and testimony. When the State agrees to partial responsibility for the injuries, losses and damages caused by an employee, [t]he employee shall remain personally liable for those injuries, losses and damages for which the State has not accepted responsibility.

This amendment addresses the possibility that the State may agree to assume all responsibility, or only partial responsibility, such as where there may be a claim for punitive damages and the State declines to assume responsibility for the punitive damages claim. This amendment clarifies the procedure applicable to full and partial assumption of liability by the State.

In addition, this amendment also clarifies that an employee remains obligated to comply with discovery requests and to give testimony because the employee who is personally named is often named because that employee has personally participated in the incident upon which the claim is based; and may be the sole source of important information that may not be available from anyone else.

To conclude, this amendment would also address the situation where a contract worker may also be employed by one or more private employers, as well as the State. There are currently cases in litigation over the question of whether the “exclusive” liability of the State also gives private employers immunity. Claimants have settled cases with the State with the understanding that they will recover the balance of their damages

from other private employers. This allows the State to pay a lower settlement amount. Private employers, however, claim that the exclusive liability provision protects them as well as the State. As a result, plaintiffs can no longer settle with the State as they did before. This ambiguity should be resolved to prevent further unnecessary litigation and to allow the State to settle its portion of a claim for less and avoid additional litigation expense as it did in the past.

It is also requested that section 1 be deleted. Section 1 provides a characterization of the Slingluff case that involved medical malpractice by a state employed doctor. HAJ disagrees with the state's characterization of the case, but instead of debating a more accurate characterization of the case, it is suggested that the section be deleted because it is entirely unnecessary to effectuate the statutory changes found in section 2 of the bill.

Thank you for allowing us to testify regarding this measure. Please contact us if there are any questions or concerns.



HAWAII GOVERNMENT EMPLOYEES ASSOCIATION
AFSCME Local 152, AFL-CIO

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

LATE

The Thirtieth Legislature, State of Hawaii
The Senate
Committee on Judiciary

Testimony by
Hawaii Government Employees Association

February 8, 2019

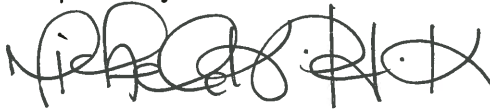
S.B. 1170 – RELATING TO PROFESSIONALLY
LICENSED OR CERTIFIED GOVERNMENT EMPLOYEES

The Hawaii Government Employees Association, AFSCME, Local 152, AFL-CIO supports the purpose and intent of S.B. 1170 which clarifies that the State shall be exclusively liable for civil tort claims for loss of property, 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 job.

As the state's largest union, we represent many of the professionally licensed or certified employees who will be impacted by the passage of this measure, including physicians, nurses, psychologists, and engineers, among others. While we believe that employees are generally afforded qualified immunity for performing within the scope of their duties, the Intermediate Court of Appeals' decision in Slingluff v. State of Hawaii, et al. created a separate distinction for professionally licensed employees. We respectfully contend that all employees, regardless of the distinction between professionally licensed or not, should be granted qualified immunity and not be held personally liable for performing within the scope of their employment.

Thank you for the opportunity to testify in support of S.B. 1170.

Respectfully submitted,


for Randy Perreira
Executive Director