



DAVID Y. IGE
GOVERNOR

JOSH GREEN
LT. GOVERNOR

**STATE OF HAWAII
OFFICE OF THE DIRECTOR
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS**

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Testimony of the Department of Commerce and Consumer Affairs

**Before the
House Committee on Labor & Tourism
Thursday, February 3, 2022
9:30 a.m.
Via Videoconference**

**On the following measure:
H.B. 2447, RELATING TO SAFETY**

Chair Onishi and Members of the Committee:

My name is Catherine P. Awakuni Colon, and I am the Director of the Department of Commerce and Consumer Affairs'. The Department opposes this bill.

The purpose of this bill is to establish a new regulatory regime for boiler inspectors and elevator inspectors, including the creation of a boiler and elevator inspectors board. Transfers the regulation of boiler inspectors and elevator inspectors from the department of labor and industrial relations to the board. Clarifies that any inspection required under the Boiler and Elevator Safety Law, including inspections required to be done by the department, may be directed to be completed by licensed qualified boiler inspectors or licensed qualified elevator inspectors.

The Department opposes this bill because (1) the boiler and elevator safety law administered by the Department of Labor and Industrial Relations (DLIR) provides for safety, including, but not limited to, safe and healthful working conditions. The licensure of individuals who would be charged with investigating compliance with these laws is more properly located in the department whose mission is best aligned with these

responsibilities; (2) the bill would essentially privatize regulatory and compliance functions traditionally and solely performed by state employees; (3) the bill creates a new regulatory measure that, if enacted, would subject unregulated individuals to licensing or other regulatory controls and as such would require referral to the legislative auditor for analysis, pursuant to Hawaii Revised Statutes, section 26H-6; (4) the bill provides no guidance as to the minimum qualifications for licensure; and (5) the bill does not provide personnel or funding resources necessary to establish or sustain the program.

First, the Department opposes placing the licensure of boiler and elevator safety inspectors under the jurisdiction of the DCCA, rather than the DLIR. This bill establishes a new chapter to license inspectors who will perform safety inspections consistent with DLIR's boiler and elevator safety law. This new statutory chapter falls squarely within the purview of the DLIR's Occupational Safety and Health Division, whose core mission is to "assure safe and healthful working conditions for the women and men of the State." In contrast, the DCCA's core mission is to protect consumers and service its business community with respect and fairness to the interests of both. Accordingly, it would be inapposite for the DCCA, a consumer protection department, to also enforce boiler and elevator safety standards through the licensure of compliance inspectors.

Second, the Department notes that the bill appears to privatize work currently performed by state employees. If the goal is to retain the DLIR positions and employees and add new licensure requirements as a condition of employment, the Department strongly urges that it not do so through a professional license and instead establish these requirements as part of the DHRD recruitment and hiring process.

Third, under Hawaii Revised Statutes section 26H-6 because this bill creates a new regulatory measure that, if enacted, would subject unregulated individuals to licensing or other regulatory controls, the bill should be referred to the legislative auditor for analysis before approval. Referral shall be by concurrent resolution that identifies a specific legislative bill to be analyzed.

Fourth, the bill provides for the creation of a new license but provides no guidance as to the educational requirements and experience requirements to qualify for licensure, and there are no identified prohibited practices, license violations, fines or disciplinary sanctions for license violations such as suspension or license revocation. Moreover, although the bill authorizes the board to promulgate rules for the adoption of license fees, there is no language in the bill that mandates the payment of fees as a condition of licensure. As a self-funded department that receives no general fund appropriations, the costs of the new program will be borne by its licensee population.

Fifth, the Department, and more particularly, the Professional and Vocational Licensing Division, is facing a significant increase in workload, as it struggles to process many more license applications than it had received in the past. At the same time, a combination of retirements and resignations has exacerbated the size of the workload for the existing staff. In short, the Department would have a very difficult time taking on more work as it struggles to meet its current obligations to existing licensees. This is especially true because bill does not provide any additional positions or funding to the Department.

Thank you for the opportunity to testify on this bill.

DAVID Y. IGE
GOVERNOR

JOSH GREEN
LIEUTENANT GOVERNOR



STATE OF HAWAII
DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS
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ANNE PERREIRA-EUSTAQUIO
DIRECTOR

JOANN A. VIDINHAR
DEPUTY DIRECTOR

February 3, 2022

To: The Honorable Richard H.K. Onishi, Chair,
The Honorable Jackson D. Sayama, Vice Chair, and
Members of the House Committee on Labor & Tourism

Date: Thursday, February 3, 2022
Time: 9:30 a.m.
Place: Conference Room 312, State Capitol

From: Anne Perreira-Eustaquio, Director
Department of Labor and Industrial Relations (DLIR)

**Re: H.B. 2447 RELATING TO THE BOILER AND
ELEVATOR SAFETY LAW**

Chair Onishi, Vice Chair Sayama, and Members of the Committee:

My name is Anne Perreira-Eustaquio, and I am the Director of the Department of Labor and Industrial Relations (DLIR). I am offering comments and raising concerns in regard to HB2447 as currently drafted. HB2447 bifurcates responsibility for the regulation of boilers and elevators and inspectors between the Department of Commerce and Consumer Affairs (DCCA) and the DLIR.

Currently, the DLIR is responsible for administering the Boiler and Elevator Safety Law (Chap 397, HRS) to help assure the safe operation and use of pressure retaining items, amusement rides, and elevators and kindred equipment. HB2447 proposes to establish a boiler and elevator inspectors board to license boiler and elevator inspectors.

This measure proposes a regulatory structure which raises issues of potential conflicts. It is unclear in which department the proposed board will reside as there is no language that places the proposed board in either the DCCA or DLIR (there are references to Chapter 436B, which is administered by the DCCA).

The proposed language regarding the board and the DLIR cooperating to facilitate the enforcement of the new chapter as well as chapter 397 is vague and raises valid liability concerns on behalf of the State as to which entities are liable. This provision does not prescribe how the department and board will work together to accomplish the purposes of both chapters.

If Chapter 397, HRS, remains operative, there will be potential conflicts of interest in

having the DLIR vet non-DLIR inspectors. It is unclear how the department would ensure that inspections are conducted in a uniform manner. If inspections are not conducted in a uniform manner, the standards for new as well as existing equipment currently regulated only under chapter 397, HRS, will be confusing to building owners, operators of the equipment, and service companies.

The measure as drafted raises numerous other administrative issues that require addressing should the measure continue to progress through the legislative process.

Thank you for the opportunity to testify on this important matter.



**TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
THIRTY-FIRST LEGISLATURE, 2022**

ON THE FOLLOWING MEASURE:
H.B. NO. 2447, RELATING TO SAFETY.

BEFORE THE:
HOUSE COMMITTEE ON LABOR AND TOURISM

DATE: Thursday, February 3, 2022 **TIME:** 9:30 a.m.

LOCATION: State Capitol, Via Videoconference

TESTIFIER(S): Holly T. Shikada, Attorney General, or
Amy Chan, Deputy Attorney General

Chair Onishi and Members of the Committee:

The Department of the Attorney General has concerns regarding this bill and provides the following comments.

This bill creates a boiler and elevator inspectors board in a newly created chapter in title 25 of the Hawaii Revised Statutes (HRS), which will regulate the licensing of boiler and elevator inspectors. This bill also amends section 397-6, HRS, by deleting the requirement that boiler safety inspections be performed either by an inspector employed by the Department of Labor and Industrial Relations (DLIR) or employed by an insurance company and deleting the requirement that elevator safety inspections be performed by an inspector employed by the DLIR.

This bill does not place the boiler and elevator inspectors board within a department and may be subject to a constitutional challenge. Section 6 of article V of the Hawaii State Constitution requires that "[a]ll executive and administrative offices, departments and instrumentalities of the state government and their respective powers and duties shall be allocated by law among and within not more than twenty principal departments" See also Hawaii Attorney General Legal Opinion 96-01. (Attached.) Therefore, we recommend that the bill be amended to include the following wording in section 2: "The boiler and elevator inspectors board shall be placed within the department of ____." The wording can further specify, if desired, whether the board is placed within the department for administrative purposes.

This bill may also be subject to constitutional challenge under the separation of powers doctrine because it provides for board members to be appointed by the President of the Senate and the Speaker of the House of Representatives. Article V, section 6, of the Hawaii State Constitution provides, in part, that "[t]he governor shall nominate and, by and with the advice and consent of the senate, appoint all officers for whose election or appointment provision is not otherwise provided for by this constitution or by law. . . ." Further, article III, section 1, of the Hawaii State Constitution provides that "[t]he legislative power of the State shall be vested in a legislature" There is no Hawaii case law that has looked at the issue of whether article III, section 1, of the Hawaii State Constitution gives the Legislature the authority to appoint board members. The U.S. Supreme Court has generally held, however, that the delegation of the executive power to appoint persons to boards or commissions where the official would be performing executive functions to Congress violates the separation of powers doctrine. See, e.g., Metro. Washington Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc., 501 U.S. 252, 111 S.Ct. 2298, 115 L.Ed.2d 236 (1991) (Congress violated the separation of powers doctrine when it gave itself the authority to appoint and remove federal commission members who performed executive functions.). Thus, by providing that the President of the Senate and the Speaker of the House of Representatives can each appoint two members, there is a potential that this bill can be challenged as an improper delegation of the Governor's appointment authority. To avoid a constitutional challenge on this issue, we recommend that the bill be amended to provide that the members of the board shall be appointed by the Governor.

This bill does not specify whether the Governor's appointments are subject to section 26-34, HRS, regarding the selection and terms of members of boards and commissions. For legal clarity, we recommend that the sentence on page 3, line 3, be amended to say, ". . . member, to be appointed by the governor as provided in section 26-34." or ". . . member, to be appointed by the governor without regard to section 26-34."

In addition, section 4 of the bill on page 8, lines 8-12, provides that "[a]ll rights, powers, functions, and duties with respect to the regulation of boiler inspectors and

elevator inspectors are transferred from" the DLIR to the newly created board. To avoid a potential conflict between this bill and chapter 397, HRS, and for legal clarity, we recommend that "regulation" be amended to "licensing" as the bill proposes to create a board regulating licensing of boiler and elevator inspectors.

Further, there is a spelling error in section 4 of the bill on page 8, line 17, which provides "elevator inspectors boar by this Act, . . ." The wording can be corrected to read as follows: "elevator inspectors board by this Act, . . ."

The Committee may also want to consider whether it would like to provide an effective date later than July 1, 2022, to allow sufficient time to establish the board.

We respectfully ask that the recommended amendments be made if the Committee decides to pass this bill. Thank you for the opportunity to provide these comments.

BENJAMIN J. CAYETANO
GOVERNOR



MARGERY S. BRONSTER
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February 16, 1996

STATE OF HAWAII

FEB 21 1996

The Honorable Benjamin J. Cayetano
Governor of Hawaii
State Capitol
Honolulu, Hawaii 96813

LEGISLATIVE REFERENCE BUREAU

Dear Governor Cayetano:

Re: Organizational Placement of Executive Branch Agencies

By memorandums dated February 2 and 11, 1996, a member of your staff requested a copy of written legal advice that your staff member incorrectly believed to have been already issued regarding the constitutional validity of the placement of state executive branch agencies placed within the Office of the Governor. Although we had orally advised you of our concern about the constitutional validity of the placement of those agencies, we have not previously issued an opinion that explains our concerns. Consequently, this opinion serves to confirm our previous oral advice and to provide further explanation in support of our advice.

We believe that the first paragraph of section 6 of article V of the Constitution of the State of Hawaii requires that state executive branch agencies be placed within the principal departments of the executive branch of state government, unless they are commissions or agencies that are both temporary and for special purposes. The Office of the Governor is not a principal department of the executive branch of state government. Therefore, any agency that is not temporary and for special purposes cannot be validly placed within the Office of the Governor.

The first paragraph of section 6 of article V of the State Constitution provides as follows:

All executive and administrative offices, departments and instrumentalities of the state government and their respective powers and duties shall be allocated by law among and within not more than twenty principal departments in such a manner as to group the same according to common purposes and

related functions. Temporary commissions or agencies for special purposes may be established by law and need not be allocated within a principal department.

The requirement of allocation by law among and within not more than twenty principal departments was originally proposed in Committee Proposal No. 22 of the Committee on Executive Powers and Functions of the Constitutional Convention of Hawaii of 1950. As originally proposed, the allocation requirement was in the first paragraph of section 10 of Committee Proposal No. 22, which read as follows:

SECTION 10. [Executive and Administrative Offices and Departments.] All executive and administrative offices, departments and instrumentalities of the State government and their respective functions, powers and duties shall be allocated by law among and within not more than 20 principal departments, in such manner as to group the same according to major purposes so far as practicable. Temporary commissions for special purposes may, however, be established by law and such commissions need not be allocated within a principal department.

1 Proceedings of the Constitutional Convention of Hawaii 1950, at 221 (1960).

In Standing Committee Report No. 67, the Committee on Executive Powers and Functions stated in part as follows:

Section 10 deals with executive and administrative offices and departments.

At the outset it should be declared that said Section 10 incorporates paragraphs 1, 2 and 4, Section IV, Article V of the New Jersey Constitution, with some modifications.

The number of principal departments in the executive branch shall be limited to not more than 20 and the Legislature shall be required to allocate the existing departments, boards and other agencies among and within the 20 or less principal departments.

1 Proceedings of the Constitutional Convention of Hawaii 1950, at 217 (1960).

During the Committee of the Whole debates held on June 20, 1950, Delegates Randolph Crossley of Kapaa, Kauai, and W. Harold Loper and Harold S. Roberts of Honolulu, Oahu, discussed the

purposes of the allocation of agencies within a limited number of departments:

CROSSLEY: I'd like to continue, if I could, uninterrupted. I was trying to point out that when you look at states like New Jersey, that is limited and does operate under 20, and some of these other states, that the whole purpose of trying to get a fewer number of boards is just to prevent what the previous speaker is talking about, and that is that every man who is going to be in charge of some division of government will have an entire independent setup of his own. If you limit the number, it will be found that those functions of government that are well related can be brought together and put under a single department without losing any of the efficiency. As a matter of fact, every single study that has been made on this subject, every revision of a state constitution, has brought about a limiting of the number for the sole purpose of bringing together these departments and trying in that manner to cut the cost of government and to bring about a more efficient government in so doing.

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LOPER: I wish to speak in support of the committee report and the position taken by the delegate from Kauai and add just this additional argument, which I don't believe has been brought out. Part of the reason for limiting the number to 20 is based upon a principle of organization, good administrative organization whether military, business or governmental, and that is that there is a limit to the spread of supervisory authority and responsibility, and by limiting it -- as a matter of fact 20 is too many to be supervised by any one executive -- but by limiting it, it's an invitation when some new function of government comes along, to find one of the existing departments to assign it to instead of setting up another commission or department.

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ROBERTS: I'd like to speak in support of the proposal. The section, to me, is a very valuable one. It goes to the very heart of proper executive function and integration of operations so that the governor, the chief executive, has a limited number of departments that he, personally, can keep in touch with and can follow the functions and operations of

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those departments. The section does not spell out how the existing departments are to be allocated, that is left for the legislature. The legislature then can re-allocate and place the departments where they think they properly belong. This proposal merely provides an adequate method of administration with a limited number of departments so that the executive can keep personally in touch with their operation and see to it that the executive functions are effectively carried out in the State. I think the purpose is good and I think we ought to support the proposal.

2 Proceedings of the Constitutional Convention of Hawaii 1950, at 318-19 (1961).

In accordance with the first paragraph of section 6 of article V of the State Constitution, section 26-4, Hawaii Revised Statutes, provides that, "[u]nder the supervision of the governor, all executive and administrative offices, departments, and instrumentalities of the state government and their respective functions, powers, and duties shall be allocated among and within the following principal departments that are hereby established," and lists the eighteen state executive branch agencies established as principal departments of the state executive branch. The offices of the Governor and of the Lieutenant Governor are constitutional offices established by sections 1 and 2 of article V of the State Constitution and are not principal departments of the state executive branch listed in section 26-4.

The second sentence of the first paragraph of section 6 of article V of the State Constitution does provide for an exception to the requirement of allocation by law within a principal department. The second sentence states, "Temporary commissions or agencies for special purposes may be established by law and need not be allocated within a principal department." We initially did have some uncertainty whether this sentence referred to "commissions or agencies" that are both "temporary" and "for special purposes" or whether this sentence referred to "temporary commissions" and "agencies for special purposes." Hawaii's provision was based on the New Jersey Constitution, which states in paragraph 1 of section IV of article V, "Temporary commissions for special purposes may, however, be established by law and such commissions need not be allocated within a principal department." The requirements of "temporary" and "for special purposes" both applied to the commissions referred to. However, there still remained the question of whether the Hawaii Constitution's wording was deliberately changed to make the requirement of "temporary" status applicable only to "commissions" and the requirement of

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"for special purposes" applicable only to "agencies." We believe that the wording was not substantively changed.

Committee Proposal No. 22, Relating to the Executive, originally contained the same wording as the New Jersey Constitution, "Temporary commissions for special purposes may, however, be established by law and such commissions need not be allocated within a principal department." 1 Proceedings of the Constitutional Convention of Hawaii 1950, at 221 (1960). The Committee of the Whole of the Constitutional Convention of Hawaii of 1950 reported on the pertinent provision in Committee Proposal No. 22, R.D. 1, stating, "Section 10, 1st paragraph, is recommended for adoption without amendment." Comm. of the Whole Rep. No. 17, 1 Proceedings of the Constitutional Convention of Hawaii 1950, at 325 (1960). Committee Proposal No. 22 passed second reading and was referred to the Committee on Style. The Committee on Style "examined each proposal agreed upon in the Committee of the Whole, studied the language of the proposal and arranged it as an article, or part of an article, within the format of the constitution, but without changing the substance or meaning of the article approved by the convention at second reading." 1 Proceedings of the Constitutional Convention of Hawaii 1950, Preface at ix (1960) (emphasis added).

In Standing Committee Report No. 119, the Committee on Style reported on the provision originally designated as "section 10" in pertinent part as follows:

Section 6. (See Section 10 of original draft). The letter "s" in the word "state" (second line of paragraph 1) is not capitalized in the redraft, the word "state" in this instance being used as an adjective. The words "or agencies" have been inserted between the words "commissions" and "for" in lines 7-8, to conform to what your committee believes to have been the intent of the Convention.

The word "however," together with the commas setting it apart, have been deleted in line 8.

The words "such commissions" have been deleted before the word "need" in line 9, as unnecessary in view of the reconstruction of the sentence.

1 Proceedings of the Constitutional Convention of Hawaii 1950, at 273 (1960) (emphasis added). As amended by the Committee on Style, the second sentence of the first paragraph read, "Temporary commissions or agencies for special purposes may be established by law and need not be allocated within a principal department." 1 Proceedings of the Constitutional Convention of

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Hawaii 1950, at 274 (1960). The sentence remains unchanged in the current constitution.

The report of the Committee on Style was presented to the convention on July 11, 1950, and was adopted without any reported discussion. 1 Proceedings of the Constitutional Convention of Hawaii 1950, at 120 (1960). With a further amendment on the floor (to add another sentence regarding interim appointments), Committee Proposal No. 22, Relating to the Executive, passed third reading on July 14, 1950. 1 Proceedings of the Constitutional Convention of Hawaii 1950, at 126 (1960).

Consequently, since the words "or agencies" were inserted by the Committee on Style, which was to make changes without changing the substance or meaning, we believe that the "commissions or agencies" referred to in the second sentence of the first paragraph of section 6 of article V of the State Constitution must meet both of the stated requirements and must be both "temporary" and "for special purposes."

In conclusion, we believe that "offices" or other agencies created by law and not placed within a principal department of the state executive branch, "in such a manner as to group the same according to common purposes and related functions," are subject to attack as being invalidly placed in violation of the first sentence of the first paragraph of section 6 of article V of the State Constitution. However, if the "offices" or other agencies are temporary and for special purposes, they may be established by law and need not be allocated within a principal department pursuant to the second sentence of the first paragraph of section 6 of article V of the State Constitution.

Very truly yours,



Maurice S. Kato
Deputy Attorney General

APPROVED:



Margery S. Bronster
Attorney General

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