

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

ON THE FOLLOWING MEASURE:

H.B. NO. 886, RELATING TO PROFESSIONALLY LICENSED OR CERTIFIED GOVERNMENT EMPLOYEES.

BEFORE THE:

HOUSE COMMITTEE ON JUDICIARY AND HAWAIIAN AFFAIRS

DATE: Wednesday, February 16, 2022 **TIME:** 2:00 p.m.

LOCATION: State Capitol, Room 325, Via Videoconference

TESTIFIER(S): Holly T. Shikada, Attorney General, or
Caron Inagaki, Deputy Attorney General

Chair Nakashima and Members of the Committee:

The Department of the Attorney General strongly supports this measure.

The purpose of this bill is to clarify that qualified privilege or immunity for torts applies to the negligent acts of a professionally licensed or certified employee of the State acting within the scope of the employee's office or employment and precludes civil actions or proceedings for money damages against the individual employee. The employee would remain exclusively liable for those injuries, losses, and damages for which the State has not accepted responsibility.

State employees are generally afforded qualified privilege or 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 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 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 employees of the State, including nurses, attorneys, engineers, and other professionals. For example, plaintiffs in civil lawsuits have attempted to apply the reasoning in Slingsluff to deputy public defenders who had represented criminal defendants. Other state

employees who hold professional licenses could also be affected and potentially be held personally liable for doing their jobs.

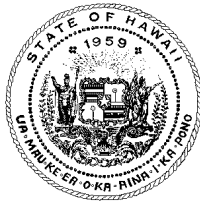
We disagree with the holding in Slingluff. An employee who is employed by the State to perform tasks for which he or she is professionally licensed or certified, is exercising judgment for which the State hired the employee and is therefore exercising governmental judgment and discretion.

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 would become 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 shall be against the State and not the individual, so long as the State agrees that the employee was acting within the course and scope of the employee's office or employment.

We respectfully ask that the Committee pass this bill.



STATE OF HAWAII
DEPARTMENT OF PUBLIC SAFETY

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No. _____

TESTIMONY ON HOUSE BILL 886
RELATING TO RELATING TO PROFESSIONALLY
LICENSED OR CERTIFIED GOVERNMENT EMPLOYEES.

by
Max N. Otani, Director

House Committee on Judiciary and Hawaiian Affairs
Representative Mark M. Nakashima, Chair
Representative Scot Z. Matayoshi, Vice Chair

Wednesday, February 16, 2022; 2:00 p.m.
and Via Video Conference

Chair Nakashima, Vice Chair Matayoshi, and Members of the Committee:

The Department of Public Safety ("Department") strongly supports House Bill (HB) 886, which clarifies personal liability requirements by making the State partially or exclusively liable for the negligent act of professionally licensed or certified employee of the State acting within the course and scope of the employee's office or employment and precluding civil actions or proceedings for money damages against the employee.

Prior to *Slingluff v. State of Hawaii*, 131 Hawaii 239, 317 P.3d 683 (2013), the Hawaii appellate courts have applied qualified immunity to many types of government employees. This was changed by the *Slingluff* court when it withheld qualified immunity from the Department's physicians and created an artificial distinction between medical discretion and governmental discretion that did not previously exist in Hawaii law. This bill clarifies that the State invokes exclusive liability and precludes civil actions or proceedings for money damages against a professionally licensed or certified employees who, acting within the course and scope of his or her employment, exercises judgment and discretion for which the State hired the employee.

The Department has always found it difficult to recruit and retain qualified physicians, psychiatrists, and advance practice registered nurses because of lower salaries than in the private sector. The demand for qualified and licensed health care provider is greater during this COVID-19 pandemic. The additional requirement that their personal assets would be at risk would further discourage applicants. This measure will help the Department recruit and retain healthcare professionals by ensuring they are not held liable for discretionary actions and judgment they carry out in the course and scope of their employment with the Department.

Thank you for the opportunity to testify on this measure.

TESTIMONY OF EVAN OUE ON BEHALF OF THE HAWAII ASSOCIATION FOR JUSTICE (HAJ) IN SUPPORT OF HB 886

Date: Wednesday February 16, 2022

Time: 2:00 p.m.

My name is Evan Oue and I am presenting this testimony on behalf of the Hawaii Association for Justice (HAJ) in **SUPPORT** of HB 886, Relating to Professionally Licensed or Certified Government Employees; Tort Liability; State Liability.

HAJ stands in support of this measure as it offers an avenue of recourse for the 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 course and scope of the employee's office or employment. HB 886 appropriately balances the protection of resident's rights to recovery while offering protection to our hardworking professionally licensed or certified state employees.

Thank you for allowing us to testify regarding this measure. Please feel free to contact us should you have any questions or desire additional information.