



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

ON THE FOLLOWING MEASURE:

S.B. NO. 2607, RELATING TO INDEPENDENT LEGAL COUNSEL.

BEFORE THE:

SENATE COMMITTEE ON HAWAIIAN AFFAIRS

DATE: Tuesday, February 1, 2022 **TIME:** 1:01 p.m.

LOCATION: State Capitol, Via Videoconference

TESTIFIER(S): Holly T. Shikada, Attorney General, or
Craig Y. Iha, Deputy Attorney General

Chair Shimabukuro and Members of the Committee:

The Department of the Attorney General opposes this bill.

The purpose of this bill is to allow the Department of Hawaiian Home Lands (DHHL) to hire its own attorneys, as needed, without the approval or participation of the Attorney General or the Governor. This bill also requires the State to pay the legal fees owed to the attorneys hired by DHHL.

The Attorney General serves as legal counsel to the State of Hawai'i, which statutory legal obligation includes providing legal services to state agencies. Because it is the largest legal entity in the State, with a number of diverse divisions, the Attorney General is best suited to provide legal advice to its state clients on a broad array of matters and therefore, as a general matter, state agencies should be advised by deputy attorneys general. By utilizing attorneys representing state agencies within the Department of the Attorney General, state agencies benefit from the wide range of experience and expertise in a cost effective and conflict-free manner. Private attorneys retained by the DHHL would not possess the necessary breadth of knowledge and experience available within the Department of the Attorney General. Additionally, because state agencies are regulated by a variety of laws not applicable in private practice – including the Procurement Code, the Sunshine Law, and the Uniform Information Practices Act – the Attorney General's expertise representing state agencies in these areas would be difficult for private attorneys to duplicate, and certainly not without additional expense. Finally, because deputy attorneys general are separate

and apart from the agencies they represent, they are insulated from political issues that may arise within an agency. This insulation permits the Department of the Attorney General to provide objective and high-quality legal counsel.

DHHL is also one of eighteen principal departments of the executive branch of state government. The exposure to liability as a result of actions taken by departments on matters with significant legal and financial implications to the State makes it essential that the Department of the Attorney General be able to provide the necessary representation and counsel.

The Department of the Attorney General is also unique in its ability under the law to undertake concurrent representation of multiple state agencies or parties that may have conflicting interests, something that private attorneys are not able to do under the Hawaii Rules of Professional Conduct, the rules governing lawyers. In State v. Klattenhoff, 71 Haw. 598 (1990), the Hawai'i Supreme Court ruled that the Department of the Attorney General may assign deputies to represent agencies or employees that have competing interests as long as it establishes appropriate safeguards, such as firewalls between those attorneys and takes steps to ensure that no prejudice is suffered by the clients. The Department of the Attorney General has done this in past cases to ensure that all client agencies are vigorously, and separately, represented. We have provided, and will continue to provide, vigorous and objective legal representation to the DHHL.

Notwithstanding the prohibition against employing or retaining private attorneys, state agencies may submit a waiver request to the Attorney General pursuant to section 28-8.3(a)(22), Hawaii Revised Statutes (HRS). Under this provision, the Attorney General may determine that circumstances exist whereby representation by private attorneys is appropriate. In such circumstances, an agency may retain or employ its own attorney, provided that the Governor also waives the provision of section 28-8.3, HRS. Indeed, this avenue has been exercised by the DHHL in the past, without incident.

For the foregoing reasons, we respectfully request that this bill be held in committee. Thank you for the opportunity to testify.

DAVID Y. IGE
GOVERNOR
STATE OF HAWAII

JOSH GREEN
LT. GOVERNOR
STATE OF HAWAII



WILLIAM J. AILA, JR.
CHAIRMAN
HAWAIIAN HOMES COMMISSION

TYLER I. GOMES
DEPUTY TO THE CHAIRMAN

**STATE OF HAWAII
DEPARTMENT OF HAWAIIAN HOME LANDS**

P. O. BOX 1879
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TESTIMONY OF WILLIAM J. AILA, JR, CHAIRMAN
HAWAIIAN HOMES COMMISSION
BEFORE THE SENATE COMMITTEE ON HAWAIIAN AFFAIRS
HEARING ON FEBRUARY 1, 2022 AT 1:01PM VIA VIDEOCONFERENCE

IN SUPPORT OF

SB 2607, RELATING TO INDEPENDENT LEGAL COUNSEL

February 1, 2022

Aloha Chair Shimabukuro, Vice-Chair Keohokalole and members of the Committee:

The Department of Hawaiian Home Lands (DHHL) strongly supports this bill allowing DHHL to retain independent legal counsel as needed and authorizing DHHL to use the services of the Attorney General as needed and when the interests of the State and DHHL are aligned. The bill also provides that funds owed to independent legal counsel should be paid by the State. The Hawaiian Homes Commission approved this measure, but it was not included in the Administration's legislative package.

DHHL has a trust duty to its beneficiaries and in the fulfillment of this trust obligation, DHHL may at times be at odds with the interests of the State. It is at these times that DHHL must be assured that its counsel provides legal advice strictly in the interest of its client. Independent counsel that is hired and retained by DHHL eliminates any cloud of uncertainty that there is a conflict of interest as a result of representation by the Attorney General's office that also represents the State of Hawaii.

Thank you for your consideration of our testimony.

February 1, 2022

Senate Committee On Hawaiian Affairs
Senator Maile S.L. Shimabukuro, Chair
Senator Jarrett Keohokolole, Vice Chair

Testimony in Support of SB-2605

Allows the Department of Hawaiian Home Lands to retain independent counsel as needed whose legal fees are to be paid for by the State.

Testimony in Support of SB-2607

Allows the Department of Hawaiian home lands to retain independent legal counsel as needed. Authorizes the Department of Hawaiian home lands to use the services of the Attorney General as needed and when the interests of the State and the Department of Hawaiian Home Lands are aligned. Provides that funds owed to independent legal counsel shall be paid by the State.

Aloha Chair Shimabukuro, Vice Chair Keohokolole, and members of the Committee,

I'm Homelani Schaedel, a beneficiary residing in Malu'ohai, a homestead leader in Kapolei, and an advocate for the Hawaiian Home Lands Trust.

What I want to know, is aside from coming year after year to make this request, what does DHHL and its' beneficiaries need to do to be exempt like the other twenty-one (21) commissions, departments, divisions, agencies, and offices in Section 28-8.3 subsection (a)? What distinction do they have that DHHL does not?, and what disqualifies DHHL from having the same opportunity? How many times do we need to come before you, because quite frankly I'm getting old and I'm tired, but this is the kuleana I've been given, so I have to ho'omau.

I'm reminded of the old adage... No man (Attorney General) can serve two (2) masters (the State and DHHL). Both of these bills mirror each other except in line 4 of the description... "when the interest of the State and the Department of Hawaiian Home Lands are aligned". When they do not, passage of this bill will allow DHHL in service to its' beneficiaries to protect **our best interest, lands, water, and natural resources** the option to retain independent legal services outside the office of the Attorney General.

To protect the interest of, elevate and improve service and opportunities to beneficiaries; DHHL from time to time requires experience and expeditious legal assistance. Your support and passage of this bill will provide DHHL the same opportunity already extended to others.

E kala mai ia'u if I have offended you with my questions or comments. I appreciate the space I've been given to share my mana'o, your time and attention. I trust you will do the right thing and move one or both of these bills forward.

Me ka mahalo nui!

SB-2607

Submitted on: 1/31/2022 1:06:53 PM

Testimony for HWN on 2/1/2022 1:01:00 PM

Submitted By	Organization	Testifier Position	Remote Testimony Requested
k. chun	Individual	Support	No

Comments:

Welina kakou, e Chair Shimabukuro, Vice Chair Keohokalole, and members of the Committee on Hawaiian Affairs. I wish to address the matter of independent legal counsel for the Department of Hawaiian Home Lands, both SB 2605, and SB 2607.

DHHL would join other agencies - the Public Utilities Commission, the Hawaii Labor Relations Board, the Hawaii Health Systems Corporation, the University of Hawaii, the insurance division, the division of consumer advocacy, the Campaign Spending Commission, the Office of Information Practices, the Hawaii Tourism Authority, the Kahoolawe Island Reserve Commission, the Office of Hawaiian Affairs - and others provided this access.

In testimony before the House Finance Committee on January 18, 2022, the Attorney General said, "...great outcome in the Nelson case, saving approximately 21 million per year defeating the claims that the Legislature had constantly short-changed DHHL beneficiaries..." The statement reflects bias on the part of the Attorney General, which is unacceptable.

As a plaintiff in the Nelson case, mahalo for the opportunity to testify on yet another need of the department.

Ms. Kaliko Chun