



**WRITTEN TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
THIRTY-FIRST LEGISLATURE, 2021**

ON THE FOLLOWING MEASURE:

S.B. NO. 891, S.D. 2, RELATING TO THE HAWAIIAN HOMES COMMISSION ACT.

BEFORE THE:

HOUSE COMMITTEE ON JUDICIARY AND HAWAIIAN AFFAIRS

DATE: Friday, March 12, 2021 **TIME:** 2:00 p.m.

LOCATION: State Capitol, Room 325, Via Videoconference

TESTIFIER(S): **WRITTEN TESTIMONY ONLY.**
(For more information, contact Craig Y. Iha,
Deputy Attorney General, at 587-2978)

Chair Nakashima and Members of the Committee:

The Department of the Attorney General opposes this bill with respect to section 7.

The purposes of sections 1-6 of this bill are to amend the Hawaiian Homes Commission Act, 1920, as amended (HHCA), to: require the Department of Hawaiian Home Lands (DHHL) to engage in beneficiary consultation when preparing certain plans and taking other actions; require at least five members of the Hawaiian Homes Commission (HHC) to be beneficiaries of the Hawaiian Home Lands Trust; establish reporting requirements for DHHL; allow the Governor, upon the recommendation of the HHC, to establish an inter-agency council to study the purposes of the HHCA; and require DHHL to implement a loan servicing manual. The purpose of section 8 of this bill is to order the Legislative Reference Bureau to study and report on creating a DHHL director position that is separate from the position of the HHC Chair.

The purpose of Section 7 of this bill is to amend section 28-8.3, Hawaii Revised Statutes (HRS), to allow DHHL to hire its own attorneys without the approval or participation of the Attorney General or the Governor. This bill provides DHHL the discretion to use the services of the Attorney General if the interests of the State and DHHL are "aligned." 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 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 locating 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.

The Department of the Attorney General is also unique in its ability under the law to undertake concurrent representation of multiple state agencies 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 that have competing interests as long as it establishes appropriate 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 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, 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 section 28-8.3, HRS. Indeed, this avenue has been exercised by DHHL in the past without incident.

For the foregoing reasons, we respectfully request that this bill be amended to delete section 7 in its entirety.

Thank you for considering our comments.

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Director

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Written Comments

SB891, SD2

RELATING TO THE HAWAIIAN HOMES COMMISSION ACT.

Charlotte A. Carter-Yamauchi, Director
Legislative Reference Bureau

Presented to the House Committee on Judiciary & Hawaiian Affairs

Friday, March 12, 2021, 2:00 p.m.
Conference Room 325

Chair Mark M. Nakashima and Members of the Committee:

Good morning Chair Nakashima and members of the Committee, my name is Charlotte Carter-Yamauchi and I am the Director of the Legislative Reference Bureau. Thank you for providing the opportunity to submit written **comments** on S.B. No. 891, S.D. 2, Relating to the Hawaiian Homes Commission Act.

The purpose of this measure is to make the Hawaiian Homes Commission more representative of, and more responsive to, the beneficiaries of the Hawaiian Home Lands Trust. More specifically, the measure:

- (1) Establishes requirements for Hawaiian Home Lands beneficiary consultations;
- (2) Requires that a majority of the members of the Hawaiian Homes Commission be at least one-fourth Hawaiian or beneficiaries of the trust who are on the Department's waitlist for Hawaiian Home Lands;
- (3) Requires the Department of Hawaiian Home Lands to report quarterly to the Legislature and beneficiaries on land dispositions made during the previous quarter;
- (4) Authorizes the Governor to establish an inter-agency council, based on a recommendation from the Hawaiian Homes Commission, to address the

purposes of the Hawaiian Homes Commission Act, and if convened, to meet at least three times per year;

- (5) Requires an annual accounting of any funding receipts and expenditures made by the Department pursuant to resolving controversies relating to the Hawaiian Home Lands Trust and covered under Act 14, Special Session Laws of Hawaii 1995;
- (6) Requires the Department to develop and implement a loan servicing manual;
- (7) Allows the Hawaiian Homes Commission to retain counsel, separate from the Attorney General, to provide services to the Commission and beneficiaries; and
- (8) Requires the Legislative Reference Bureau to conduct a study on the potential consequences of creating a position of Director of Hawaiian Home Lands that is separate from the Chairperson of the Hawaiian Homes Commission.

The Bureau takes no position on this measure but submits the following comments for your consideration.

With regard to the study required of the Bureau under section 8 of the measure, we note that the Bureau has no specific expertise or particular experience in matters relating to the Hawaiian Homes Commission or to Hawaiian Home Lands, or with respect to executive department organizational structure or personnel issues. We note that the Senate Draft 2 of the measure attempts to meet the Bureau's concerns that the study parameters are too vague, as we voiced in our testimony to the Senate Standing Committees on Hawaiian Affairs, Ways and Means, and Judiciary. However, the Senate Draft 2 still requires the Bureau to make a number of unguided organizational assumptions that would, in essence, substitute the Bureau's own ideas on what the Legislature's intent is in attempting to structurally reorganize the administration of the Department of Hawaiian Home Lands and Hawaiian Homes Commission.

The study provisions require the Bureau to "consider the effectiveness, cost, and potential conflicts of interests (e.g., contested case hearings), and other issues that may arise from the proposed change in the governance structure of the department of Hawaiian home lands." However, the Senate Draft 2 version, like the original version of the measure, does not indicate if one or both the Director and Chairperson positions are to be paid a salary, nor does it clearly delineate the position responsibilities of the Director or Chairperson. The lack of guidance on this and similar matters directly impacts how costs would be estimated. Further, it is unclear what scenarios the proponents of the study are foreseeing that may pose potential conflicts of interest in a contested case setting. If required to conduct the study, the Bureau would just be guessing, with very little experience or information, on what conflicts may arise.

Again, while we appreciate the previous Senate Committees' attempt to add clarity, unfortunately, the amendments to the study provisions do not fully address our concerns. The lack of clarity in the measure will make performing such a study difficult, if not impossible, and may result in the Bureau providing a study product with little meaningful findings and recommendations for the Legislature to consider when rendering policy decisions on this issue.

For these reasons, the Bureau respectfully requests that, if this measure is to move on in the legislative process, amendments be made to section 8 of the bill to provide explicit guidance through the inclusion of: a comprehensive proposed organizational structure for the Department of Hawaiian Home Lands and the Hawaiian Homes Commission; job responsibilities for the Director and Chairperson positions; a list of cost elements to consider; examples of potential conflicts of interest necessitating contested case hearings under the new organizational structure; and parameters upon which to rely in conducting the study.

Thank you again for the opportunity to submit written comments.

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**

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**TESTIMONY OF WILLIAM J. AILA, JR, CHAIRMAN
HAWAIIAN HOMES COMMISSION
BEFORE THE HOUSE COMMITTEE ON JUDICIARY & HAWAIIAN AFFAIRS
HEARING ON MARCH 12, 2021 AT 2:00PM VIA VIDECONFERENCE**

SB 891, SD2 RELATING TO THE HAWAIIAN HOMES COMMISSION ACT

March 12, 2021

Aloha Chair Nakashima, Vice Chair Matayoshi, and members of the Committee:

The Department of Hawaiian Home Lands (DHHL) submits comments on this bill that establishes requirements for Hawaiian home lands beneficiary consultation; requires that a majority of the members of the Hawaiian Home Commission (HHC) be beneficiaries or on the waitlist for Hawaiian homestead lands; requires quarterly reporting to the legislature and beneficiaries on land dispositions made during the quarter; authorizes the Governor to establish an inter-agency council, based on a recommendation from the HHC; requires an annual accounting of Act 14, Special Session Laws of Hawaii 1995, expenditures; requires DHHL to develop and implement a loan servicing manual; allows the HHC to retain separate counsel from the Attorney General to provide service to the Commission and beneficiaries; and requires the Legislative Reference Bureau to conduct a study on the potential effects of creating a position for the Director of DHHL that is separate from the Chairperson of the HHC.

Section 1 of the bill establishes requirements for Hawaiian home lands beneficiary consultation. Since DHHL adopted administrative rules defining beneficiary consultation that became effective on August 25, 2018 after beneficiary consultation and public hearings, this section of the bill is unnecessary.

Section 2 of the bill amends section 202 of the HHCA to require that a majority of the members of the HHC be beneficiaries or on the waitlist. DHHL supports increasing the members from four to five of nine that are descendants of not less than one-fourth part of the blood of the races inhabiting the Hawaiian Islands previous to 1778. This increase aligns with the amendment to the HHCA made by Congress in 1935 providing that at least three of the five members shall be descendants of not less than one-fourth part of the blood of the races inhabiting the Hawaiian Islands previous to 1778.

Section 2 of the bill also adds language to section 202 of the HHCA to require quarterly reporting to the legislature and beneficiaries on land dispositions made during the quarter. This proposed amendment is unnecessary since DHHL prepares extensive

reports on a monthly basis to the HHC. An example from March 2021 can be viewed here: <https://dhh.hawaii.gov/wp-content/uploads/2021/03/HHC-Agenda-March-15-16-2021-PACKET-revised.pdf>. More importantly, the reports on a monthly basis ensure that decisions impacting a particular area are timely considered and decided for that area on any given month.

Section 2 of the bill finally adds language to section 202 of the HHCA authorizing the Governor to establish an inter-agency council, based on a recommendation from the HHC. DHHL does not object to this proposed language.

Section 3 of the bill adds language to section 213.6 to require an annual accounting of Act 14, Special Session Laws of Hawaii 1995, expenditures. DHHL prepares annual reports that can be viewed here: <https://dhh.hawaii.gov/newsroom/annual-reports/> and an independent financial and compliance audit of DHHL is being completed annually and the most recent audit of for the year ended June 30, 2019 can be accessed here: <https://investorrelations.hawaii.gov/dhhl/wp-content/uploads/sites/4/2020/04/DHHL-2019.pdf>.

Section 4 of the measure would amend section 216 of the HHCA requiring DHHL to develop and implement a loan servicing manual. These proposed amendments are unnecessary since DHHL has written loan servicing guidelines and Department staff work one-on-one with lessees who are experiencing challenges in paying their mortgages. These challenges may include, but are not limited to, job loss, a medical emergency, or a family crisis. In addition, loan officers with DHHL provide payment options and financial counseling paid for by the Department. To ensure the availability of adequate assistance, lessees are contacted by postal mail, phone, e-mail, and through in-person visits, if necessary.

Section 7 of the bill adds language to section 28-8.3, HRS to allow DHHL to retain separate counsel from the Attorney General's office. DHHL supports this section of the measure.

Section 8 of the bill requires the Legislative Reference Bureau to conduct a study on the potential effects of creating a position for the Director of DHHL that is separate from the Chairperson of the HHC. DHHL does not object to this proposed language.

Thank you for your consideration of our testimony.