



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

ON THE FOLLOWING MEASURE:

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

BEFORE THE:

SENATE COMMITTEE ON HAWAIIAN AFFAIRS

DATE: Thursday, February 4, 2021

TIME: 1:00 p.m

LOCATION: State Capitol, Via Videoconference

TESTIFIER(S): **WRITTEN TESTIMONY ONLY.**

(For more information, contact Ryan K. P. Kanaka'ole,
Deputy Attorney General, at 808-587-2978)

Chair Shimabukuro and Members of the Committee:

The Department of the Attorney General opposes this bill with respect to section 4.

The purposes of sections 1, 2, 3, and 5 of this bill are to: require at least five members of the Hawaiian Homes Commission (HHC) to be beneficiaries of the Hawaiian Home Lands Trust; establish reporting requirements for the Department of Hawaiian Home Lands (DHHL); allow the Governor to establish an inter-agency council to study the purposes of "this chapter"; and 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 4 of this bill is to allow the HHC and DHHL to hire its own attorneys without the approval or participation of the Attorney General or the Governor. This bill provides the HHC and DHHL the discretion to use the services of the Attorney General if the interests of the State, the HHC, and DHHL are "aligned." This bill also requires the State to pay the legal fees owed to the attorneys hired by the HHC and 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 HHC and 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 the HHC and 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, 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 section 28-8.3, HRS. Indeed, this avenue has been exercised by the HHC and DHHL in the past without incident.

For the foregoing reasons, we respectfully request that this bill be amended to delete section 4 in its entirety.

Thank you for considering our comments.

Charlotte A. Carter-Yamauchi
Director

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Written Comments

SB891 RELATING TO THE HAWAIIAN HOMES COMMISSION ACT

Charlotte A. Carter-Yamauchi, Director
Legislative Reference Bureau

Presented to the Senate Committee on Hawaiian Affairs

Thursday, February 4, 2021, 1:00-2:30 p.m.
Via Videoconference

Chair Shimabukuro and Members of the Committee:

Good afternoon Chair Shimabukuro 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, 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) Requires that a majority of the members of the Hawaiian Homes Commission be beneficiaries and on the Department's waitlist for Hawaiian Home Lands;
- (2) Requires the Department of Hawaiian Home Lands to report quarterly to the Legislature and beneficiaries on land dispositions made during the previous quarter;
- (3) Authorizes the Governor to establish an inter-agency council to address the purposes of the Hawaiian Homes Commission Act, and if convened, to meet at least three times per year;

- (4) 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;
- (5) Allows the Hawaiian Homes Commission to retain separate counsel from the Attorney General to provide service to the Commission and beneficiaries; and
- (6) Requires the Legislative Reference Bureau to conduct a study on the implications 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 5 of the bill, 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 personnel issues. Moreover, the parameters of the study referenced in section 5 seem to be far too general to allow the Bureau to determine if it will be able to successfully undertake the task. As written, the bill only notes that the Bureau is to study the implications of creating a separate Director position from that of the current Chairperson position of the Department of Hawaiian Home Lands. The measure provides no other instruction on the potential organizational structure of the Department of Hawaiian Home Lands if it were to have both a Director of the Department and a Chairperson of the Hawaiian Homes Commission, such as how will the position of Director be filled (i.e., gubernatorial appointment or by majority vote of the Hawaiian Homes Commission), what responsibilities will be bestowed upon each position, will both positions be voting members of the Hawaiian Homes Commission, will both positions be paid a salary, and if so, at what amount? The previous questions are just a sampling of information that needs to be included in the measure for the Bureau to get a sense of how to approach such a study. Without further explicit guidance on the study provision's intent, the Bureau would be hard-pressed to be able to determine what "implications" the Legislature would like studied.

For these reasons, the Bureau respectfully requests that, if this measure is to move on in the legislative process, amendments be made to section 5 of the bill to provide explicit guidance 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



LATE

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 SENATE COMMITTEE ON HAWAIIAN AFFAIRS
HEARING ON FEBRUARY 4, 2021 AT 1:00PM VIA VIDECONFERENCE

SB 891 RELATING TO THE HAWAIIAN HOMES COMMISSION ACT

February 4, 2021

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

The Department of Hawaiian Home Lands (DHHL) submits comments on this bill that requires that majority of the members of the Hawaiian Home Commission (HHC) be beneficiaries and on the waitlist; requires quarterly reporting to the legislature and beneficiaries on land dispositions made during the quarter; authorizes the governor to establish an inter-agency council; requires a full accounting of Act 14, Special Session Laws of Hawaii 1995, expenditures within one year; 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 implications of creating a position for the Director of the Department of Hawaiian Home Lands that is separate from the Chairperson of the Hawaiian Homes Commission.

Section 1 of the bill amends section 202 of the HHCA to require that a majority of the members of the HHC be beneficiaries and on the waitlist for Hawaiian Home Lands. The Hawaiian Homes Commission Act (HHCA) as enacted in 1921 established the HHC to be composed of five members – the Governor and four citizens of the Territory to be appointed by the Governor with at least three of the appointed members of the HHC to be native Hawaiian. In 1935, Congress amended the HHCA providing that the HHC is to be composed of five members appointed by the Governor and at least three of the members shall be descendants of not less than one-fourth part of the blood of the races inhabiting the Hawaiian Islands previous to 1778. Since this amendment to the HHCA came shortly after the HHCA was passed through an Act of Congress, DHHL would prefer that this language remain and not be deleted as proposed on Page 2, lines 2-3 of the bill. DHHL supports increasing the members from four to five that are descendants of not less than one-fourth part of the blood of the races inhabiting the Hawaiian Islands previous to 1778.

Section 1 of the bill also adds language to section 202 of the HHCA to require DHHL to distribute by email or its website a quarterly report. DHHL prepares extensive reports on a monthly basis to the HHC. An example from January 2021 can be viewed

here: <https://dhh.hawaii.gov/wp-content/uploads/2021/01/January-19-20-2021-HHC-Packet-opt-1.pdf>.

Section 1 of the bill finally adds language to section 202 of the HHCA to allow the Governor to establish an inter-agency council to address the purposes of the HHCA. DHHL does not object to this proposed language.

Section 2 of the bill adds language to section 213.6 to require that annual reports include a full accounting of all Act 14, Special Session Laws of Hawaii 1995, funding receipts and 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 bill adds language to section 28-8.3(a), HRS to allow the HHC and DHHL to retain separate counsel from the Attorney General's office. DHHL supports this section of the measure, but notes that reference to the Commission should be deleted because section 28-8.3(b) provides that the term "department" includes any department, board, commission, agency, bureau, or officer of the State. Based on this language in the existing statute, reference to DHHL includes the HHC.

Section 5 of the bill requires the Legislative Reference Bureau to conduct a study on the implications of creating a position for the Director of DHHL separate from the Chairperson of the HHC. DHHL does not object to this proposed language.

Thank you for your consideration of our testimony.

LATE

SB-891

Submitted on: 2/4/2021 9:52:12 AM

Testimony for HWN on 2/4/2021 1:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Nancy Jones	Individual	Support	No

Comments:

Testimony Supporting SB891

Aloha Chair Shimabukuro and Committee Members:

My apologies for this delay, but I respectfully present this testimony in support of SB891. This bill requires: 1) that the majority of Hawaiian Homes Commission members be beneficiaries and on the waitlist; 2) quarterly reporting to the legislature and beneficiaries on land dispositions; 3) establishing an inter-agency council via the Governor; 4) a fulling accounting of Act 14, Spec. Session Laws of Hawaii 1995, expenditures within 1 year; 5) allowance by the Hawaiian Homes Commission to retain separate counsel from the Attorney General to provide service to the Commission and beneficiaries; and finally 6) the Legislative Reference Bureau conduct a study of the implications for creating a position for a Director of the Dept. of Hawaiian Home Lands separate and apart from the Chair of the Hawaiian Homes Commission.

I support this bill in two key areas: a) I agree that the majority of Commission members should be beneficiaries -- ideally from the Department's current waitlist; b) that DHHL continue to provide its extensive reporting to the Hawaiian Homes Commission via its website and/or email (as highlighted in its testimony); and c) that Section 5 of this bill be amended "to provide explicit guidance and parameters upon which to rely in conducting the study" as highlighted in the Legislative Reference Bureau's testimony.

Again -- my apologies for the delay, but I will appreciate any consideration you can provide in terms of supporting SB 891, Mahalo for this opportunity to present testimony to you.