

**WRITTEN TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
KA 'OIHANA O KA LOIO KUHINA
THIRTY-SECOND LEGISLATURE, 2023**

ON THE FOLLOWING MEASURE:

S.B. NO. 1014, S.D. 1, RELATING TO INDEPENDENT LEGAL COUNSEL.

BEFORE THE:

SENATE COMMITTEES ON JUDICIARY AND ON WAYS AND MEANS

DATE: Friday, March 3, 2023

TIME: 10:00 a.m.

LOCATION: State Capitol, Room 211

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

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

Chairs Rhoads and Dela Cruz and Members of the Committees:

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, without the approval or participation of the Attorney General or the Governor when the opposing party to DHHL's reasonably anticipated litigation is the State or another state agency. 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 of 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 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.

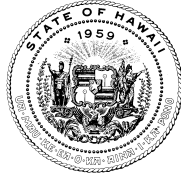
Notwithstanding the prohibition against employing or retaining private attorneys, state agencies may submit a waiver request to the Attorney General pursuant to section 28-8.3(a)(22), Hawaii Revised Statutes (HRS). Under this provision, the Attorney General may determine that circumstances exist whereby 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.

JOSH GREEN, M.D.
GOVERNOR
STATE OF HAWAII
*Ke Kia 'āina o ka Moku 'āina 'o
Hawai'i*

SYLVIA J. LUKE
LT. GOVERNOR
STATE OF HAWAII
*Ka Hope Kia 'āina o ka Moku 'āina
'o Hawai'i*



IKAIKA ANDERSON
CHAIRMAN DESIGNATE, HHC
Ka Luna Ho'okele

KATIE L. DUCATT
DEPUTY DESIGNATE TO THE
CHAIRMAN
Ka Hope Luna Ho'okele

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

Ka 'Oihana 'Āina Ho'opulapula Hawai'i

P. O. BOX 1879
HONOLULU, HAWAII 96805

**TESTIMONY OF IKAIKA ANDERSON, CHAIRMAN-DESIGNATE
HAWAIIAN HOMES COMMISSION
BEFORE THE SENATE COMMITTEE ON JUDICIARY AND
THE SENATE COMMITTEE ON WAYS AND MEANS
DECISION MAKING ON MARCH 3, 2023 AT 10:00AM IN CR 211**

SB 1014, SD 1, RELATING TO INDEPENDENT LEGAL COUNSEL

March 3, 2023

Aloha Chair Rhoads, Chair Dela Cruz, and members of the Committees:

The Department of Hawaiian Home Lands (DHHL) strongly supports this measure that would 1) allow the Department of Hawaiian Home Lands to retain independent legal counsel where the opposing party to the reasonably anticipated litigation is the State or another state agency and 2) 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.

DHHL is unique in its genesis through the Hawaiian Homes Commission Act enacted by Congress and subsequently incorporated as a provision of the State Constitution as a condition of statehood. Because of this history, DHHL should be allowed to retain independent legal counsel to ensure the trust obligation is being upheld and not be subject to seeking a waiver request each time the need for independent counsel arises.

At the same time, allowing DHHL to use the services of the Attorney General as needed provides DHHL the benefit of the Attorney General's expertise representing state agencies that are regulated by a variety of laws including but not limited to the Procurement Code, the Sunshine Law, and the Uniform Information Practices Act.

Thank you for your consideration of our testimony.

SB-1014-SD-1

Submitted on: 2/28/2023 6:37:33 PM

Testimony for JDC on 3/3/2023 10:00:00 AM

Submitted By	Organization	Testifier Position	Testify
Kenneth R. Conklin, Ph.D.	Testifying for Center for Hawaiian Sovereignty Studies	Oppose	Written Testimony Only

Comments:

Amend to delete "funds owed to independent legal counsel shall be paid by the State." Yes DHHL as a government agency should be allowed to use the services of the Attorney General. However, the reason for them wanting to hire independent counsel is if they are suing the state, which is what would cause a conflict of interest. In that case, let them pay their own way -- this would incentivize them to resolve their dispute through either mediation or arbitration.

SB-1014-SD-1

Submitted on: 3/1/2023 8:49:33 AM

Testimony for JDC on 3/3/2023 10:00:00 AM

Submitted By	Organization	Testifier Position	Testify
Marion K A Kapuniai	Individual	Support	Written Testimony Only

Comments:

Many times, the Beneficiaries also need their own counsel as provided for in this bill.

Thank you,

M Kapuniai

SB-1014-SD-1

Submitted on: 3/1/2023 3:54:50 PM

Testimony for JDC on 3/3/2023 10:00:00 AM

Submitted By	Organization	Testifier Position	Testify
Leimomi Khan	Individual	Support	Written Testimony Only

Comments:

Support. Avoids any state conflict of interest.