

# SB889

Measure Title: RELATING TO PROFESSIONALLY LICENSED OR CERTIFIED GOVERNMENT EMPLOYEES.

Report Title: Professionally Licensed or Certified Government Employees; Tort Liability; Exclusive Liability

Description: Clarifies that the State shall be exclusively liable for claims for injury or loss of property, or personal injury or death, resulting from the negligent or wrongful act or omission of any professionally licensed or certified employee of the State while acting within the scope of the employee's office or employment. Establishes that any civil action or proceeding for money damages arising out of or related to the same subject matter against the employee shall be precluded.

Companion: [HB1023](#)

Package: Governor

Current Referral: CPH, JDL/WAM

Introducer(s): KOUCHI (Introduced by request of another party)



**TESTIMONY OF  
THE DEPARTMENT OF THE ATTORNEY GENERAL  
TWENTY-NINTH LEGISLATURE, 2017**

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**ON THE FOLLOWING MEASURE:**

S.B. NO. 889, RELATING TO PROFESSIONALLY LICENSED OR CERTIFIED GOVERNMENT EMPLOYEES.

**BEFORE THE:**

SENATE COMMITTEE ON COMMERCE, CONSUMER PROTECTION, AND HEALTH

**DATE:** Tuesday, February 7, 2017 **TIME:** 9:00 a.m.

**LOCATION:** State Capitol, Room 229

**TESTIFIER(S):** Douglas S. Chin, Attorney General, or  
Caron M. Inagaki, Deputy Attorney General, or  
Kendall J. Moser, Deputy Attorney General

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Chair Baker and Members of the Committee:

The Department of the Attorney General supports this Administration bill.

The purpose of this bill is to mitigate the personal monetary risk of professionally licensed or certified state employees.

State employees are generally afforded a qualified privilege 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 Slingluff 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 employee of the State, including nurses, attorneys, engineers, and other professionals.

In the wake of Slingluff, 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 becomes unnecessary with the passage of this bill.

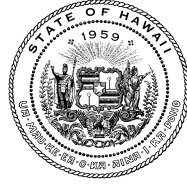
The potential for personal liability prevents good, well-qualified professionals from applying for jobs with the government. As of December 2016, there are at least 1,031 professionally licensed or certified employees employed by the State of Hawaii as physicians, engineers, architects, registered nurses, attorneys, dentists, physical therapists, clinical psychologists, as well as other professionals. 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.

To address the ramifications of Slingluff, and in an effort to attract and retain physicians and other professionally licensed or certified state employees, it is proposed that section 662-14, Hawaii Revised Statutes, be amended 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 acting within the scope of the employee's office or employment shall be against the State alone.

We respectfully ask the Committees to pass this bill.

DAVID Y. IGE  
GOVERNOR

SHAN TSUTSUI  
LT. GOVERNOR



STATE OF HAWAII  
**DEPARTMENT OF TAXATION**  
P.O. BOX 259  
HONOLULU, HAWAII 96809  
PHONE NO: (808) 587-1540  
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MARIA E. ZIELINSKI  
DIRECTOR OF TAXATION

DAMIEN A. ELEFANTE  
DEPUTY DIRECTOR

To: The Honorable Rosalyn H. Baker, Chair  
and Members of the Senate Committee on Commerce, Consumer Protection, and  
Health

Date: Tuesday, February 7, 2017

Time: 9:00 A.M.

Place: Conference Room 229, State Capitol

From: Maria E. Zielinski, Director  
Department of Taxation

Re: S.B. 889, Relating to Professionally Licensed or Certified Government Employees

The Department of Taxation (Department) supports S.B. 889, and offers the following comments for your consideration.

The Department has numerous employees who are also professionals and who are directly affected by the holding in *Slingluff v. State of Hawaii*. This measure will help the Department recruit and retain professional employees by ensuring those professional employees cannot be held personally liable for actions they carry out in the course and scope of their government employment.

Thank you for the opportunity to provide comments.

DAVID Y. IGE  
GOVERNOR



RODERICK K. BECKER  
Comptroller  
AUDREY HIDANO  
Deputy Comptroller

**STATE OF HAWAII**  
**DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES**

P.O. BOX 119, HONOLULU, HAWAII 96810-0119

TESTIMONY OF  
RODERICK K. BECKER, COMPTROLLER  
DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES  
TO THE  
SENATE COMMITTEE  
ON  
COMMERCE, COMSUMER PROTECTION, AND HEALTH  
TUESDAY, FEBRUARY 7, 2017  
9:00 A.M.  
CONFERENCE ROOM 229

S.B. 889

RELATING TO PROFESSIONALLY LICENSED OR CERTIFIED GOVERNMENT  
EMPLOYEES

Chair Baker, Vice Chair Nishihara, and members of the Committee, thank you for the opportunity to submit testimony on S.B. 889. The Department of Accounting and General Services (DAGS) supports the measure.

DAGS has multiple divisions and attached agencies that rely on the work of employees who are licensed professionals. This bill will help DAGS to attract, hire, and retain qualified licensed professionals by protecting such employees from personal liability for exercising their professional judgment in the course and scope of their State work. Without this provision, current State employees, and those considering State employment, who require professional licensing for employment, may seek work in other sectors to avoid such personal liability. Also, absent the protection from this bill, individual employees may be required to purchase their own professional liability insurance policies.

Thank you for the opportunity to submit testimony on this measure.

DAVID Y. IGE  
GOVERNOR



STATE OF HAWAII  
**DEPARTMENT OF PUBLIC SAFETY**  
919 Ala Moana Boulevard, 4th Floor  
Honolulu, Hawaii 96814

**NOLAN P. ESPINDA**  
DIRECTOR

**Cathy Ross**  
Deputy Director  
Administration

**Jodie F. Maesaka-Hirata**  
Deputy Director  
Corrections

**Renee R. Sonobe Hong**  
Deputy Director  
Law Enforcement

No. \_\_\_\_\_

TESTIMONY ON SENATE BILL 889  
RELATING TO PROFESSIONALLY LICENSED  
OR CERTIFIED GOVERNMENT EMPLOYEES

by

Nolan P. Espinda, Director  
Department of Public Safety

Senate Committee on Commerce, Consumer Protection, and Health  
Senator Rosalyn H. Baker, Chair  
Senator Clarence K. Nishihara, Vice Chair

Tuesday, February 7, 2017; 9:00 a.m.  
State Capitol, Conference Room 229

Chair Baker, Vice Chair Nishihara, and Members of the Committee:

The Department of Public Safety (PSD) **supports** Senate Bill (SB) 889, which proposes to amend section 662-14 of the 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 acting within the scope of the employee's office or employment shall be against the State alone. PSD offers the following comments.

In Singluff v. State of Hawaii, the Intermediate Court of Appeals held that PSD physicians are not entitled to qualified immunity for exercising their professional medical judgment. The Court reasoned that these physicians were subject to separate professional standards for which they were specially licensed, and were exercising their professional medical judgment separate and distinct from their governmental judgment. The Court's ruling may be argued to apply to not just physicians, as personal liability may be imposed on any state employee who is a professional, such as advanced practice registered nurses.

PSD has always found it difficult to recruit and retain qualified physicians, psychiatrists, and advanced practice registered nurses because government salaries are generally lower than in the private sector. Knowing that their personal assets may be at risk has further discouraged qualified candidates from applying for State employment. PSD has had to obtain a malpractice insurance policy to protect PSD physicians and other medical professionals from personal financial harm and professional risk.

Thank you for the opportunity to present this testimony.

**TESTIMONY OF ROBERT TOYOFUKU ON BEHALF OF THE HAWAII  
ASSOCIATION FOR JUSTICE (HAJ) IN OPPOSITION TO S.B. 889**

Date: Tuesday, February 7, 2017  
Time: 9:00 a.m.  
Room: 229

To: Chair Rosalyn Baker and Members of the Senate Committee on Commerce,  
Consumer Protection, and Health:

My name is Bob Toyofuku and I am presenting this testimony on behalf of the Hawaii Association for Justice (HAJ) in OPPOSITION to S.B. 889, Relating to Professionally Licensed or Certified Government Employees as currently drafted.

The Department of the Attorney General contacted HAJ last week to work together on the issue of State defense and indemnification of professional employees. HAJ and the Department of the Attorney General began this effort last session but ran out of time before final consensus could be reached. Much progress was made and HAJ expects to work out the few remaining differences in light of the early start in collaborating this session.

HAJ understands the purpose of this measure and will work with the State to refine the language to eliminate potential ambiguity. Because we are focusing on technical language rather than substance the proposed amendments might be more appropriately addressed to the Judiciary and Labor committee. The following amendment is offered for clarification:

(b) The remedy against the State provided by this chapter and section 661-11 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 scope of the employee's office or employment shall be exclusive whenever the State agrees to be fully liable for the injuries, losses and damages caused by the professionally licensed or certified employee. Any civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate shall thereafter be precluded without regard to when the act or omission occurred; provided that claims based on liability other than an employee's scope of employment with the State or employment with an employer other than the State shall not be precluded. When an employee is named in an individual capacity, the State may notify all parties in writing that the State is invoking exclusive liability by agreeing to be fully liable for the injuries, losses and damages caused by the professionally licensed or certified employee; and the action or proceeding shall thereafter proceed against the State alone. When the State agrees to partial responsibility for the injuries, losses and damages of an employee, the employee shall remain personally liable for those injuries, losses and damages for which the State has not accepted responsibility.

These amendments address the possibility that the State may agree to assume all responsibility, or only partial responsibility, such as where there may be a claim for punitive damages and the State declines to assume responsibility for the punitive damages claim. These amendments clarify the procedure applicable to full and partial assumption of liability by the State.

These amendments also address the situation where a contract worker may also be employed by one or more private employers, as well as the State. There are currently cases in litigation over the question of whether the “exclusive” liability of the State also gives private employers immunity. Claimants have settled cases with the State with the understanding that they will recover the balance of their damages from other private employers. This allows the State to pay a lower settlement amount. Private employers, however, claim that the exclusive liability provision protects them as well as the State. As a result, plaintiffs can no longer settle with the State as they did before. This ambiguity should be resolved to prevent further unnecessary litigation and to allow the State to settle its portion of a claim for less and avoid additional litigation expense as it did in the past.

It is requested that section 1 be deleted. Section 1 provides a characterization of the Slingluff case that involved medical malpractice by a state employed doctor. HAJ disagrees with the state’s characterization of the case, but instead of debating a more accurate characterization of the case, it is suggested that the section be deleted because it is entirely unnecessary to effectuate the statutory changes found in section 2 of the bill.

Thank you very much for allowing me to testify in OPPOSITION to this measure. Please contact me if there are any questions or concerns.

D. DOUGLAS SMITH, M.D.  
229 Aiokoa Street  
KAILUA, HAWAII 96734

February 6, 2016 at 9:00 AM

Room 229

To: COMMITTEE ON COMMERCE, CONSUMER PROTECTION & HEALTH  
Senator Rosalyn H. Baker, Chair  
Senator Clarence K. Nishihara, Vice Chair

From: D. Douglas Smith, M.D.

Re: SB 889, Relating to Professionally Licensed or Certified Government Employees

**IN SUPPORT**

I would like to thank Chair Baker, Vice Chair Nishihara, and members of the Senate Committee on Commerce, Consumer Protection and Health for the opportunity to submit comments on SB889.

I am a physician who specializes in psychiatry and have spent my career practicing in Hawaii. For 11 years I was on the faculty of the JABSOM department of psychiatry and much of that time I was assigned to the Hawaii State Hospital.

I support this bill, and urge you to consider some of the important implications and issues surrounding professional liability, especially regarding SB384, psychologist prescribing.

As you know, the State employs physicians and other licensed or certified professionals to provide important services by the Department of Health, the Department of Public Safety and the University of Hawaii Student Health Services, the John A Burns School of Medicine and other departments and programs. Some of these programs exist to provide critical services to high-risk settings and populations, are dependent on attracting, hiring and retaining such employees. One of the most important career issues for these professionals is liability for tort actions on claims for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful acts or omissions. SB889 is focused on ensuring these employees that the State will be liable for such claims.

In recent years, the Department of Health has found it challenging to fill positions for psychologists and of psychiatric physicians, and struggled to make these State service attractive as a place to come to practice. The State has been forced to hire low-caliber professionals, to pay much more for short-term “locums” hires, or to leave positions vacant. Program functions and quality have suffered as a result, raising the risk of harm to individuals under state care and custody, and the risk of lawsuits.

This a clear and undeniable relationship between the State’s approach to maintaining a competent professional workforce and how it manages risk and liability. This is most apparent whenever the State adopts reckless policies that would increase the foreseeable risk placed on these professionals. There is no escape from the consequences of these unfortunate policy decisions. Either the State will be held responsible, as proposed under SB889, or the professional will be personally responsible, exacerbating the challenges in hiring a competent and stable workforce. In *Slingluff v. State*, the Courts has made clear that there is no way to escape liability for malpractice, “Prisoners should not be denied recovery ‘for the sole reason that the doctor or nurse is a government employee.’”

SB889 has significant implications for another bill before this committee, SB384 that would certify prescribing psychologists. The main “safeguard” in SB384 is that psychologists granted prescriptive authority would have to work in collaboration and consultation with licensed physicians, and with employed psychiatric physicians at the Department of Health for patients who are forensically encumbered or diagnosed with serious mental illness. These tend to be the most complex, most vulnerable and highest risk patients in the state.

The lack of other safeguards in SB384 would create a ticking risk-management time-bomb for the state’s budget and reputation. It will expose the deep pockets of the self-indemnified DOH (i.e. taxpayers of Hawaii) to any plaintiff with severe mental illness who is harmed under HB767’s reckless scheme. Last year alone, the legislature had to approve \$11 million to resolve claims against the state. Just think what one tragedy like the FSU shooting could cost.

Under SB384, the State’s assumption of this shared risk with community practitioners would be an unprecedented arrangement, creating a risk-management minefield in which

DOH physicians would be expected to collaborate with these poorly trained psychologists in the care of the highest risk patients and to guard both patient and public safety. If any of these DOH physicians fails to perform its due diligence in providing clinical oversight or in reviewing a prescribing psychologist's medical competence and practice, they will be liable for any harms.

If the State were to try to shirk this responsibility for future harms, then the liability for such a reckless policy would fall on state-employed professional(s). This would make it even harder to recruit and retain them. The department of health's support for SB384 is baffling in this regard. With trouble filling its openings for psychiatrists to treat the state's most complex and highest risk patients, why would DOH support burdening them with responsibility for the medication decisions of psychologists with poor medical training? There should be careful consideration of this connection between SB384 ("crash course" psychologist prescribing) and SB889 (State liability for medical torts).

The only way to reduce the risks posed by SB384, which will be heard later in the week, is to amend the psychologist prescribing bill to include all reasonable safeguards, including higher training standards, a narrower drug list and limited range of patients similar to the Department of Defense PDP program, and as recommended by the Hawaii Legislative Reference Bureau back in 2007. It would be morally and fiscally reckless to fail do so while ruling that the State shall be exclusively liable for all tort actions on claims for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of professionally licensed or certified employees of the State.

Thank you for allowing me to testify on SB889, and your consideration of these concerns is appreciated.

Sincerely,

A handwritten signature in cursive script that reads "D. Douglas Smith".

D. Douglas Smith, M.D.

**From:** mailinglist@capitol.hawaii.gov  
**Sent:** Thursday, February 2, 2017 7:16 PM  
**To:** CPH Testimony  
**Cc:** KarinNomura1@gmail.com  
**Subject:** \*Submitted testimony for SB889 on Feb 7, 2017 09:00AM\*

**SB889**

Submitted on: 2/2/2017

Testimony for CPH on Feb 7, 2017 09:00AM in Conference Room 229

| <b>Submitted By</b> | <b>Organization</b> | <b>Testifier Position</b> | <b>Present at Hearing</b> |
|---------------------|---------------------|---------------------------|---------------------------|
| Karin Nomura        | Individual          | Support                   | No                        |

Comments:

Please note that testimony submitted less than 24 hours prior to the hearing, improperly identified, or directed to the incorrect office, may not be posted online or distributed to the committee prior to the convening of the public hearing.

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