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Hon. Ivan Blanco
Chairman
Committee on Judiciary & Governmental Operations
House of Representatives
20th Northern Marianas Commonwealth Legislature
Saipan, MP 96950

Re: Comments on HB 20-43

Dear Chairman Blanco,

I have reviewed House Bill 20-43 that you have introduced along with fourteen members of the House of Representatives. The focal points of my comments are in regard to Sections 2 and 3 of the bill, which attempts to clarify and define the authority of the Office of the Attorney General (OAG). I give special attention to Section 3 because it seeks to effectively strip the Office of the Attorney General of its constitutional duties and responsibilities. Accordingly, I do not support the passage of HB 20-43 as it is presently drafted.

The Attorney General's Constitutional Mandate: Independence, Expanded Responsibilities, and Consolidated Legal Services

Before addressing the apparent unconstitutional sections in HB 20-43, it is important to discuss the constitutional framework of the Office. After electorate approval of HLI 17-2, HD3, HS2 ("HLI 17-2"), in 2012 by 81% of the people of the Commonwealth, the Office of the Attorney General was transformed in two significant ways: (1) the Attorney General is now an elected office, and (2) as Chief Legal Officer, legal services for the Commonwealth government have been consolidated within the Office.

House Legislative Initiative 17-2 not only provided for an independent Attorney General but also strengthened the OAG's constitutional authority. It expanded the constitutional duties of the OAG by placing public corporations and autonomous agencies under its responsibility. With the formal designation of the Attorney General as Chief Legal Officer of the Commonwealth, the amendment centralized and consolidated legal services for the Commonwealth executive branch departments

and agencies within the OAG. *See Environmental Protection Agency v. Pollution Control Bd.*, 372 N.E.2d 50, 51–52 (Ill. 1977) ("As the chief legal officer of the State, the Attorney General has the constitutional duty of acting as legal adviser to and legal representative of State agencies. . . . The effect of this grant of power to the Attorney General is that Illinois is served by a centralized legal advisory system.").

As Chief Legal Officer, the Attorney General serves as the legal advisor to the Governor and executive departments, public corporations, and autonomous agencies. NMI CONST. art. III, § 11. The Analysis of the Constitution of the Commonwealth of the Northern Mariana Islands makes clear that the Attorney General's grant of authority is required before agencies can engage outside counsel. Analysis of the Constitution of the Commonwealth of the Northern Mariana Islands 88 (1976) [hereinafter Analysis].

The rationale for the changes in HLI 17-2 is self-evident: to maintain consistent policy on legal issues and to effectively use Commonwealth resources. *See* NATIONAL ASSOCIATION OF STATE ATTORNEYS GENERAL, STATE ATTORNEYS GENERAL POWERS AND RESPONSIBILITIES 55 (Emily Myers ed., 3d ed., 2013). When statutes and case law are applied more consistently under a consolidated system, as envisioned by HLI 17-2, legal conflicts between agencies are reduced. Consolidation also minimizes duplication of legal and technical expertise and enables the Commonwealth to provide specialized staff and facilities. From a fiscal standpoint, consolidating the legal resources within the Office of the Attorney General provides more consistency in fiscal planning for legal services. Finally, the constitutional independence of the Attorney General places an obligation squarely on its attorneys to give independent and objective advice. Independent legal advice to agencies could be jeopardized when agencies hire their own counsel.

A. Section 3 of HB 20-43 interferes with the Attorney General's constitutional duty.

Section 3 of House Bill 20-43 amends 1 CMC § 2153 by adding subsections (i) and (j). The proposed amendment seeks to limit the Attorney General's constitutional duty to represent the executive branch departments and agencies. For example, subsection (i) states that the Attorney General's representation "shall be as requested, and pursuant to the position, policy, and direction of the Commonwealth government," and subsection (j) states that the Attorney General "shall not be the exclusive representative for the Commonwealth government" and that the Commonwealth government "shall be able to contract for and obtain the representation, advice[,] and counsel of non-governmental private counsel without the consent or approval of the Attorney General." Further, the proposed language appears to restrict the Attorney General's scope of representation by stating that it will be "pursuant to the position, policy, and direction of the Commonwealth government, its executive department, agency, instrumentality or public corporation." Notably, this limitation does not appear in the language that authorizes agencies to retain the services of private counsel without the Attorney General's approval. Finally, the last clause of subsection (j) could be construed as permitting agencies to "retain attorneys, specialists, and experts, as individuals and organizations, to assist the Attorney General," without the Attorney General's approval.

As previously stated, NMI CONST. art. III, § 11, establishes the Attorney General as the Chief Legal Officer of the Commonwealth government and states that the Attorney General "shall be responsible for providing legal advice to the governor and executive departments (including public corporations and autonomous agencies), representing the Commonwealth in all legal matters, and prosecuting violations of Commonwealth law." The Constitution provides the Attorney General authority greater than most of the states. The Analysis provides commentary that discusses those responsibilities in further detail. *See Dept. of Pub. Lands v. N. Mariana Islands*, 2010 MP 14 ¶ 7 (citing Analysis at 1; *Rayphand*, 2003 MP 12 ¶ 71) (stating that the Analysis summarizes the intent of the Convention in approving each section and is extremely persuasive authority in discerning the intent of the framers).

The Analysis states that Article III, Section 11 of the NMI Constitution confers three duties on the Attorney General: to advise the governor and heads of executive departments on legal matters, to represent the Commonwealth in suits by and against the Commonwealth, and to prosecute violations of Commonwealth law. Analysis at 78. In advising the governor and heads of executive departments on legal matters, the Analysis states that the Attorney General, in his discretion, may "engage" outside counsel to advise or represent the Commonwealth on any matter. *Id.* Similarly, it provides executive departments and the governor with the ability to seek advice from outside counsel on any matter; however, it limits executive departments' ability to seek outside counsel by "prevent[ing] executive departments from engaging outside counsel to represent the department in any legal matter without a grant of authority from the attorney general." *Id.*

Section 3 of House Bill 20-43 violates NMI CONST. art. III, § 11, because (1) section 11 requires that executive departments receive a grant of authority from the Attorney General before seeking legal advice from outside counsel, and (2) House Bill 20-43, § 3, authorizes executive departments to seek legal advice from outside counsel without the consent or approval of the Attorney General. Thus, the amendments in Section 3 are a clear challenge to the Attorney General's responsibility under the Constitution to advise and represent the Commonwealth and all agencies in all legal matters.

Last, the Attorney General cannot properly serve the Commonwealth and the public interest if executive agencies are allowed to employ private counsel without the office's approval. *See Environmental Protection Agency*, 372 N.E.2d at 53 (Ill. 1977) ("To allow the numerous State agencies the liberty to employ private counsel without the approval of the Attorney General would be to invite chaos into the area of legal representation of the State."). If executive agencies are allowed to employ private counsel without the office's approval, the Office of the Attorney General will not be able to properly serve the public's interests because it would be unable to establish and sustain a uniform and consistent legal policy for the Commonwealth.

B. Section 2 prevents the Attorney General from effective risk management of the Commonwealth's legal obligations.

Section 2 of HB 20-43 amends 1 CMC §§ 2153(e) and (g). Section 2153(e), as amended, states that the Attorney General may review, only when requested, the rules and regulations promulgated by any executive department, agency, or instrumentality of the Commonwealth. Similarly, § 2153(g), as amended, allows the Attorney General to review, only when requested, all proposed contracts, bonds, and other contractual obligations of the Commonwealth. Further, HB 20-43, § 2, limits the Attorney General's review for "form and legal sufficiency" to three issues: (1) whether there is any conflict with any general statute or regulation, federal law or regulation, or the constitution of the Commonwealth or the United States; (2) whether there is compliance with the notice and comment provision of the APA; and (3) whether there is compliance with the *express* statutory authority authorizing the promulgation of the regulation.

As you may know, statutes are often ambiguous and susceptible to different interpretations. In those situations, the Attorney General's review would be confined to the text of the enabling statute. Even though the NMI Supreme Court has upheld the use of the extrinsic aids of statutory construction, § 2 seeks to prevent the Attorney General from making any reasonable interpretation of an ambiguous statute. Moreover, such a restriction runs against the Attorney General's professional responsibility to provide competent representation. *See* NMI R. ATT'Y DISC. & P. 3(a) ("An attorney is subject to discipline for . . . [a]ny act or omission that violates the most recent version of the Model Rules of Professional Conduct of the American Bar Association."); MODEL RULES OF PROF'L CONDUCT R. 1.1 ("A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.") The Attorney General, under the bill, would not be able to provide adequate legal representation—he or she would essentially be relegated to a mere publisher of rules and regulations. Last, the OAG notes that the limits to the Attorney General's review would not apply to private counsel retained by executive agencies; therefore, any issues the executive branch has in regard to the OAG's current review of legal matters will likely arise if private counsel is retained.

Section 2 of House Bill 20-43 states that the Attorney General would no longer review and approve rules, regulations, contracts, and other documents creating legal obligations for the Commonwealth. It specifies that the Attorney General's review of such documents is at the discretion of the departments and agencies. By limiting the Attorney General's statutory duty to review and approve all rules, regulations, and contractual obligations, HB 20-43 removes statutory safeguards that protect public officials who err in their duties.

For example, in *Rayphand v. Tenorio*, Governor Froilan C. Tenorio appealed a final judgment of the Superior Court that held him liable to the Commonwealth for misspent public funds. 2003 MP 12 ¶ 1. In determining whether the trial court erred in holding that Governor Tenorio was not entitled to qualified immunity, the Court first set out the procedure required when the defense of qualified immunity is asserted:

> The first step is to determine whether a constitutional violation has, in fact occurred. Only after that has been determined should the court go further to assess whether the right in question was 'clearly established' and whether a reasonable official would have known that his acts violated the right in question.

Id. ¶ 68 (quoting *Charfauros v. Board of Elections*, 1998 MP 16 ¶ 43). After the Court determined that the expenditures violated certain constitutional provisions and that the law governing Governor Tenorio's actions was not clearly established, *id.* ¶¶ 69–77, the Court examined whether the Governor's actions were reasonable in light of the ambiguity presented by the constitutional provisions. *Id.* ¶ 78. In concluding that the Governor's actions were reasonable in regard to one cause of action, the Court relied upon the fact that the Governor sought and followed the advice of the Attorney General. *Id.* ¶¶ 79–80 ("Governor Tenorio's actions are all the more reasonable, insofar as he followed the advice of the Attorney General . . . ." (citing *Cannon v. Taylor*, 493 P.2d 1313, 1315 (Nev. 1972); *Washington v. Martin*, 392 P.2d 435, 441 (Wash. 1964); *Oregon v. Mott*, 97 P.2d 950, 954 (Or. 1940))). In contrast, the Court held that Governor Tenorio was not entitled to qualified immunity on a different cause of action because the constitutional provision was not ambiguous and the Attorney General's opinion did not "authorize" his actions. *Id.* ¶ 82.

Currently, 1 CMC §§ 2153(e) and (g) help safeguard executive officers from liability for civil damages because these subsections require departments, agencies, and instrumentalities of the Commonwealth government to seek the Attorney General's review and approval of rules, regulations, and contractual obligations. By amending these subsections, executive officers may promulgate rules and regulations and enter into contracts without the Attorney General's review and approval, and if executive officers err in these actions without seeking and following the advice of the Attorney General, then a court may find the executive officer acted unreasonably and determine that he is not entitled to qualified immunity.

The legislature should consider not amending the current statute because the current statute minimizes the liability of the Commonwealth by ensuring that proposed rules and regulations fall within the statutory authority of the agencies. The same reasoning holds true for the review of contracts. The independence guaranteed by the Constitution ensures the Attorney General's vigorous review of proposed rules and regulations and draft contracts. I am pleased to inform the Legislature that since I have been in office, disputes in regard to the procurement process and contracts have been substantially reduced. As part of my commitment to provide objective legal review, and upon my initiative, the OAG has modernized and streamlined the forms of the Division of Procurement & Supply to correspond with the objectives of the particular procurement. Thus, contracts for the purchase of goods are no longer being used as independent contracts for professional services. Further, it became apparent that training of agency staff was needed to ensure compliance with the regulations, and under my direction, staff attorneys conducted several procurement training workshops to interested agencies. As part of my duty and responsibility, I anticipate a regular schedule of such workshops for agencies that have appreciated the time we have taken to inform them of the procurement process.

My office has also drafted a complete overhaul of the existing procurement regulations and rules, which was presented to the Secretary of Finance in mid-2016. The proposed regulations will eliminate outdated procedures, simplify the procurement process, and relieve the Attorney General of having to apply provisions that are no longer relevant.

I urge you and members of your committee to review the pertinent provisions of the NMI Constitution and its amendment pertaining to the duties and responsibilities of the Office of the Attorney and be mindful of its preamble that the OAG be an independent office "free from political influence and interference."

Thank you for the opportunity present comments on HB 20-43.

Sincerely,

EDWARD MANIBUSAN
Attorney General

cc: Deputy Attorney General
Governor
Lt. Governor
All Members, House of Representatives
All Members, The Senate