



STATE OF HAWAII
DEPARTMENT OF HEALTH
P. O. Box 3378
Honolulu, HI 96801-3378
doh.testimony@doh.hawaii.gov

LATE

**Testimony in SUPPORT of H.B. 1620 H.D. 2
RELATING TO ADMINISTRATION OF JUSTICE**

SENATOR ROSALYN H. BAKER, CHAIR
SENATE COMMITTEE ON COMMERCE, CONSUMER PROTECTION, AND HEALTH

Hearing Date and Time: Friday, March 13, 2020 at 9:30 a.m.

Room: 229

1 **Department Position:** The Department of Health (“Department”) strongly supports this
2 measure offering comments and proposed amendments.

3 **Department Testimony:** The subject matter of this measure intersects with the scope of the
4 Department’s Behavioral Health Administration (BHA) whose statutory mandate is to assure a
5 comprehensive statewide behavioral health care system by leveraging and coordinating public,
6 private and community resources. Through the BHA, the Department is committed to carrying
7 out this mandate by reducing silos, ensuring behavioral health care is readily accessible, and
8 person-centered. The BHA’s Adult Mental Health Division (AMHD) provides the following
9 testimony on behalf of the Department.

10 The Department strongly supports the development of opportunities for diversion of
11 individuals who are living with behavioral health issues into treatment. Providing alternative
12 pathways for individuals with lower level charges when found unfit though an expedited fitness
13 evaluation process is a goal we share in common with the Judiciary (JUD). The Department has
14 worked with the JUD to address concerns expressed by the Department of the Attorney
15 General (ATG) regarding fitness and concerns expressed by the Department of the Prosecuting
16 Attorney of the City and County of Honolulu and the Office of the public Defender regarding
17 petty non-violent misdemeanors.

1 The attached proposed S.D. 1 includes amendments we believe will get us closer to the
2 goal of having all parties agree on statutory changes in order to effectuate the intent of this
3 measure and these amendments are supported by the JUD.

4 In summary, the proposed S.D. 1 includes the following suggested amendments.

5 PART 1, SECTION 1 – Amending new section of Chapter 704, Hawaii Revised Statutes (HRS)

6 The Department respectfully proposes that page 1, line 5 through page 3, line 21 of this
7 measure be amended to allow for the criminal justice diversion program to be made available
8 at this time only for petty misdemeanors not involving violence or attempted violence. The
9 Department believes that this amendment clarifies that defendants deemed fit to proceed will
10 have their criminal cases resumed and only defendants who cannot be determined as fit to
11 proceed will be diverted into the behavioral health system.

12 Additionally, the seven days will be available to evaluate and assess defendants for their
13 current level of care. Defendants whose evaluation and assessment identify a recommendation
14 for treatment will be diverted and their case will be dismissed. When appropriate, the
15 Department will, on a case-by-case basis, utilize options provided in Chapter 334, HRS.

16 The Department believes the criminal justice diversion program, with our suggested
17 amendments, can be implemented with existing resources. Further, should the criminal justice
18 diversion program be expanded in the future, the Department will be able to identify additional
19 resources including requests for appropriations from the legislature.

20 PART 1, SECTION 2 – Amending Section 704-404, HRS

21 For consistency with the proposed amendments for SECTION 1, revisions to SECTION 2,
22 page 4, line 2 through page 8, line 6 are necessary. Additionally, to address our concerns
23 regarding available resources, including staffing, the Department proposes language in this
24 section be revised to address provisions for expedited hearings and evaluations.

1 PART 1, SECTION 3 – Amending Section 704-406, HRS

2 For consistency with the proposed amendments for SECTION 1 and SECTION 2, revisions
3 to SECTION 3, page 8, line 7 through page 10, line 21 are necessary.

4

5 The Department supports the intent of this bill to allow for agreements that expand and
6 expedite access to evaluation and treatment when the defendant’s behavioral health is a factor
7 in a case. We have been collaborating closely with the JUD regarding the expansion of
8 treatment pathways and greater coordination for defendants with behavioral health issues.

9 Respectfully, the Department defers to the JUD on items in the bill that impact judicial
10 proceedings such as mandatory reductions of examinations from three to one; and the changes
11 in time requirements for penal responsibility evaluations outlined on page 18, lines 15-18 but
12 generally agrees with their stance on those points. We very strongly support the elimination of
13 prescriptive language regarding the composition of the three member panel to enable broader
14 workforce utilization.

15 The Department thanks the Legislature for its support of developing more appropriate
16 and effective pathways for this population.

17 **Offered Amendments:** For Part I: The Department respectfully offers the attached proposed
18 S.D. 1. For Part II: The Department echoes the proposed amendments from the JUD regarding
19 relevant sections of sections 704-404, 704-411, and 704-414, Hawaii Revised Statutes.

20 Thank you for the opportunity to testify.

21 **Fiscal Implications:** Undetermined.

A BILL FOR AN ACT

RELATING TO THE ADMINISTRATION OF JUSTICE.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

1 SECTION 1. Chapter 704, Hawaii Revised Statutes, is
2 amended by adding a new section to be appropriately designated
3 and to read as follows:

4 (a) "704- Proceedings for defendants charged with petty
5 misdemeanors not involving violence or attempted violence,
6 criminal justice diversion program. (1) In cases where the
7 defendant is charged with a petty misdemeanor not involving
8 violence or attempted violence, if, at the hearing held pursuant
9 to section 704-404(2) (a) or at a further hearing held after the
10 appointment of an examiner pursuant to section 704-404(2) (b),
11 the court determines that the defendant is fit to proceed, then
12 the proceedings against defendant shall resume. In all other
13 cases where fitness remains an outstanding issue, the court
14 shall continue the suspension of the proceedings and commit the
15 defendant to the custody of the director of health to be placed
16 in a hospital or other suitable facility for further examination
17 and assessment.

H.B. NO. 1620, Proposed S.D. 1

1 (2) Within seven days from the commitment of the defendant
2 to the custody of the director of health shall, or as soon
3 thereafter as is practicable, the director of health shall
4 report to the court on the defendant's current capacity to
5 understand the proceedings against defendant and defendant's
6 current ability to assist in defendant's own defense. If,
7 following the report, the court finds defendant fit to proceed,
8 the proceedings against defendant shall resume. In all other
9 cases, the court shall dismiss the charge with or without
10 prejudice in the interest of justice. The director of health
11 may at any time proceed under the provisions of section 334-60.2
12 or 334-121."

13 SECTION 2. Section 704-404, Hawaii Revised Statutes, is
14 amended as follows:

15 (1) By amending subsections (1) and (2) to read:

16 “(1) Whenever there is reason to doubt the defendant's
17 fitness to proceed, the court may immediately suspend all
18 further proceedings in the prosecution; provided that for any
19 defendant not subject to an order of commitment to [~~a hospital~~]
20 the director of health for the purpose of the examination,
21 neither the right to bail nor proceedings pursuant to chapter
22 804 shall be suspended. If a trial by jury has been

H.B. NO. 1620, Proposed S.D. 1

1 ~~[empanelled,]~~ empaneled, it shall be discharged or retained at
2 the discretion of the court. The discharge of the trial jury
3 shall not be a bar to further prosecution.

4 (2) Upon suspension of further proceedings in the
5 prosecution~~[7]~~:

6 (a) In cases where the defendant is charged with a petty
7 misdemeanor not involving violence or attempted
8 violence, if a court-based certified examiner is
9 available, the court shall appoint the court-based
10 certified examiner to examine and provide an expedited
11 report solely upon the issue of the defendant's ability
12 to assist in defendant's own defense. The court-based
13 certified examiner shall file the examiner's report
14 with the court within two days of the appointment of
15 the examiner, or as soon thereafter is practicable. A
16 hearing shall be held to determine if defendant is fit
17 to proceed within two days of the filing of the report
18 or as soon thereafter as is practicable;

19 (b) In all other nonfelony cases, and where a court-based
20 certified examiner is not available in cases under
21 section (2) (a) above, the court shall appoint ~~three~~
22 qualified examiners in felony cases, and] one qualified

H.B. NO. 1620, Proposed S.D. 1

1 examiner [~~in nonfelony cases~~] to examine and report
2 upon the defendant's fitness to proceed. The court may
3 appoint as the examiner either a psychiatrist or a
4 licensed psychologist; and

5 (c) In felony cases, the court shall appoint three
6 qualified examiners to examine and report upon the
7 defendant's fitness to proceed. The court shall
8 appoint as examiners [~~at least one psychiatrist and at~~
9 ~~least one licensed psychologist. The third examiner~~
10 ~~may be a psychiatrist, licensed psychologist, or~~
11 ~~qualified physician. One~~] psychiatrist, licensed
12 psychologists, or qualified physicians; provided that
13 one of the three examiners shall be a psychiatrist or
14 licensed psychologist designed by the director of
15 health from within the department of health.

16 [~~In nonfelony cases, the court may appoint as examiners either a~~
17 ~~psychiatrist or a licensed psychologist.] All examiners shall
18 be appointed from a list of certified examiners as determined by
19 the department of health. The court, in appropriate
20 circumstances, may appoint an additional examiner or examiners.
21 The examination may be conducted while the defendant is in
22 custody or on release or, in the court's discretion, when~~

H.B. NO. 1620, Proposed S.D. 1

1 necessary the court may order the defendant to be committed to a
2 hospital or other suitable facility for the purpose of the
3 examination for a period not exceeding thirty days, or a longer
4 period as the court determines to be necessary for the purpose.
5 The court may direct that one or more qualified physicians or
6 psychologists retained by the defendant be permitted to witness
7 the examination. As used in this section, the term "licensed
8 psychologist" includes psychologists exempted from licensure by
9 section 465-3(a)(3) and "qualified physician" means a physician
10 qualified by the court for the specific evaluation ordered."

11 2. By amending subsection (5) to read:

12 "(5) [~~The~~] Except in the case of an examination pursuant
13 to subsection (2)(a), the report of the examination for fitness
14 to proceed shall include the following:

15 (a) A description of the nature of the examination;

16 (b) A diagnosis of the physical or mental condition of the
17 defendant;

18 [~~(b)~~] (c) An opinion as to the defendant's capacity to
19 understand the proceedings against the defendant and
20 to assist in the defendant's own defense;

21 [~~(c)~~] (d) An assessment of the risk of danger to the

H.B. NO. 1620, Proposed S.D. 1

1 defendant or to the person or property of others for
2 consideration and determination of the defendant's
3 release on conditions; and

4 [~~(d)~~] (e) Where more than one examiner is appointed, a
5 statement that the opinion rendered was arrived at
6 independently of any other examiner, unless there is a
7 showing to the court of a clear need for communication
8 between or among the examiners for clarification. A
9 description of the communication shall be included in
10 the report. After all reports are submitted to the
11 court, examiners may confer without restriction."

12 3. By amending subsection (7) to read:

13 "(7) [~~Three copies~~] A copy of the report of the
14 examination, including any supporting documents, shall be filed
15 with the clerk of the court[, ~~who shall cause copies to be~~
16 ~~delivered to the prosecuting attorney and to counsel for the~~
17 ~~defendant~~]."

18 SECTION 3. Section 704-406, Hawaii Revised Statutes, is
19 amended by amending subsection (1) to read as follows:

20 "(1) If the court determines that the defendant lacks
21 fitness to proceed, the proceeding against the defendant shall
22 be suspended, excepted as provided in [~~section~~] sections

H.B. NO. 1620, Proposed S.D. 1

1 704-407[7] and 704- , and the court shall commit the defendant
2 to the custody of the director of health to be placed in an
3 appropriate institution for detention, assessment, care and
4 treatment; provided that [~~the commitment shall be limited in~~
5 ~~certain cases as follows~~]:

6 (a) When the defendant is charged with a petty
7 misdemeanor not involving violence or attempted
8 violence, the [~~commitment shall be limited to no~~
9 ~~longer than sixty days from the date the court~~
10 ~~determines the defendant lacks fitness to proceed; and~~
11 defendant shall be diverted from the criminal justice
12 system pursuant to section 704- .

13 (b) When the defendant is charged with a misdemeanor not
14 involving violence or attempted violence, the
15 commitment shall be limited to no longer than one
16 hundred twenty days from the date the court determines
17 the defendant lacks fitness to proceed.

18 If the court is satisfied that the defendant may be released on
19 conditions without danger to the defendant or to another or risk
20 of substantial danger to property of others, the court shall
21 order the defendant's release, which shall continue at the
22 discretion of the court, on conditions the court determines

H.B. NO. 1620, Proposed S.D. 1

1 necessary[; ~~provided that the release on conditions of a~~
2 ~~defendant charged with a petty misdemeanor not involving~~
3 ~~violence or attempted violence shall continue for no longer than~~
4 ~~sixty days; and] the release on conditions of a defendant
5 charged with a misdemeanor not involving violence or attempted
6 violence shall continue for no longer than one hundred twenty
7 days.] A copy of all reports filed pursuant to section 704-404
8 shall be attached to the order of commitment or order of release
9 on conditions that is provided to the department of health.
10 When the defendant is committed to the custody of the director
11 of health for detention, assessment, care, and treatment, the
12 county police departments shall provide to the director of
13 health and the defendant copies of all police reports from cases
14 filed against the defendant that have been adjudicated by the
15 acceptance of a plea of guilty or nolo contendere, a finding of
16 guilt, acquittal, acquittal pursuant to section 704-400, or by
17 the entry of a plea of guilty or nolo contendere, made pursuant
18 to chapter 853; provided that the disclosure to the director of
19 health and the defendant does not frustrate a legitimate
20 function of the county police departments; provided further that
21 expunged records, records of or pertaining to any adjudication
22 or disposition rendered in the case of a juvenile, or records~~

H.B. NO. 1620, Proposed S.D. 1

1 containing data from the United States National Crime
2 Information Center shall not be provided. The county police
3 departments shall segregate or sanitize from the police reports
4 information that would result in the likely or actual
5 identification of individuals who furnished information in
6 connection with the investigation or who were of investigatory
7 interest. No further disclosure of records shall be made except
8 as provided by law."

9 SECTION 4. Section 704-411, Hawaii Revised Statutes, is
10 amended by amending subsection (3) to read as follows:

11 "(3) When ordering a hearing pursuant to subsection (2):

12 (a) In nonfelony cases, the court shall appoint a
13 qualified examiner to examine and report upon the
14 physical and mental condition of the defendant. The
15 court may appoint either a psychiatrist or a licensed
16 psychologist. The examiner may be designated by the
17 director of health from within the department of
18 health. The examiner shall be appointed from a list
19 of certified examiners as determined by the department
20 of health. The court, in appropriate circumstances,
21 may appoint an additional examiner or examiners; and

22 (b) In felony cases, the court shall appoint three

H.B. NO. 1620, Proposed S.D. 1

1 qualified examiners to examine and report upon the
2 physical and mental condition of the defendant. In
3 each case, the court shall appoint [~~at least one~~
4 ~~psychiatrist and at least one licensed psychologist.~~
5 ~~The third member may be a psychiatrist, a licensed~~
6 ~~psychologist, or a qualified physician. One] as
7 examiners psychiatrists, licensed psychologists, or
8 qualified physicians; provided that one of the three
9 shall be a psychiatrist or licensed psychologist
10 designated by the director of health from within the
11 department of health. The three examiners shall be
12 appointed from a list of certified examiners as
13 determined by the department of health.~~

14 To facilitate the examination and the proceedings thereon, the
15 court may cause the defendant, if not then confined, to be
16 committed to a hospital or other suitable facility for the
17 purpose of examination for a period not exceeding thirty days or
18 a longer period as the court determines to be necessary for the
19 purpose upon written findings for good cause shown. The court
20 may direct that qualified physicians or psychologists retained
21 by the defendant be permitted to witness the examination. The
22 examination and report and the compensation of persons making or

H.B. NO. 1620, Proposed S.D. 1

1 assisting in the examination shall be in accordance with section
2 704-404(3), (5)(a), ~~[and]~~, (b), (d) and (e), (7), (8), (9),
3 (10), and (11). As used in this section, the term "licensed
4 psychologist" includes psychologists exempted from licensure by
5 section 465-3(a)(3) and "qualified physician" means a physician
6 qualified by the court for the specific evaluation ordered."

7 SECTION 5. Section 704-414, Hawaii Revised Statutes, is
8 amended by amending subsection (1) to read as follows:

9 "(1) Upon filing of an application pursuant to section
10 704-412 for discharge or conditional release, or upon the filing
11 of an application pursuant to section 704-413 for discharge, the
12 court shall appoint three qualified examiners in felony cases,
13 and one qualified examiner in nonfelony cases, to examine and
14 report upon the physical and mental condition of the defendant.
15 In felony cases, the court shall appoint ~~[at least one~~
16 ~~psychiatrist and at least one licensed psychologist. The third~~
17 ~~member may be a psychiatrist, a licensed psychologist, or a~~
18 ~~qualified physician. One]~~ as examiners psychiatrists, licensed
19 psychologists, or qualified physicians; provided that one of the
20 three shall be a psychiatrist or licensed psychologist
21 designated by the director of health from within the department
22 of health. The examiners shall be appointed from a list of

H.B. NO. 1620, Proposed S.D. 1

1 certified examiners as determined by the department of health.
2 To facilitate the examination and the proceedings thereon, the
3 court may cause the defendant, if not then confined, to be
4 committed to a hospital or other suitable facility for the
5 purpose of the examination and may direct that qualified.
6 physicians or psychologists retained by the defendant be
7 permitted to witness the examination. The examination and
8 report and the compensation of persons making or assisting in
9 the examination shall be in accordance with section 704-404(3),
10 (5) (a) [~~and~~], (b), (d) and (e), (7), (8), (9), (10), and (11).

11 As used in this section, the term "licensed psychologist"
12 includes psychologists exempted from licensure by
13 section 465-3(a) (3) and "qualified physician" means a physician
14 qualified by the court for a specific evaluation ordered."

15 PART II

16 SECTION 6. The legislature finds that the recommendations
17 of the Hawaii Summit on Improving the Governmental Response to
18 Community Mental Illness hosted by the State Justice Institute,
19 National Center for State Courts, Conference of Chief Justices,
20 and the Conference of State Court Administrators on November
21 6, 2019, as well as studies such as the 2016-2017 Policy Paper by
22 the Conference of State Court Administrators' "Decriminalization

H.B. NO. 1620, Proposed S.D. 1

1 of Mental Illness: Fixing a Broken System", demonstrate that
2 jails nationwide have become the default mental health method of
3 treatment for numerous low-level defendants whose needs could be
4 far more effectively addressed by diversion into behavioral
5 health treatment. Moreover, once the issue of mental health
6 surfaces during a judicial proceeding, the defendant more often
7 than not actually spends far more time being incarcerated
8 without being treated and being denied due process while
9 awaiting mental health evaluations. With the cost of
10 incarceration in Hawaii averaging over \$150 per day and the high
11 rate of recidivism shown by these studies because of the lack of
12 treatment, the legislature finds that allowing the parties to
13 opt out of judicial proceedings by entering into agreements at
14 any stage of the process is more cost-effective with respect to
15 time, money, and community results.

16 The purpose of this part is to:

- 17 (1) Authorize the courts to enter into agreements with the
18 parties where there is reason to believe that the
19 defendant has a physical or mental disease, disorder,
20 or defect that will or has become an issue in the
21 criminal case;
- 22 (2) Amend the requirements for appointing qualified

H.B. NO. 1620, Proposed S.D. 1

1 examiners to perform examinations for penal
2 responsibility; and

3 (3) Require an examination for penal responsibility to be
4 conducted within fifteen days after a finding of
5 fitness to proceed.

6 SECTION 7. Section 704-407.5, Hawaii Revised Statutes, is
7 amended as follows:

8 1. By amending subsections (1) and (2) to read:

9 “(1) Whenever the defendant has filed a notice of
10 intention to rely on the defense of physical or mental disease,
11 disorder, or defect, excluding penal responsibility, or there is
12 reason to believe that the physical or mental disease, disorder,
13 or defect of the defendant will or has become an issue in the
14 case, the court may order an examination as to the defendant’s
15 physical or mental disease, disorder, or defect at the time of
16 the conduct alleged.

17 Whenever there is reason to believe that the physical or
18 mental disease, disorder, or defect of the defendant will or has
19 become an issue in the case, the court may enter into an
20 agreement with the parties at any stage of the proceeding to
21 divert the case into an evaluation of the defendant, treatment
22 of the defendant, including residential or rehabilitation

H.B. NO. 1620, Proposed S.D. 1

1 treatment; or any other course or procedure, including diversion
2 into specialized courts. Such agreements may include in-court
3 clinical evaluations.

4 (2) ~~[The]~~ For those cases not diverted by an agreement
5 pursuant to subsection (1), the court shall appoint three
6 qualified examiners [in felony cases] for class A and class B
7 felonies, as well as for class C felonies involving violence or
8 attempted violence, and one qualified examiner in nonfelony
9 cases to examine and report upon the physical or mental disease,
10 disorder, or defect of the defendant at the time of the conduct.
11 For class C felonies not involving violence or attempted
12 violence, the court may appoint one or three qualified
13 examiner(s) to examine and report upon the physical or mental
14 disease, disorder, or defect of the defendant at the time of the
15 conduct. In [felony] cases[7] where the court appoints three
16 examiners, the court shall appoint [at least one psychiatrist
17 and at least one licensed psychologist. The third examiner may
18 be a psychiatrist, licensed psychologist, or qualified
19 physician. One] as examiners psychiatrists, licensed
20 psychologists, or qualified physicians; provided that one of the
21 three examiners shall be a psychiatrist or licensed psychologist
22 designated by the director of health from within the department

H.B. NO. 1620, Proposed S.D. 1

1 of health. In nonfelony cases[7] and class C felonies not
2 involving violence or attempted violence, the court may appoint
3 as examiners either a psychiatrist or a licensed psychologist.
4 The examiner may be designated by the director of health from
5 within the department of health. All examiners shall be
6 appointed from a list of certified examiners as determined by
7 the department of health. The court, in appropriate
8 circumstances, may appoint an additional examiner or examiners.
9 The court may direct that one or more qualified physicians or
10 psychologists retained by the defendant by permitted to witness
11 the examination. As used in this section, the term "licensed
12 psychologist" includes psychologists exempted from licensure by
13 section 465-3(a) (3) and "qualified physician" means a physician
14 qualified by the court for the specific evaluation ordered."

15 2. By amending subsection (4) to read:

16 "(4) For defendants charged with felonies, the
17 examination for fitness to proceed under section 704-404 and
18 penal responsibility under this section shall be conducted
19 separately unless a combined examination has been ordered by the
20 court upon a request by the defendant or upon a showing of good
21 cause to combine the examinations. When the examinations are
22 separate, the examination for penal responsibility under this

H.B. NO. 1620, Proposed S.D. 1

1 section shall not be ordered more than [~~thirty~~] fifteen days
2 after a finding of fitness to proceed. The report of the
3 examination for fitness to proceed shall be separate from the
4 report of the examination for penal responsibility unless a
5 combined examination has been ordered. For defendants charged
6 with offenses other than felonies, a combined examination is
7 permissible when ordered by the court."

8 PART III

9 SECTION 8. This Act does not affect rights and duties that
10 matured, penalties that were incurred, and proceedings that were
11 begun before its effective date.

12 SECTION 9 Statutory material to be repealed is bracketed
13 and stricken. New statutory material is underscored.

14 SECTION 10. This Act shall take effect on July 1, 2050.

H.B. NO. 1620, Proposed S.D. 1

Report Title:

Fitness to Proceed; Petty Misdemeanors; DOH; Penal Responsibility; Mental Health Treatment; Agreements

Description:

Amends the effect of finding a defendant charged with a petty misdemeanor not involving violence or attempted violence unfit to proceed. Amends the requirements for fitness determination hearings, court-appointed examiners, and examination reports. Authorizes the courts to enter into agreements to divert into residential, rehabilitative, and other treatment those defendants whose physical or mental disease, disorder, or defect is believed to have become or will become an issue in a judicial case. Amends the requirements for appointing qualified examiners to perform examinations for penal responsibility. Requires an examination for penal responsibility to be conducted within fifteen days after a finding of fitness to proceed. Effective 7/1/2050. (HD2)

LATE



Hawai'i Psychological Association *For a Healthy Hawai'i*

P.O. Box 833
Honolulu, HI 96808

www.hawaiipsychology.org

Email: hpaexec@gmail.com
Phone: (808) 521-8995

COMMITTEE ON COMMERCE, CONSUMER PROTECTION AND HEALTH

SENATOR ROSALYN H. BAKER, CHAIR
SENATOR STANLEY CHANG, VICE CHAIR

Friday, March 13, 2020, 9:30 AM
Conference Room 229

Testimony in OPPOSITION of HB 1620 HD2

HB 1620 HD2 fails to achieve the laudable goal of reducing the criminalization of mental illness in Hawai'i. It is indeed problematic that individuals charged with petty misdemeanors often wait in jail 30-45 days for fitness to proceed evaluations even though the maximum jail sentence for someone convicted of that charge is 30 days. Many states address this problem by not allowing for fitness evaluations on petty misdemeanors.

Our first concern is that the HD2 version of this bill is unclear what specific type of nonfelony case the two-day expedited report of fitness to proceed applies to.

Secondly, *mandating a fitness to proceed evaluation within two days of arrest would not allow an examiner to review previous treatment or jail records.* The examiner would be "flying blind" with an unacceptably high error rate. This would be a gross departure from acceptable assessment practice such that in many, if not most cases, an ethical examiner would not be able to arrive at an opinion.

Additionally, the requirement for a fitness evaluation within two days is unrealistic as it is our understanding that the Health Department's Court Evaluation Branch is already thinly staffed and has difficulty meeting 30-45 day deadlines. It is our further understanding that the Branch is currently expecting 2.5 of their 7 FTE positions to become vacant this July.

The concept of a two-day evaluation was likely borrowed from a two-day process utilized in Massachusetts; however, Massachusetts conducts a screening within two days, *not* a final opinion on fitness to proceed. This screening process in Massachusetts recommends cases to be evaluated in the hospital, civilly committed instead of prosecuted, or diverted into community treatment. The national average deadline for the completion of a final opinion fitness to proceed examination is 31 days. It is our understanding that when Washington State

mandated a 15-day deadline, State Hospital admissions skyrocketed, the State paid \$85 million in fines for late reports, had to double the number of fitness examiners, and raise their salaries.

Under HB 1620 HD2 persons who are found unfit to proceed within two days of referral would be committed to Hawai'i State Hospital for seven days and then have their charges dropped if they cannot be civilly committed. In this scenario, persons who are found unfit to proceed within two days secondary to the effects of crystal methamphetamine, would still be categorized as unfit to proceed after their psychotic symptoms clear. State Hospital admissions would increase even though many patients in jail respond adequately to psychiatric medication within four to six weeks and are then found fit to proceed instead of being hospitalized. We cannot be sure that the census would not increase due to shorter hospitalizations. Furthermore, hospital intakes and discharges are time consuming; the influx of new seven-day State Hospital commitments would divert resources from the care of patients with longer hospitalizations.

Another problem is that HB 1620 HD2 is only applicable when a court-based clinician is available. On the neighbor islands especially, a court-based evaluator would likely not be available, and *defendants would have different procedures based on geography and staffing*. If this bill becomes law, some persons in our state found unfit to proceed would have their charges dropped after seven days, while others would wait at least four weeks in jail for the fitness exams.

It is highly problematic that HD2 now contains a provision from HB 1619 that allows court-ordered penal responsibility evaluations for non-violent Felony C cases to be based on the opinion of just one examiner instead of the current requirement for three examiners. Relying on the opinion of only one examiner reduces a judge's ability to make an informed decision as studies show that another examiner would provide a different opinion at least 30% of the time. Examiner inter-rater reliability for penal responsibility evaluations averages around 60%, which means in many cases that *relying on a single evaluator's opinion could result in the judge inappropriately sending an insane individual to prison for a maximum sentence of five years*.

Rather than reducing delays, this provision for one-panel examinations will result in *more delays*. When an examiner is unable to reach an opinion or when a one-panel examination contains insufficient information – situations that are not uncommon - more examinations will be ordered, ultimately adding *more time* before a decision on penal responsibility can be made.

As such, this bill will also increase the likelihood that the defense or the prosecution will hire additional evaluators, resulting in *further delays*. Further, research conducted at the University of Virginia has conclusively demonstrated a *systematic bias* in defense/prosecutor retained evaluations. In contrast, the current three-panel system hires independent evaluators and the likelihood of systematic bias is significantly less. National experts who have reviewed our state's three-panel felony system for penal responsibility examinations have recommended it as a model for other states. It is our understanding that the courts in Hawai'i do a better job of achieving justice than most states in the continental U.S., where it is relatively common to find

severely mentally ill persons inappropriately placed in prisons, and people without severe mental illness committed to state psychiatric hospitals.

Finally, HB 1620 HD2 is not clear as to whether the fitness to proceed evaluations would be performed at the police cell block or at the Hawai'i State Hospital. If the fitness to proceed evaluations are performed at the State Hospital after triage by the treatment team, the State Hospital psychologists would be in the best position to complete the exams in two days; however, it is our understanding that they may have less expertise in this task than their colleagues at the Court Evaluations Branch.

For all these reasons, HPA respectfully urges you not to pass this bill as currently written.

Thank you for your consideration.

Julie Takishima-Lacasa, PhD, President
Chair, Legislative Action Committee
Hawai'i Psychological Association

HB-1620-HD-2

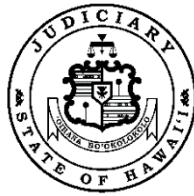
Submitted on: 3/9/2020 5:38:58 PM

Testimony for CPH on 3/13/2020 9:30:00 AM

Submitted By	Organization	Testifier Position	Present at Hearing
Louis Erteschik	Testifying for Hawaii Disability Rights Center	Comments	Yes

Comments:

We think the intent of this bill has merit and deserves further discussion. It appears to seek to screen defendants found not fit to proceed for either civil commitment or assisted community treatment. That makes sense and might be a way to bring people into the system and provide treatment that would not be available currently. don't know how many people who are found unfit to proceed will actually meet these criteria so it remains to be seen if this will be successful. But it is worth exploring. We do like the idea of dismissing the charges in the minor non violent cases as it would help avoid clogging up the courts and jails with people who really do not need to be there. It also would avoid some of the stigma that comes from the "criminalization of the mentally ill". Some of the timelines that are specified might need to be looked at more closely. For instance, we are not sure if a two day timeline for a fitness evaluation is realistic. We suspect it may not be. would certainly be interested in working with the Committee and relevant stakeholders to further develop and refine this proposal as the session moves forward.



LATE

The Judiciary, State of Hawai'i

Testimony to the Thirtieth State Legislature, 2020 Session

Senate Committee on Commerce, Consumer Protection, and Health

Senator Rosalyn H. Baker, Chair
Senator Stanley Chang, Vice-Chair

Friday, March 13, 2020 at 9:30 AM
State Capitol, Conference Room 229

By

Shirley M. Kawamura

Deputy Chief Judge, Criminal Administrative Judge, Circuit Court of the First Circuit

WRITTEN TESTIMONY ONLY

Bill No. and Title: House Bill No. 1620. HD2, Relating to the Administration of Justice

Purpose: Amends the effect of finding a defendant charged with a petty misdemeanor not involving violence or attempted violence unfit to proceed. Amends the requirements for fitness determination hearings, court-appointed examiners, and examination reports. Authorizes the courts to enter into agreements to divert into residential, rehabilitative, and other treatment those defendants whose physical or mental disease, disorder, or defect is believed to have become or will become an issue in a judicial case. Amends the requirements for appointing qualified examiners to perform examinations for penal responsibility. Requires an examination for penal responsibility to be conducted within fifteen days after a finding of fitness to proceed. Effective 7/1/2050. (HD2)

Judiciary's Position:

The Judiciary strongly supports the intent of this bill and the opportunity to work with the Department of Health and the Department of the Attorney General to propose refined language of this measure to address the concerns raised. The Judiciary also supports the majority of the amendments made by the House Judiciary Committee, but has concerns with and opposes certain portions of Part II as noted below.



SECTION 1, addition of the new section 704-_____

Revisions to this section could make clear that those defendants deemed fit to proceed will have their criminal cases resumed and only those who cannot be determined to be fit to proceed will be diverted into the mental health system. The seven days will be available for those defendants to be evaluated and assessed as to the level of care they may require (in-patient, out-patient, or merely crisis intervention). Those individuals who may require or benefit from treatment will be diverted and their case will be dismissed. As is always within their discretion, the Department of Health may proceed under Chapter 334 if the situation so requires. The Judiciary acknowledges the concerns raised by the prosecutors as well as the Office of the Public Defender. The Judiciary proposes the following language for section 704-__ in place of Page 1, Line 5 through Page 3, Line 21 of H.B. 1620, H.D.2:

“704-_____ Proceedings for defendants charged with petty misdemeanors not involving violence or attempted violence, criminal justice diversion program. (1) In cases where the defendant is charged with a petty misdemeanor not involving violence or attempted violence, if, at the hearing held pursuant to section 704-404(2)(a) or at a further hearing held after the appointment of an examiner pursuant to section 704-404(2)(b), the court determines that the defendant is fit to proceed, then the proceedings against defendant shall resume. In all other cases where fitness remains an outstanding issue, the court shall continue the suspension of the proceedings and commit the defendant to the custody of the director of health to be placed in a hospital or other suitable facility for further examination and assessment.

(2) Within seven days from the commitment of defendant to the custody of the director of health, or as soon thereafter as is practicable, the director of health shall report to the court on the defendant’s current capacity to understand the proceedings against defendant and defendant’s current ability to assist in defendant’s own defense. If, following the report, the court finds defendant fit to proceed, the proceedings against defendant shall resume. In all other cases, the court shall dismiss the charge with or without prejudice in the interest of justice. The director of health may at any time proceed under the provisions of section 334-60.2 or 334-121.”

SECTION 2, amendment of section 704-404:

In light of the revision proposed above to section 704-_____, further revisions are required for consistency and cohesiveness to section 704-404. In addition, the Judiciary suggests amendments to the proposed provisions of the expedited hearings and evaluations for the petty non-violent misdemeanors that will address potential straining of the resources of the



Department of Health due to the expedited nature of the evaluations. Specifically, the Judiciary proposes that Page 4, line 3 through Page 5, line 11 of H.B. 1620, H.D.2 would be amended to state as follows:

1. By amending subsections (1) and (2) to read:

"(1) Whenever there is reason to doubt the defendant's fitness to proceed, the court may immediately suspend all further proceedings in the prosecution; provided that for any defendant not subject to an order of commitment to ~~[a hospital]~~ the director of health for the purpose of the examination, neither the right to bail nor proceedings pursuant to chapter 804 shall be suspended. If a trial jury has been ~~[empaneled,]~~ empaneled, it shall be discharged or retained at the discretion of the court. The discharge of the trial jury shall not be a bar to further prosecution.

(2) Upon suspension of further proceedings in the prosecution [;]:

(a) In cases where the defendant is charged with a petty misdemeanor not involving violence or attempted violence, if a court-based certified examiner is available, the court shall appoint the court-based certified examiner to examine and provide an expedited report solely upon the issue of the defendant's capacity to understand the proceedings against defendant and defendant's ability to assist in defendant's own defense. The court-based certified examiner shall file the examiner's report with the court within two days of the appointment of the examiner, or as soon thereafter as is practicable. A hearing shall be held to determine if defendant is fit to proceed within two days of the filing of the report, or as soon thereafter as is practicable;

(b) In all other nonfelony cases, and where a court-based certified examiner is not available in cases under section (2)(a) above, the court shall appoint ~~[three qualified examiners in felony cases, and]~~ one qualified examiner ~~[in nonfelony cases,]~~ to examine and report upon the defendant's fitness to proceed. The court may appoint as the examiner either a psychiatrist or a licensed psychologist; and

SECTION 3, amendment of section 704-406:

In light of the House Committee's revision in HD2 of section 704-____ (removing the misdemeanors) certain language should be preserved in 704-406 which was to be removed under HD1. The Judiciary proposes that Page 8, line 17 through Page 9, line 18 of H.B. 1620, H.D.2 be revised to state as follows to not remove subparagraph (b) and the provisions for the release on conditions for the full misdemeanors:

"(1) If the court determines that the defendant lacks fitness to proceed, the proceeding against the defendant shall be suspended, except as provided in ~~[section]~~ sections 704-407[;] and 704-____, and the court shall commit the defendant to the custody



of the director of health to be placed in an appropriate institution for detention, assessment, care, and treatment; provided that ~~[the commitment shall be limited in certain cases as follows:]~~

- (a) When the defendant is charged with a petty misdemeanor not involving violence or attempted violence, the ~~[commitment shall be limited to no longer than sixty days from the date the court determines the defendant lacks fitness to proceed; and]~~ defendant shall be diverted from the criminal justice system pursuant to section 704-.
- (b) When the defendant is charged with a misdemeanor not involving violence or attempted violence, the commitment shall be limited to no longer than one hundred twenty days from the date the court determines the defendant lacks fitness to proceed.

If the court is satisfied that the defendant may be released on conditions without danger to the defendant or to another or risk of substantial danger to property of others, the court shall order the defendant's release, which shall continue at the discretion of the court, on conditions the court determines necessary; provided that ~~[the release on conditions of a defendant charged with a petty misdemeanor not involving violence or attempted violence shall continue for no longer than sixty days, and]~~ the release on conditions of a defendant charged with a misdemeanor not involving violence or attempted violence shall continue for no longer than one hundred twenty days. A

PART II, SECTION 7, amendment of section 704-407.5:

The Judiciary opposes the mandatory reduction from three to one evaluators for the evaluations on penal responsibility for "C" felonies not involving violence or attempted violence. The determination of penal responsibility is a trial issue, to be determined by the trier of fact whether that be a judge or a jury. This provision mandates that only one examiner should evaluate and present evidence on a defendant's mental disease, disorder, or defect where the defendant is charged with a "C" felony, a serious crime subject to five years imprisonment. This would appear to invade the purview of the trier of fact.

The proposed mandatory reduction from three to one evaluators is also unlikely to lead to expedited proceedings because it would likely lead to one or both parties seeking a motion allowing them to have their own evaluations of the defendant completed, pursuant to sections 704-409 and 704-410, and thus further postpone the trial. If a reduction in the number of examiners is sought, the Judiciary respectfully proposes that the reduction be discretionary upon agreement of the parties and not mandatory.

The Judiciary also seeks the removal of the specific specialty requirements as proposed in the amendments to sections 704-404, 704-411, and 704-414 and as noted in the proposed language below.



The Judiciary respectfully proposes the following revisions to H.B. 1620, H.D. 2, Page 17, line 3 through Page 18, line 8:

“(2) ~~[The]~~ For those cases not diverted by an agreement pursuant to subsection (1), the court shall appoint three qualified examiners [in felony cases] for class A and class B felonies, as well as for class C felonies involving violence or attempted violence, and one qualified examiner in nonfelony cases to examine and report upon the physical or mental disease, disorder, or defect of the defendant at the time of the conduct. For class C felonies not involving violence or attempted violence the court may appoint one or three qualified examiner(s) to examine and report upon the physical or mental disease, disorder, or defect of the defendant at the time of the conduct. In ~~[felony]~~ cases~~;~~ where the court appoints three examiners, the court shall appoint ~~[at least one psychiatrist and at least one licensed psychologist. The third examiner may be a psychiatrist, licensed psychologist, or qualified physician. One]~~ as examiners psychiatrists, licensed psychologists, or qualified physicians; provided that one of the three examiners shall be a psychiatrist or licensed psychologist designated by the director of health from within the department of health. In nonfelony cases~~;~~ and in class C felony cases not involving violence or attempted violence where one examiner is appointed, the court may appoint as examiners either a psychiatrist or a licensed psychologist. The examiner may be designated by the director of health from within the department of health. All examiners shall be appointed from a list of certified examiners as determined by the department of health. The court, in appropriate circumstances, may appoint an additional examiner or examiners. The court may direct that one or more qualified physicians or psychologists retained by the defendant be permitted to witness the examination. As used in this section, the term "licensed psychologist" includes psychologists exempted from licensure by section 465-3 (a) (3) and "qualified physician" means a physician qualified by the court for the specific evaluation ordered.”

The Judiciary strenuously opposes the time requirement for the ordering of the penal responsibility evaluation on Page 18, lines 15-18, and would propose it be removed, as any such requirement would violate a defendant’s constitutional right to present a defense. See *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (“Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense.”).

Thank you for the opportunity to testify on this measure.



HB1620 HD2 Court Diversion and Mental Health Treatment
COMMITTEE ON COMMERCE, CONSUMER PROTECTION AND HEALTH:

- Sen. Rosalyn Baker, Chair; Sen. Stanley Chang, Vice Chair
- Friday, Mar. 13th, 2020: 9:30 am:
- Conference Room 229

Hawaii Substance Abuse Coalition Recommends and Supports HB1620 HD2:
ALOHA CHAIR, VICE CHAIR AND DISTINGUISHED COMMITTEE MEMBERS. My name is Alan Johnson. I am the current chair of the Hawaii Substance Abuse Coalition (HSAC), a statewide organization of over 30 non-profit alcohol and drug treatment and prevention agencies.

RECOMMENDATION:

HSAC Recommends changing “Mental Health Outpatient” to “Mental Health or Co-occurring Disorder” treatment because many patients have both mental health or substance use disorders and several programs now treat both.

Section 1.(3) If the defendant's clinical team determines that the defendant does not meet the criteria for involuntary hospitalization, or the family court denies the petition for involuntary hospitalization, or in the anticipation of discharge after involuntary hospitalization pursuant to section 334-60.3, the clinical team shall determine whether an assisted community treatment plan is appropriate pursuant to chapter 334, part VIII. If the clinical team determines that an assisted community treatment plan is appropriate, the psychiatrist or advanced practice registered nurse from the clinical team shall prepare the certificate for assisted community treatment specified by section 334-123. The clinical team shall identify a community mental

health or co-occurring disorder ~~outpatient~~ treatment program that agrees to provide mental health services to the defendant as the designated mental health program under the assisted community treatment order. The defendant may be held at the hospital or other suitable facility pending the family court hearing on the petition for assisted community treatment. If the petition is granted, the defendant shall be released for treatment with the designated mental health program once the assisted community treatment order is issued and the initial treatment consistent with the assisted community treatment plan is administered to the defendant.

(4) If the petition for assisted community treatment is not granted or the clinical team determines that an assisted community treatment order is not appropriate, the defendant shall be:

(1) Referred to an appropriate ~~outpatient~~ mental health or co-occurring disorder program for continued support, care, and treatment; and

HSAC supports amending the Fitness to Proceed for Defendants with Non-Violent Misdemeanors as part of a Criminal Justice Diversion program. Transferring custody to the Dept. of Health to file an involuntary hospitalization to begin hospital services and eventually referred to community-based outpatient programs is in the best interest of the persons involved.

HSAC notes that SAMHSA regards the Sequential Intercept Models as best practices: which is that crisis response professionals and law enforcement act together in a “guardian” role to move people with mental and substance use disorders from arrest into treatment/services in order to avoid criminal justice involvement.¹

¹ SAMHSA Pre-arrest Diversion Expert Panel, convened in January 2018. <https://store.samhsa.gov/system/files/pep19-crisis-rural.pdf>

SAMHSA recommends that states develop partnerships with police, hospitals and community service agencies to increase the capacity of agencies to provide services as well as enable sharing of information and ideas. Incorporating technology into mental health and substance use treatment services may require programs to shift to less traditional staffing models (e.g., remote employees that are not based in one central location such as through telehealth), bolstering their electronic infrastructure, and make other changes to support a shift towards virtual service delivery.

The state must ensure that there are shifts in the intended process changes by increasing their financial investment in those resources that results in:

- Higher usage rates,
- Increased on-scene resolution of crises,
- Less demand for services on emergency response systems,
- Reduced use of costly transportation, and
- Quicker delivery of critical services to individuals in crisis or presenting with mental and substance use disorders.

It is often more beneficial to expand existing programs, rather than developing entirely new programs as a means to improve opportunities for crisis response or pre-arrest diversion. This approach may include supplying new tools and resources to current agencies/staff and providing specialized training for responders to address a broad range of crises effectively.

We appreciate the opportunity to provide testimony and are available for questions.

HB-1620-HD-2

Submitted on: 3/11/2020 4:34:45 PM

Testimony for CPH on 3/13/2020 9:30:00 AM

Submitted By	Organization	Testifier Position	Present at Hearing
Jud Cunningham	Testifying for Aloha House, Inc.	Support	No

Comments:

HB-1620-HD-2

Submitted on: 3/9/2020 4:52:21 PM

Testimony for CPH on 3/13/2020 9:30:00 AM

Submitted By	Organization	Testifier Position	Present at Hearing
Pat McManaman	Individual	Support	No

Comments:

TESTIMONY IN SUPPORT OF HB1620, HD2 WITH SUGGESTED CHANGES

I write in strong support of HB1620, HD1. For far too long we have unnecessarily incarcerated non-violent misdemeanor and petty misdemeanor defendants in jails across the State pending a fitness to proceed determination. These determinations may take weeks and months and often exceed the maximum period of incarceration for the underlying offense. More importantly, individuals with serious mental illness (SM) are warehoused in a non-therapeutic environment and receive little or no treatment for their underlying condition during the pendency of the fitness proceedings.

HD1, Section 1, remedies this issue, in part, by providing for a closed-ended assessment period for non-violent misdemeanor and petty misdemeanor offenders. This is a significant improvement to existing procedures. But, we can and should do better for individuals with SMI whose illness is not a matter of choice, but rather the result of biological processes.

In the existing language of Section 1, an individual found unfit to proceed will be transferred to the custody of the Department of Health and placed "in a hospital or other suitable facility" for further examination, for up to seven days. I recommend this phrase, as used in Section 1, be amended to read an "existing public or private psychiatric facility." The proposed change will assure that individuals with SMI receive needed medical attention in a therapeutic and supportive environment. Transfer to an existing public or private psychiatric facility also reduces the census in our overcrowded jails and is a step forward in assuring the physical safety of individuals with SMI, frequent victims of abuse and assault.

Thank you for your consideration,

Pat McManaman

baker8 - Jessica

From: Rod Macdonald <rjmacdonald@hawaiiintel.net>
Sent: Tuesday, March 10, 2020 7:55 PM
To: CPH Testimony
Cc: rjmacdonald@hawaiiintel.net
Subject: Testimony of R.J. Macdonald Re: HB2420 HD2, Relating to the Hawaii Civil Rights Commission

Senate Committee on Commerce, Consumer Protection and Health Senator Rosalyn H. Baker, Chair

Friday, March 13, 2020
9:30 am
Conference Room 229
Hawaii State Capitol

Re: HB2420 HD2 - Relating to the Hawaii Civil Rights Commission

Madam Chair, Members:

My name is Rod Macdonald. I am a consumer who happens to be deaf and blind. This fact frequently makes accessing information a challenging undertaking, since I cannot read printed matter and cannot hear speech. Accessing services and information in an accessible manner is a very big deal for me.

I am submitting this testimony to strongly urge you to pass HB2420 HD2, relating to the Hawaii Civil Rights Commission because it will allow the Hawaii Civil Rights Commission to help individuals like me get the documents that they need instead of having to go to Federal Court.

On numerous occasions I have requested information from state of Hawaii agencies and contractors, information that should be readily available to the public. In theory it should be a fairly straight-forward request: A colleague can readily obtain a print copy of a document; I would like a copy of that document in electronic format instead of a paper copy. Simple?

Unfortunately, not so simple. As an example, I requested an electronic copy of a 2017-2018 contract between the Department of Human Services and the University of Hawaii. A colleague received this contract on paper within a few days. I submitted my request on the designated state form, and within a week I was sent an electronic text file of the contract. The problem: it was a scanned image of a paper copy, with over a thousand scanning errors that I just could not decipher in braille. I told DHS of this problem and received no answer.

A year later I requested an electronic copy of the 2018-2019 contract. This time I was provided with a number of files, some accessible and some not (they were "pictures" of the documents, not digital text). Some files were simply not provided. I was told that there was nothing DHS could do, since the Attorney General had ownership of the files, passwords were required for access, Ag staff were busy... sorry.

Additionally, I have made formal, written requests for information that should be accessible to the public, and simply received no response to my requests at all, or else received misleading information for a different time frame, or otherwise not what I had asked for. Sometimes the information requested comes from a contractor, and the agency simply passes it on, taking no responsibility for its accuracy or relevance.

So what does a consumer do in such cases? I am told that the Hawaii Civil Rights Commission is no longer able to respond to such complaints. As a consumer I have the options of filing a complaint in Federal court, filing a complaint with the U.S. Department of Justice, or perhaps hiring an attorney to file a lawsuit. There just isn't a Hawaii resource available to handle a discrimination complaint.

And, for the record, I did file a formal complaint with the U.S. Department of Justice. I was told that, without passing judgement on the merit of my complaint, DOJ was too busy to take it up and I was urged to seek a local remedy in Hawaii.

Knowing this, holders of information I am seeking are not shy about ignoring my requests - no one is going to hold them accountable.

I am a consumer with a dual disability that makes access to information difficult, even though multiple laws clearly state that I have a right to such information. What remedy do I have, realistically, if the holder of such information simply says no?

I strongly urge you to address this problem by passing HB2420 HD2. It is a remedy to a glaring shortcoming in our legal system. Please support this legislation.

Thank you,
Rod Macdonald, MA LHD

HB-1620-HD-2

Submitted on: 3/11/2020 6:06:50 PM

Testimony for CPH on 3/13/2020 9:30:00 AM

Submitted By	Organization	Testifier Position	Present at Hearing
Andrea Quinn	Individual	Support	No

Comments:

HB-1620-HD-2

Submitted on: 3/12/2020 1:33:46 PM

Testimony for CPH on 3/13/2020 9:30:00 AM

Submitted By	Organization	Testifier Position	Present at Hearing
John Honda	Individual	Support	No

Comments:



**TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
THIRTIETH LEGISLATURE, 2020**

LATE

ON THE FOLLOWING MEASURE:

H.B. NO. 1620, H.D. 2, RELATING TO THE ADMINISTRATION OF JUSTICE.

BEFORE THE:

SENATE COMMITTEE ON COMMERCE, CONSUMER PROTECTION, AND HEALTH

DATE: Friday, March 13, 2020

TIME: 9:30 a.m.

LOCATION: State Capitol, Room 229

TESTIFIER(S): Clare E. Connors, Attorney General, or
Debbie L. Tanakaya, Deputy Attorney General

Chair Baker and Members of the Committee:

The Department of the Attorney General offers the following comments.

Part I of this bill adds a section to chapter 704, Hawaii Revised Statutes, which addresses the diversion of a non-violent petty misdemeanor defendant determined to lack fitness to proceed. This creates different possible outcomes for these defendants, allowing a court to (1) suspend criminal proceedings and order defendants to be transferred to the custody of the Director of Health to be placed in a hospital or other suitable facility for further examination and assessment for up to seven days or (2) dismiss the charges with or without prejudice. If these defendants are transferred to the custody of the Director of Health, depending on the results of the further examination and assessment, the defendant could be involuntarily hospitalized, ordered into an assisted community treatment plan, referred to an appropriate mental health outpatient program, or discharged from the custody of the Director of Health. This part also amends the requirements for fitness determination hearings, court-appointed examiners, and examination reports.

Part II of this bill authorizes the courts to enter into agreements to divert defendants, whose physical or mental disease, disorder, or defect may be an issue, to an evaluation, treatment, or other course or procedure, including diversion to specialized courts. This part also amends requirements for appointing examiners to

perform penal responsibility examinations and decreases the time allowed for penal responsibility examinations to be conducted after a finding of fitness to proceed.

The ordering of defendants charged with petty misdemeanors not involving violence or attempted violence to the custody of the Director of Health (upon a court determination of unfitness to proceed), found in section 1, page 1, line 14, through page 2, line 2, of the bill, raises constitutional concerns because it does not require a finding that the defendant poses a danger to self or others prior to custody being transferred to the director of the Department of Health. The constitutional concerns could be resolved by providing standards for the determination of fitness to proceed for purposes of these defendants or by saving the determination of fitness for after the seven-day assessment period provided on page 2, line 1.

Additionally, the word "transferred" at page 1, line 15, of the bill, does not apply to defendants who are not already in custody. We believe the word should be changed to "committed."

An additional concern is the provision at page 3, lines 5-7, which would allow a defendant who has been determined to not meet the criteria for involuntary hospitalization, or for whom the family court has denied a petition for involuntary hospitalization, to be held at the hospital or other suitable facility pending a family court hearing on a petition for assisted community treatment. Continued holding of a defendant, especially with no time limitation, in that circumstance may violate the defendant's constitutional due process rights.

Our Department is available to work further with the Committee, the Department of Health, the Judiciary, prosecuting attorneys, the Public Defender, and other stakeholders to address the intent of this measure.

Thank you for this opportunity to testify.

DEPARTMENT OF THE PROSECUTING ATTORNEY
CITY AND COUNTY OF HONOLULU

ALII PLACE
1060 RICHARDS STREET • HONOLULU, HAWAII 96813
PHONE: (808) 768-7400 • FAX: (808) 768-7515

DWIGHT K. NADAMOTO
ACTING PROSECUTING ATTORNEY



LYNN B.K. COSTALES
ACTING FIRST DEPUTY
PROSECUTING ATTORNEY

LATE

**THE HONORABLE ROSALYN H. BAKER, CHAIR
SENATE COMMITTEE ON COMMERCE,
CONSUMER PROTECTION AND HEALTH
Thirtieth State Legislature
Regular Session of 2020
State of Hawai'i**

March 13, 2020

RE: H.B. 1620, H.D. 2; RELATING TO THE ADMINISTRATION OF JUSTICE.

Chair Baker, Vice-Chair Chang, and members of the Senate Committee on Commerce, Consumer Protection and Health, the Department of the Prosecuting Attorney, City and County of Honolulu (“Department”), submits the following testimony in strong opposition to H.B. 1620, H.D. 2. This bill contains modified versions of what was previously H.B. 1620 and H.B. 1619.

Dismissal without required treatment exacerbates the “revolving door” problem

The Department is deeply concerned that H.B. 1620 H.D. 2, would allow a court to dismiss some petty misdemeanor offenses—including some with victims—simply because a defendant is currently unfit to proceed. Being unfit for purposes of court proceedings is completely separate and apart from one’s mental state and penal responsibility at the time of offense, and many defendants who are found unfit during the course of a case will “regain fitness” after receiving treatment.

H.B. 1620, H.D. 2, not only allows courts to dismiss criminal cases without determining penal responsibility, but also allows courts to dismiss the case without requiring that the defendant receive any form of treatment (page 1, lines 14-16 through page 2, lines 1-3). Thus, certain “low-level” offenders—particularly for property crimes, such as theft or criminal property damage—would not only rotate through the system without treatment, as often occurs now, but on top of that, their cases would be dismissed, precluding any future charges for habitual property crime, which provide much more significant opportunities for treatment, oversight, and specialty courts.

Please remove the term, “involving violence or attempted violence”

While the Department understands the intent to distinguish between cases “involving violence or attempted violence,” that is simply not how our Penal Code is categorized, and there is

currently no definition or list of what charges that would include. Without those things, the interpretation of “involving violence or attempted violence” can vary greatly from one judge to the next, leaving everyone uncertain whether a defendant’s—often serious—“grey area” charges will be considered violent or non-violent. For example:

Class C felonies:

- Negligent Homicide in the 2nd Degree (HRS §707-703)
- Negligent Injury in the 1st Degree (HRS §707-705)
- Reckless Endangering in the 1st Degree (HRS §707-713)
- Terroristic Threatening (HRS §707-716)
- Sexual assault in the 3rd Degree (HRS §707-732)
- Aggravated Harassment by Stalking (HRS §711-1106.4)
- Arson in the 3rd Degree (HRS §708-8253)
- Violation of Privacy in the 1st Degree (HRS §711-1110.9)
- Habitual OVUII (§291E-61.5, H.R.S.)
- Promoting Pornography for Minors (§712-1215, H.R.S.)
- Solicitation of a Minor for Prostitution (§712-1209.1, H.R.S.)
- Electronic Enticement of a Child in the 2nd Degree (HRS §707-757)

Misdemeanors:

- Violation of temporary restraining order (HRS §586-4 or §604-10.5)
- Reckless endangering in the 2nd degree (HRS §707-714)
- Terroristic threatening in the 2nd degree (HRS §707-717)
- Unlawful imprisonment in the 2nd degree (HRS §707-722)
- Custodial interference in the 2nd degree (HRS §707-727)
- Sexual assault in the 4th degree (HRS §707-733)
- Criminal property damage (3rd degree HRS §708-822; 4th degree HRS §708-823)
- Endangering the welfare of a minor in the 2nd degree (HRS §709-904)
- Endangering the welfare of an incompetent person (HRS §709-905)
- Harassment by stalking (HRS §711-1100)

We do understand that one statute—passed in ____-- currently contains the language of “involving violence or attempted violence,” and that language has indeed been a source of argument and differing opinions in actual court cases, illustrating our concerns regarding inconsistency and fairness.

Critical for 3-panel examinations to include both psychiatrist and psychologist

At multiple points, now, this bill proposes to change the requirement—whenever a “three-panel” of examiners is indicated—from requiring at least one psychiatrist and one psychologist on the panel, to allow any combination of psychiatrists or psychologists; this leaves open the possibility of having no psychiatrists, or no psychologists, on any given panel (see page 5, lines 12-20; page 11, line 14 through page 12, line 4; page 13, lines 9-16; page 17, lines 11-15).

Because psychiatrists and psychologists have very different backgrounds and areas of expertise, it is unclear why it would ever be preferred for a mental health examination to be solely limited to just psychologists or just psychiatrists. It is our understanding that these are two distinct,

but equally important, fields that specialize in addressing different aspects of a person's mental state. If one of these views is lost, it inherently increases the likelihood of missing some important aspect of the analysis, and decreases the reliability of the outcome. Thus, the Department strongly believes that the requirement to have both a psychiatrist and psychologist, on every 3-panel, must be kept as-is, for all parties to receive a fair and accurate assessment of the defendant's mental health.

Felony cases should not turn on the opinion of 1 mental health examiner

At page 17, lines 4-11, the current version of H.B. 1620, H.D. 2, would prohibit courts from ordering a 3-panel of examiners in some class C felony cases. Because mental health is not a black-and-white science, and is often subject to differing opinions, it is crucial that the court and all stakeholders have the benefit of receiving multiple opinions in every felony case, to most accurately assess that defendant's mental condition. Indeed, it is not uncommon for a 3-panel of examiners to come back with an opinion that is split, two-to-one. If certain felony cases are limited to one examiner, there is a distinct possibility that that opinion could have been the minority, thus decreasing the likelihood that the court and all involved parties are receiving the most "accurate" mental health assessment for those felony defendants.

The Department is also very concerned that the court's decision to hold a 3-panel or 1-panel examination would have to be based on a term that is completely undefined, and highly inconsistent with the makeup of our Penal Code. As noted previously, there is currently no definition or list of which charges qualify as "involving violence or attempted violence," and while that term is now noted once in our Penal Code—since ____--it has led to significant arguments and differing opinions on various types of offenses. *Please see the list of "grey area" C felony charges, noted above.* We should also note that this type of distinction does not further our Department's overarching concern of assessing the "dangerousness" of an individual, as dangerous individuals can still be brought to court on "non-violent" charges

Conclusion

While the Department understands the desire to streamline mental health assessments that are done for court purposes, H.B. 1620, H.D. 2 would do so at the expense of public safety and welfare—which is the Department's primary concern—and as such, the Department cannot support this measure.

As a point for clarification, the Department is also concerned that it remains unclear whether all parties must agree on the specific treatment plan—as noted at page 16, lines 15-21 through page 17, lines 1-2—or if that just means an agreement is made to divert the case. Please note that, in a few "specialized courts," a plea of no-contest or guilty is required before admission; therefore, a number of diversion options envisioned by this section may be unavailable.

For all of the foregoing reasons, the Department of the Prosecuting Attorney of the City and County of Honolulu strongly opposes the passage of H.B. 1620, H.D. 2. Thank you for the opportunity to testify on this matter.