

JAN 26 2009

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# A BILL FOR AN ACT

RELATING TO MENTAL HEALTH.

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

1       SECTION 1. Act 100, Session Laws of Hawaii 2008, enacted  
2       several statutory changes "to minimize the census at Hawaii State  
3       Hospital and promote community based health services for  
4       forensic patients" largely based on recommendations stemming from  
5       the task force established through Senate Concurrent Resolution  
6       No. 117 in 2006. The task force focused on the provisions of  
7       chapter 704, Hawaii Revised Statutes, which govern penal  
8       responsibility and fitness to proceed and provide an affirmative  
9       defense in criminal cases for defendants who do not meet the  
10      test for penal responsibility on account of physical or mental  
11      disease, disorder, or defect. At several stages of the criminal  
12      process related to the affirmative defense, the statutes in  
13      chapter 704 authorize the courts to commit defendants to a  
14      hospital or to the custody of the director of health. These  
15      provisions govern the large majority of admissions to, and  
16      discharges from, the Hawaii state hospital. The time elapsed in  
17      cases involving hospital services during chapter 704 processes

1 and procedures directly affects the rate of hospital admissions  
2 and discharges and, therefore, directly affects the Hawaii state  
3 hospital census. During its consideration of the actual time  
4 involved in the application of chapter 704 procedures, the  
5 Senate Concurrent Resolution No. 117 task force received  
6 information about the long time frames usually involved in each  
7 stage of the procedures, and many of the task force's  
8 recommendations were aimed at shortening those time frames.  
9 Senate Bill No. 2396, introduced during the regular session of  
10 2008, set forth the task force's proposed statutory amendments,  
11 including an initial provision requiring judicial review of  
12 commitments resulting from felony charges and all conditional  
13 releases on an annual basis for the first five years, and in  
14 biennial intervals thereafter. As the bill went through the  
15 legislative process, this proposed judicial call back provision  
16 drew concern. The resulting amendment by Act 100 of section  
17 704-411, Hawaii Revised Statutes, which added the provisions as  
18 subsections (5), (6), and (7), appears to have resulted,  
19 inadvertently, in a two-tiered procedure for conditional release  
20 or discharge from the custody of the director of health, or at  
21 least, raised confusion about the interplay of these new  
22 subsections and the conditional release and discharge processes

1 set forth in section 704-412, Hawaii Revised Statutes. The  
2 purposes of this Act are to clarify that the provisions of  
3 section 704-412 govern the timing and standards of decision for  
4 applications for conditional release or discharge from the  
5 custody of the director of health, and to then include in  
6 section 704-412 a time frame for decisions on motions for  
7 conditional release or discharge.

8 SECTION 2. Section 704-411, Hawaii Revised Statutes, is  
9 amended to read as follows:

10 **"§704-411 Legal effect of acquittal on the ground of**  
11 **physical or mental disease, disorder, or defect excluding**  
12 **responsibility; commitment; conditional release; discharge;**  
13 **procedure for separate post-acquittal hearing. (1) When a**  
14 defendant is acquitted on the ground of physical or mental  
15 disease, disorder, or defect excluding responsibility, the  
16 court, on the basis of the report made pursuant to section  
17 704-404, if uncontested, or the medical or psychological  
18 evidence given at the trial or at a separate hearing, shall make  
19 an order as follows:

20 (a) The court shall order the defendant to be committed to  
21 the custody of the director of health to be placed in  
22 an appropriate institution for custody, care, and

1 treatment if the court finds that the defendant:

2 (i) Is affected by a physical or mental disease,  
3 disorder, or defect;

4 (ii) Presents a risk of danger to self or others; and

5 (iii) Is not a proper subject for conditional release;

6 provided that the director of health shall place

7 defendants charged with misdemeanors or felonies

8 not involving violence or attempted violence in

9 the least restrictive environment appropriate in

10 light of the defendant's treatment needs and the

11 need to prevent harm to the person confined and

12 others. The county police departments shall

13 provide to the director of health and the

14 defendant copies of all police reports from cases

15 filed against the defendant which have been

16 adjudicated by the acceptance of a plea of guilty

17 or no contest, a finding of guilt, acquittal,

18 acquittal pursuant to section 704-400, or by the

19 entry of a plea of guilty or no contest made

20 pursuant to chapter 853, so long as the

21 disclosure to the director of health and the

22 defendant does not frustrate a legitimate

1 function of the county police departments, with  
2 the exception of expunged records, records of or  
3 pertaining to any adjudication or disposition  
4 rendered in the case of a juvenile, or records  
5 containing data from the United States National  
6 Crime Information Center. The county police  
7 departments shall segregate or sanitize from the  
8 police reports information that would result in  
9 the likelihood or actual identification of  
10 individuals who furnished information in  
11 connection with the investigation of who were of  
12 investigatory interest. Records shall not be re-  
13 disclosed except to the extent permitted by law;

14 (b) The court shall order the defendant to be granted  
15 conditional release with conditions as the court deems  
16 necessary if the court finds that the defendant is  
17 affected by physical or mental disease, disorder, or  
18 defect and that the defendant presents a danger to  
19 self or others, but that the defendant can be  
20 controlled adequately and given proper care,  
21 supervision, and treatment if the defendant is  
22 released on condition; or

1 (c) The court shall order the defendant discharged if the  
2 court finds that the defendant is no longer affected  
3 by physical or mental disease, disorder, or defect or,  
4 if so affected, that the defendant no longer presents  
5 a danger to self or others and is not in need of care,  
6 supervision, or treatment.

7 (2) The court, upon its own motion or on the motion of the  
8 prosecuting attorney or the defendant, shall order a separate  
9 post-acquittal hearing for the purpose of taking evidence on the  
10 issue of physical or mental disease, disorder, or defect and the  
11 risk of danger that the defendant presents to self or others.

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

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

1 (b) In felony cases, the court shall appoint three  
2 qualified examiners to examine and report upon the  
3 physical and mental condition of the defendant. In  
4 each case, the court shall appoint at least one  
5 psychiatrist and at least one licensed psychologist.  
6 The third member may be a psychiatrist, a licensed  
7 psychologist, or a qualified physician. One of the  
8 three shall be a psychiatrist or licensed psychologist  
9 designated by the director of health from within the  
10 department of health. The three examiners shall be  
11 appointed from a list of certified examiners as  
12 determined by the department of health. To facilitate  
13 the examination and the proceedings thereon, the court  
14 may cause the defendant, if not then confined, to be  
15 committed to a hospital or other suitable facility for  
16 the purpose of examination for a period not exceeding  
17 thirty days or such longer period as the court  
18 determines to be necessary for the purpose upon  
19 written findings for good cause shown. The court may  
20 direct that qualified physicians or psychologists  
21 retained by the defendant be permitted to witness the  
22 examination. The examination and report and the

1 compensation of persons making or assisting in the  
2 examination shall be in accord with section 704-  
3 404(3), (4)(a) and (b), (6), (7), (8), and (9). As  
4 used in this section, the term "licensed psychologist"  
5 includes psychologists exempted from licensure by  
6 section 465-3(a)(3).

7 (4) Whether the court's order under subsection (1) is made  
8 on the basis of the medical or psychological evidence given at  
9 the trial, or on the basis of the report made pursuant to  
10 section 704-404, or the medical or psychological evidence given  
11 at a separate hearing, the burden shall be upon the State to  
12 prove, by a preponderance of the evidence, that the defendant is  
13 affected by a physical or mental disease, disorder, or defect  
14 and may not safely be discharged and that the defendant should  
15 be either committed or conditionally released as provided in  
16 subsection (1).

17 ~~[(5) The director of health may apply to the court to~~  
18 ~~conduct a hearing to assess any further need for inpatient~~  
19 ~~hospitalization of a person who is acquitted on the ground of~~  
20 ~~physical or mental disease, disorder, or defect excluding~~  
21 ~~responsibility. The director shall make this application in a~~  
22 ~~report to the circuit from which the order was issued. The~~



1 ~~director shall transmit a copy of the application and report to~~  
2 ~~the prosecuting attorney of the county from which the order was~~  
3 ~~issued.~~

4       ~~(6) Any person committed pursuant to this chapter may~~  
5 ~~apply to the court to conduct a hearing to assess any further~~  
6 ~~need for inpatient hospitalization of the committed person~~  
7 ~~acquitted on the ground of physical or mental disease, disorder,~~  
8 ~~or defect excluding responsibility. The application shall be~~  
9 ~~accompanied by a letter from or supporting affidavit of a~~  
10 ~~qualified physician or licensed psychologist. A copy of the~~  
11 ~~application and letter or affidavit shall be transmitted to the~~  
12 ~~circuit from which the order was issued. The person shall~~  
13 ~~transmit a copy of the application and letter or affidavit to~~  
14 ~~the prosecuting attorney of the county from which the order was~~  
15 ~~issued.~~

16       ~~(7) Upon application to the court by either the director~~  
17 ~~of health or the person committed, the court shall complete the~~  
18 ~~hearing process and render a decision within sixty days of the~~  
19 ~~application, provided that for good cause the court may extend~~  
20 ~~the sixty day time frame upon the request of the director of~~  
21 ~~health or the person.~~

22       ~~(8)]~~ (5) In any proceeding governed by this section, the

1 defendant's fitness shall not be an issue."

2 SECTION 3. Section 704-412, Hawaii Revised Statutes, is  
3 amended to read as follows:

4 **"§704-412 Committed person; application for conditional**  
5 **release or discharge; by the director of health; by the person.**

6 (1) After the expiration of at least ninety days following an  
7 original order of commitment pursuant to section 704-411(1)(a),  
8 or after the expiration of at least sixty days following the  
9 revocation of conditional release pursuant to section 704-413,  
10 if the director of health is of the opinion that the person  
11 committed is still affected by a physical or mental disease,  
12 disorder, or defect and may be granted conditional release or  
13 discharged without danger to self or to the person or property  
14 of others or that the person is no longer affected by a physical  
15 or mental disease, disorder, or defect, the director shall make  
16 an application for either the conditional release or discharge  
17 of the person, as appropriate. In such a case, the director  
18 shall submit a report to the court by which the person was  
19 ordered committed and shall transmit copies of the application  
20 and report to the prosecuting attorney of the county from which  
21 the person was committed and to the person committed.

22 (2) After the expiration of ninety days from the date of

1 the order of commitment pursuant to section 704-411, or after  
2 the expiration of sixty days following the revocation of  
3 conditional release pursuant to section 704-413, the person  
4 committed may apply to the court from which the person was  
5 committed for an order of discharge upon the ground that the  
6 person is no longer affected by a physical or mental disease,  
7 disorder, or defect. The person committed may apply for  
8 conditional release or discharge upon the ground that, though  
9 still affected by a physical or mental disease, disorder, or  
10 defect, the person may be released without danger to self or to  
11 the person or property of others. A copy of the application  
12 shall be transmitted to the prosecuting attorney of the county  
13 from which the person was committed. If the court denies the  
14 application, the person shall not be permitted to file another  
15 application for either conditional release or discharge until  
16 one year after the date of the hearing held on the immediate  
17 prior application.

18 (3) Upon application to the court by either the director  
19 of health or the person committed, the court shall complete the  
20 hearing process and render a decision within sixty days of the  
21 application; provided that for good cause the court may extend  
22 the sixty-day time frame upon the request of the director of

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1 health or the person."

2 SECTION 4. Statutory material to be repealed is bracketed  
3 and stricken. New statutory material is underscored.

4 SECTION 5. This Act shall take effect on upon its  
5 approval.

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INTRODUCED BY:

8

BY REQUEST

**Report Title:**

Mental Health; Hawaii State Hospital; Forensic Patients

**Description:**

Clarifies that the provisions of section 704-412, Hawaii Revised Statutes, govern the timing and standards of decision for applications for conditional release or discharge from the custody of the Director of Health and includes a time frame for decisions on motions for conditional release or discharge.

SB 937

JUSTIFICATION SHEET

DEPARTMENT: Health

TITLE: A BILL FOR AN ACT RELATING TO MENTAL HEALTH.

PURPOSE: Clarify that the provisions of section 704-412, Hawaii Revised Statutes (HRS), govern the timing and standards of decision for applications for conditional release or discharge from the custody of the director of health, and to include in section 704-412, HRS, a time frame for decisions on motions for conditional release or discharge.

MEANS: Amend sections 704-411 and 704-412, HRS.

JUSTIFICATION: Act 100, Session Laws of Hawaii (SLH) 2008, enacted several statutory changes "to minimize the census at Hawaii State Hospital and promote community based health services for forensic patients" largely based on recommendations stemming from the task force established through Senate Concurrent Resolution No. 117, 2006 (SCR 117). The task force focused on the provisions of chapter 704, HRS, which govern penal responsibility and fitness to proceed and provide an affirmative defense in criminal cases for defendants who do not meet the test for penal responsibility on account of physical or mental disease, disorder, or defect. At several stages of the criminal process related to the affirmative defense, the statutes in chapter 704, authorize the courts to commit defendants to a hospital or to the custody of the director of health. These provisions govern the large majority of admissions to, and discharges from, the Hawaii state hospital. The time elapsed in cases involving hospital services during chapter 704, processes and procedures directly affects the rate of hospital admissions and discharges and, therefore, directly affects the Hawaii State Hospital

census. During its consideration of the actual time involved in the application of chapter 704 procedures, the SCR 117 task force received information about the long time frames usually involved in each stage of the procedures, and many of the task force's recommendations were aimed at shortening those time frames. Senate Bill No. 2396, 2008, as amended, set forth the task force's proposed statutory amendments, including an initial provision requiring judicial review of commitments resulting from felony charges and all conditional releases on an annual basis for the first five years, and in biennial intervals thereafter. In the closing weeks of the 2008 legislative session this proposed judicial call back provision sparked objections. The resulting amendment of section 704-411, HRS, which added the provisions as subsections (5), (6), and (7), appears to have resulted, inadvertently, in a two-tiered procedure for conditional release or discharge from the custody of the director of health, or at least, raised confusion about the interplay of these new subsections and the conditional release and discharge processes set forth in section 704-412, HRS. The purposes of the amendments proposed by this bill are to clarify that the provisions of section 704-412, govern the timing and standards of decision for applications for conditional release or discharge from the custody of the director of health, and to then include in section 704-412 a time frame for decisions on motions for conditional release or discharge.

Impact on the public: The proposed changes will remove from section 704-411 an unintended source of confusion for defendants and their attorneys concerning conditional release and discharge applications. In addition, the sixty-day time frame for decisions on motions for conditional release or discharge to be

included in section 704-412 will benefit defendants seeking conditional release or discharge who now may wait for several weeks or months from the date of their applications until decisions on the motions.

Impact on the department and other agencies:

The proposed changes will address the unintended confusion and potential duplication of efforts that would likely be encountered by Hawaii State Hospital staff, AMHD courts and corrections examiners, adult client services branch personnel, prosecutors, and courts as they attempted to comply with the current provisions of the law. In addition the sixty-day time frame for decisions on motions for conditional release or discharge pursuant to section 704-412 will help the department and Hawaii State Hospital manage the hospital's census more effectively.

GENERAL FUND: None.

OTHER FUNDS: None.

PPBS PROGRAM  
DESIGNATION: HTH-430.

OTHER AFFECTED  
AGENCIES: Department of the Attorney General,  
Judiciary (Courts and the Adult Client  
Services Branch), Prosecutor's Offices,  
Office of the Public Defender.

EFFECTIVE DATE: Upon approval.