DAVID Y. IGE
GOVERNOR OF HAWAII

BRUCE S. ANDERSON, PHD
DIRECTOR OF HEALTH

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

Testimony COMMENTING on H.B. 1619
RELATING TO PENAL RESPONSIBILITY

REPRESENTATIVE JOHN M. MIZUNO, CHAIR
HOUSE COMMITTEE ON HEALTH

Hearing Date and Time: Tuesday, January 28, 2020 at 8:35 a.m. Room: 329

Department Position: The Department of Health ("Department") strongly supports the intent of this measure and offers the following comments.

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

The Department supports the development of opportunities for pre- and post-arrest diversion into appropriate pathways, and out of involvement with the criminal justice system when appropriate for individuals who are living with behavioral health issues. The Department appreciates the intent of this bill to allow for collaborative agreements that expand and expedite access to evaluation and treatment when the defendant's behavioral health is a factor in a case.

Respectfully, the Department defers to the Judiciary on items in the bill that impact judicial proceedings such as mandatory reductions of examinations from three to one; and the changes in time requirements for penal responsibility evaluations outlined on page 5, lines 1-4.

However, we have been collaborating closely with the Judiciary regarding the expansion of treatment pathways and greater coordination for defendants with behavioral health issues and would echo and support the following specific amendments to the measure the Judiciary has proposed.

Offered Amendments: We respectfully echo the Judiciary's proposal that relevant sections of HRS 704-404, 704-406, 704-411, and 704-414 be amended to eliminate specific specialty requirements and read, "<u>In cases requiring three examiners, the court shall appoint psychiatrists, licensed psychologists, or qualified physicians.</u>"

Thank you for the opportunity to testify.

Fiscal Implications: Undetermined.

The Judiciary, State of Hawai'i

Testimony to the Thirtieth State Legislature, 2020 Session

House Committee on Health
Representative John M. Mizuno, Chair
Representative Bertrand Kobayashi, Vice-Chair

Tuesday, January 28, 2020, 8:35 a.m.
State Capitol, Conference Room 329

WRITTEN TESTIMONY ONLY

By
Shirley M. Kawamura
Deputy Chief Judge, Criminal Administrative Judge, Circuit Court of the First Circuit

Bill No. and Title: House Bill No. 1619, Relating to Penal Responsibility

Purpose: Authorizes the courts to enter into collaborative 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.

Judiciary's Position:

The Judiciary appreciates the intent of this proposed bill, however the bill in its current form remains unclear in certain key areas, rendering implementation a concern. Further, as described below, the Judiciary opposes portions of the bill.

First, the bill does not specify the offenses for which the bill is applicable. Second, the bill does not provide a clear definition of "collaborative agreement." For instance, it is not clear who may enter into such an agreement nor the terms which may be considered. Third, the bill does not set forth the applicable disposition of the criminal case following evaluation and treatment of the defendant. Fourth, the bill does not set forth the applicable disposition of the case in the event the defendant fails to follow the terms of any collaborative agreement. Fifth, there is no instruction as to who would be conducting the evaluation and treatment of the defendant, who would manage the care, or who would incur the costs associated therewith.

Finally, the bill is unclear whether the "collaborative agreements" provision applies only when the physical or mental disease, disorder, or defect of the defendant at the time of the alleged offense will or has become an issue in the case. This could lead to potential confusion as to whether or not collaborative agreements could be used when there is a question of a defendant's fitness to proceed.

Moreover, 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.

Alternatively, the proposed elimination of specific specialty requirements, as proposed in section 2 of H.B. 1842, may accomplish the intent of the reduction from three to one evaluators. Specifically, the pertinent portion of the statute may read: "In cases requiring three examiners, the court shall appoint psychiatrists, licensed psychologists, or qualified physicians."

Indeed, the Judiciary respectfully seeks these amendments in HRS sections 704-404, 704-406, 704-411, and 704-414—allowing for the three professionals to be psychiatrists, licensed psychologists, or qualified physicians.

The judiciary strenuously opposes the time requirement for the ordering of the penal responsibility evaluation on page 5, lines 1 – 4, 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.

STATE OF HAWAIʻI
OFFICE OF THE PUBLIC DEFENDER

Testimony of the Office of the Public Defender,
State of Hawaiʻi to the House Committee on Health

January 27, 2020

H.B. No. 1619: RELATING TO PENAL RESPONSIBILITY

Chair Mizuno, Vice Chair Kobayashi, and Members of the Committee:

The Office of the Public Defender respectfully supports in part and opposes in part H.B. No. 1619.

We support the provision relating to diversion by a collaborative agreement with the parties at any stage of the proceedings. However, we strongly oppose any reduction in the number of qualified examiners from three examiners to only one examiner for class C felonies not involving violence or attempted violence.

A panel of three qualified examiners is necessary and essential to protecting a person's due process rights for all felony cases. Indeed, there is no difference between a class C felony not involving violence or attempted violence and a class C felony involving violence or attempted violence; both types of class C felonies subject defendants to the maximum prison sentence of five years. Therefore, a mentally impaired person allegedly committing a non-violent felony should not be treated differently than from a mentally impaired person allegedly committing a violent felony.

In many cases, the desire to push a person through the system quickly, under the guise of protecting the speedy processing of a case or in the name of judicial economy, is counter-productive. Our office has seen many cases where the three panel of examiners disagree on whether a defendant had the capacity to appreciate the wrongfulness of his/her conduct (cognitive capacity) or to conform his/her conduct to the requirements of the law (volitional capacity) at the time of the alleged conduct. Requiring three examiners for all felony cases ensures that the defendant's guilt or innocence (by insanity) is not dependent on the luck of the draw -- i.e., the selection of one particular examiner. Given the high stakes involved in felony prosecutions (i.e. extended periods of hospitalization, prison terms of five years for class C felonies), the current standard of three examiners should remain. When there is disagreement on the panel, only a full litigation of the issue leads to justice being served. The appointment of a single examiner would not assure a correct resolution on this issue.

Moreover, the views of all three examiners are considered valuable and are taken into account by the trial judge in deciding whether a person who did not have the cognitive capacity or volitional capacity at the time of the alleged conduct should be sent to the Hawaiʻi State Hospital or to be released into the community for care and treatment.

Thank you for the opportunity to comment on H.B. No. 1619.

DEPARTMENT OF THE PROSECUTING ATTORNEY

CITY AND COUNTY OF HONOLULU

ALII PLACE
1060 RICHARDS STREET • HONOLULU, HAWAII 96813
PHONE: (808) 547-7400 • FAX: (808) 547-7515

DWIGHT K. NADAMOTO
ACTING PROSECUTING ATTORNEY

LYNN B.K. COSTALES
ACTING FIRST DEPUTY
PROSECUTING ATTORNEY

THE HONORABLE JOHN M. MIZUNO, CHAIR
HOUSE COMMITTEE ON HEALTH
Thirtieth State Legislature
Regular Session of 2020
State of Hawai`i

January 28, 2020

RE: H.B. 1619; RELATING TO PENAL RESPOSIBILITY.

Chair Mizuno, Vice Chair Kobayashi and members of the House Committee on Health, the Department of the Prosecuting Attorney of the City and County of Honolulu submits the following testimony in strong opposition of H.B. 1619.

The purpose of H.B. 1619 is to cut costs and time as it relates to the important issues of mental health by allowing a court to enter into a "collaborative agreement" with the parties involved when there is reason to believe that, physical or mental disease, disorder or defect becomes an issue in a criminal case.

First, the Department believes that the language is too vague, ambiguous and not clearly defined. Specifically, "collaborative agreement" which serves as the instrumental trigger to diverting defendants to evaluation, treatment and rehabilitation is not defined in the Hawaii Revised Statutes. Thus, it fails to indicate if all parties must agree on the specific treatment plan, or that just an agreement is met to divert the case. In addition, in a number of "specialized courts", an entry of a no-contest or guilty plea is required before admission; therefore, a number of diversion alternatives envisioned by H.B. 1619 would become unavailable.

Second, H.B. 1619 fails to take into consideration that an assessment of one's mental condition 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. Please keep in mind that, while our criminal code categorizes offenses into class A, B and C felonies, it does not always clearly indicate which cases involve violence or attempted violence nor does it alone distinguish the "dangerousness" of an individual. For example, it is unclear whether the following Class C felony offenses would be among those relegated to a panel of one examiner:

- 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)

It is our understanding that psychiatrists and psychologists have different areas of expertise, and thus provide slightly different perspectives on each defendant. Therefore, decreasing the number of examiners from 3 down to 1 for all Class C felony offenses "not involving violence or attempted violence" would also eliminate the additional precaution of having at least one psychiatrist and at least one psychologist in a number of offenses which are not as clear as it relates to violence.

For these reasons, the Department of the Prosecuting Attorney strongly opposes the passage of H.B. 1619. Thank you for this opportunity to testify.

HB-1619
Submitted on: 1/24/2020 7:11:17 PM
Testimony for HLT on 1/28/2020 8:35:00 AM

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

Comments:

We definitely support the idea of the collaborative agreement to divert the case into an evaluation/treatment of the defendant, especially involving a specialized court. We believe this is a very enlightened approach. We reserve decision at this point regarding the reduction in the number of examiners for non-violent Class C felonies and would like to hear more from other stakeholders to determine if that is a good idea.

HB-1619
Submitted on: 1/24/2020 1:36:39 PM
Testimony for HLT on 1/28/2020 8:35:00 AM

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

Comments:

Thank you for hearing this bill and for the opportunity to testify in support.

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 HEALTH
REPRESENTATIVE JOHN M. MIZUNO, CHAIR
REPRESENTATIVE BERTRAND KOBAYASHI, VICE CHAIR

Tuesday January 28, 2020, 8:35 AM
Conference Room 329

Testimony in STRONG OPPOSITION to HB 1619

HB 1619 would allow 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. If passed, this bill would reduce a judge's ability to make an informed decision by relying on the opinion of only one examiner. It has been demonstrated that a second examiner provides a differing opinion in these cases at least 30% of the time. In fact, the examiner inter-rater reliability for penal responsibility evaluations averages around 60%. The implication of this is that in many cases, relying on only one evaluator's opinion could result in the judge inappropriately sending an insane individual to prison for a maximum sentence of five years.

When an examiner is unable to reach an opinion or when a one panel examination contains insufficient information – situations that are not uncommon – additional examinations will be ordered, delaying a decision on penal responsibility.

This bill would also increase the likelihood that the defense or the prosecution will hire additional evaluators, resulting in further delays. These hired evaluations have also been found to exhibit bias; research conducted at the University of Virginia has conclusively demonstrated a systematic bias in defense- or prosecutor-retained evaluations. In contrast, the current three-panel system hires independent evaluators who serve as "friends of the court," and the likelihood of systematic bias is significantly decreased.

The existing law was drafted by a task force of stakeholders who designed the three-panel system in order to remediate common flaws found in other states. National experts who have reviewed our system have recommended it as a model for other states. We believe that the courts in Hawai‘i do a better job of achieving justice when it comes to this issue 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.

The Hawai‘i Psychological Association strongly urges you to oppose HB 1619.

Thank you for your consideration.

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