The Judiciary, State of Hawai‘i

Testimony to the Thirtieth State Legislature, 2020 Session

Senate Committee on Judiciary
Senator Karl Rhoads, Chair
Senator Jarrett Keohokalole, Vice-Chair

Tuesday, June 30, 2020, 9:46 a.m.
State Capitol, Conference Room 016

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. 1620, H.D. 2, S. D. 1, 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 the ordering of the penal responsibility evaluation. Effective 7/1/2050. (S.D. 1)

Judiciary's Position:

The Judiciary strongly supports this bill as set forth in Senate Draft 1 and greatly appreciates the opportunity to work with the Department of Health, the Department of the

Attorney General, and the various committees of the Hawai‘i State Legislature to propose and revise the language and content of this measure to address the concerns raised. This bill is a culmination of the year-long work of the Mental Health Core Steering Committee (a collaboration of the Department of Health, Department of Public Safety, and the Judiciary)

Thank you for the opportunity to testify on this measure.

DAVID Y. IGE
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Testimony in SUPPORT of H.B. 1620 S.D. 1
RELATING TO ADMINISTRATION OF JUSTICE

SENATOR KARL RHOADS, CHAIR
SENATE COMMITTEE ON JUDICIARY

Hearing Date and Time: Tuesday, June 30, 2020 at 9:46 a.m. Room: 016

Department Position: The Department of Health ("Department") strongly supports this measure offering 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 strongly supports the development of opportunities for diversion of individuals who are living with behavioral health issues into treatment. Providing alternative pathways for individuals with lower level charges when found unfit though an expedited fitness evaluation process is a goal we share in common with the Judiciary (JUD).

We strongly support the intent of this bill to allow for agreements that expedite access to evaluation and treatment when the defendant's behavioral health is a factor in a case and to expand treatment pathways with greater coordination for defendants with behavioral health issues.

We have been closely collaborating with the JUD to address concerns expressed by the Department of the Attorney General (ATG) regarding fitness and concerns expressed by the Department of the Prosecuting Attorney of the City and County of Honolulu and the Office of the Public Defender regarding petty non-violent misdemeanors. We respectfully defer to the JUD on items in the bill that impact judicial proceedings.

The Department thanks the Legislature for its support of developing expanded, appropriate and effective pathways for this population.

Offered Amendments: None.

Thank you for the opportunity to testify.

Fiscal Implications: Undetermined.

STATE OF HAWAI'I
OFFICE OF THE PUBLIC DEFENDER

LATE

Testimony of the Office of the Public Defender,
State of Hawai'i to the Senate Committee on Judiciary

H.B. No. 1620 HD2 SD1: RELATING TO THE ADMINISTRATION OF JUSTICE

Hearing: June 30, 2020, 9:46 a.m.

Chair Rhoads, Vice Chair Keohokalole, and Members of the Committee:

The Office of the Public Defender respectfully supports in part and opposes in part H.B. No. 1620 HD2 SD1.

Part I: Petty Misdemeanors / Fitness to Proceed

Unlike the previous versions of this bill (H.B. No. 1620 HD2, H.B. No. 1620 HD1, and H.B. No. 1620), the Office of the Public Defender supports Part I of H.B. No. 1620 HD2 SD1.

The issue of mental health has resulted in the incarceration of numerous non-violent individuals charged with low-level and petty misdemeanors within the state correctional facilities, and that these individuals do not receive the necessary mental health services. Part I of H.B. 1620 HD2 SD1 will more effectively address the needs of a defendant suffering from mental illness by dismissing the charge with or without prejudice when the defendant is not fit to proceed and continue under the provisions of H.R.S. section 334-60.2 or 334-121.

We previously opposed the bill primarily due to the section relating to the assisted community treatment under SECTION 1(b)(2), (b)(3) and (b)(4). We, however, have no objection to the language proposed by the Department of Health as follows:

> (1) In cases where the defendant is charged with a misdemeanor or 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.

Our primary concern had been that the assisted community treatment requirement will substantially increase the pre-trial (pre-hearing) incarceration time for criminal defendants charged with petty misdemeanors due to lengthy process to litigate a petition for assisted community treatment. The pre-trial/pre-hearing incarceration time for a defendant charged with a petty misdemeanor offense will far exceed the maximum jail sentence. The foregoing suggested language, however, sufficiently addresses our concerns.

1-Panel Examiner for Class C Felonies

The Office of the Public Defender 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. Indeed, according to the written testimony by the Hawai‘i Psychological Association submitted to the Committee on Health, "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%."

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 trier of fact (either a trial judge or a jury) 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 Hawai‘i State Hospital or to be incarcerated to a prison term or to be released into the community for care and treatment.

Thank you for the opportunity to comment on H.B. No. 1620 HD2 SD1.

DEPARTMENT OF THE PROSECUTING ATTORNEY

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THE HONORABLE KARL RHOADS, CHAIR
SENATE COMMITTEE ON JUDICIARY
Thirtieth State Legislature
Regular Session of 2020
State of Hawai`i

June 30, 2020

RE: H.B. 1620, H.D. 2, S.D. 1; RELATING TO THE ADMINISTRATION OF JUSTICE.

Chair Rhoads, Vice-Chair Keohokalole, and members of the Senate Committee on Judiciary, 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, S.D. 1.

Dismissal without required treatment exacerbates the "revolving door" problem

The Department is deeply concerned that H.B. 1620 H.D. 2, S.D. 1, would allow a court to dismiss certain 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 who are found unfit during the course of a case will "regain fitness" after receiving treatment.

H.B. 1620, H.D. 2, S.D. 1, 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 2, lines 11-12). 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 could be dismissed, precluding any future charge for habitual property crime, and that charge provides much more significant opportunities for treatment, oversight, and specialty courts.

Please remove the term, "involving violence or attempted violence"

While the Department understands the desire 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. This is particularly troubling for felony charges (see page 16, lines 6-7 and 10-11; and page 17, lines 1-2), such as:

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)

We do understand that two statutes—as both were amended in 2016—currently contain the phrase, "involving violence or attempted violence," but that language has 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 4, lines 16-18; page 10, lines 17-20; page 12, lines 9-13; page 16, lines 15-17).

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.

The Department is also very concerned that the court's decision to hold a 3-panel or 1-panl 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 the addition of that undefined term in our Penal Code has led to significant argument 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, S.D. 1, 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 15, line 14 through page 16, line 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 that may be envisioned by this section would 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, S.D. 1. Thank you for the opportunity to testify on this matter.

HB-1620-SD-1
Submitted on: 6/28/2020 2:01:13 PM
Testimony for JDC on 6/30/2020 9:46:00 AM

Submitted By	Organization	Testifier Position	Present at Hearing
Louis Erteschik	Testifying for Hawaii Disability Rights Center	Comments	No

Comments:

We definitely support the provision in Part 2 which allows the Court to divert the defendant to a treatment program. However, on the rest of Part 2 and on Part 1 we are concerned about reducing the number of examiners and we continue to question whether a two day timeline for a fitness report as set out in Part 1 is realistic. It is also not clear if the legal issues surrounding the seven day confinement of a defendant have been resolved. The overall intent of the bill has merit but it still needs a lot of discussion and we question whether that can effectively occur in an abbreviated session where the stakeholders are not able to provide adequate input.

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COMMITTEE ON JUDICIARY
SENATOR KARL RHOADS, CHAIR
SENATOR JARRETT KEOHOKALOLE, VICE CHAIR

Tuesday June 30, 2020, 9:46 AM
Conference Room 016

Important Amendments to HB 1620 HD2 SD1 Needed

We support the *intent* of HB 1620 HD2 SD1 to de-criminalize mental illness in Hawaii by diverting mentally ill individuals charged with small crimes from the criminal justice system. 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. The underlying problem is the shortage of civil commitment hospital beds on psychiatric units.

However, we strongly urge the Committee to change Section 2a from "two days" to "31 days" to read "The court examiner shall file the examiner's report with the court within 31 days of the appointment of the examiner or as soon thereafter as is practicable". Once charges go forward and Chapter 704 mental health exams are ordered, it is essential to maintain the integrity of examinations in accordance with national recommendations. Similarly, it is essential that the separate language for non-violent Class C felonies in Section 7(2) be stricken such that three qualified examiners shall be appointed for all penal responsibility evaluations.

The national average deadline for the completion of a final opinion on fitness to proceed examinations is 31 days. A two-day evaluation period does not allow an examiner to review previous treatment or jail records. Thus, an examiner will be "flying blind" with an unacceptably high error rate. Furthermore, the requirement for a fitness evaluation within two days is completely unrealistic as it is our understanding that the Health Department's Court Evaluation Branch is already thinly staffed and has difficulty meeting the much longer 30-45-day deadlines. It is our further understanding that two of the Branch's seven FTE positions are vacant and frozen. Simply scheduling an evaluation will in many cases push the evaluation beyond the proposed two-day period, as most hospitals and jails in Hawaii require that examiners schedule fitness interviews one to two days in advance. Some evaluations also require foreign language interpreters who are usually not available within two days.

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, similar to the intent of HB 1620 HD2 SD1, which is sound practice.

It is also our understanding that when Washington State mandated a 15-day deadline, their 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. State Hospital admissions increased in Washington because many people were found unfit to proceed secondary to the effects of crystal methamphetamine which often take longer to clear than two to 15 days. Currently, many of these persons would be found fit to proceed after 31 days, but not within two days, while still under the effects of crystal methamphetamine.

HB1620 HD2 SD1 now contains a provision from HB 1619, which the House deferred, 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. We oppose any such revision regarding penal responsibility evaluations. In this past, reducing the number of three panel examiners from three to one has been strongly opposed by virtually every stakeholder other than the Department of Health. 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 40% 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 *additional 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 current three-panel felony system for penal responsibility examinations have recommended it as a model for other states.

For all these reasons, HPA respectfully urges you to adopt our recommended changes. We would be happy to work with other stakeholders to improve this important initiative.

Thank you for your consideration.

Raymond Folen, PhD, Executive Director
Hawai'i Psychological Association

HB-1620-SD-1
Submitted on: 6/28/2020 2:30:25 PM
Testimony for JDC on 6/30/2020 9:46:00 AM

Submitted By	Organization	Testifier Position	Present at Hearing
Gerard Silva	Individual	Oppose	No

Comments:

This law only protects to Crooks!!!!!

The people of Hawaii will not let this sly by!!