The Judiciary, State of Hawai'i

Testimony to the Thirtieth State Legislature, 2020 Session

House Committee on Human Services & Homelessness
Representative Joy A. San Buenaventura, Chair
Representative Nadine K. Nakamura, Vice-Chair

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

Wednesday, January 29, 2020 at 10:00 am
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. 1842, Relating to Fitness to Proceed.

Purpose: Diverts non-violent petty misdemeanants living with mental illness from the criminal justice system to the appropriate community treatment.

Judiciary's Position:

The Judiciary ***strongly supports*** the proposed bill, though respectfully requests the below amendments to ensure constitutionality and for consistency, and to correct an error in the previous version of sections 704-411 and 704-414.

Following months of significant collaboration between the Judiciary and the Department of Health, and a statewide summit convened in November 2019 by Chief Justice Recktenwald and Governor Ige, the Judiciary and Department of Health issued a joint report on mental health challenges and opportunities across the state and a possible path forward.

House Bill No. 1842, Relating to Fitness to Proceed
House Committee on Human Services and Homelessness
House Committee on Health
Wednesday, January 29, 2020

The essence of this bill prepares that path forward in a way that will improve public safety, better assist those living with mental illness obtain appropriate assistance, and lessen targeted inefficiencies in the criminal justice system and healthcare system. More specifically, this bill will divert non-violent petty misdemeanants suffering from mental illness away from the criminal justice system within days rather than months, and this bill will divert into the appropriate treatment path.

SECTION 1, the addition of a new section:

The Judiciary respectfully proposes that page 1, lines 9-14 should be amended as follows to ensure the constitutionality of the proposed bill by making it clear that initial seven (7) day temporary commitment is not a civil commitment, but relates solely to the criminal matter: … the court determines that the defendant lacks fitness to proceed, [~~the charges shall be dismissed with prejudice and~~] the court shall order the defendant to be committed to the custody of the director of health and placed in an appropriate institution for detention, assessment, care, and treatment for up to seven days. On the seventh day, the charges shall be dismissed with prejudice.

SECTION 4, amendment of section 704-411:

The Judiciary respectfully proposes that page 11, lines 16-21 of the bill should be changed to amend subsection (3)(b) to be consistent with the examinations ordered under Section 704-404 (page 5, lines 10-20 of HB1842) and state:

. . . In each case, the court shall appoint as examiners [~~at least one psychiatrist and at least one licensed psychologist. The third member may be a psychiatrist, a licensed psychologist, or a qualified physician. One~~] psychiatrists, licensed psychologists, or qualified physicians; provided that one of the three shall be a psychiatrist or licensed psychologist . . .

In addition, the Judiciary respectfully requests that the proposed change on page 12, line 15 not be made as it will continue to require an opinion from the examiners on fitness to proceed for reports submitted for the issues of discharge, conditional release, and discharge from conditional release.

As background, the 2016 amendment of section 704-404 removed the diagnosis requirement (what was 704-404(4)(b)), and moved all of the other requirements of what was previously 704-404(4) up a letter and shifting all the requirements from 404(4) to 404(5) (thus making 5(b) a fitness determination), however this change was not carried through to §§ 704-411(3) and 414(3). Therefore, currently, our court-ordered examination reports for post-acquittal dangerousness hearing (704-411(2)) and conditional release, discharge from conditional release, and discharge (704-412 and 413) require the doctors to opine on fitness to proceed despite the

statutory provision of § 704-411(5) (which states that defendant's fitness shall not be an issue) and the irrelevance of fitness on a determination of conditional release and/or discharge.

The Judiciary would propose instead the change at page 12, line 15 be:

704-404(3), (5)(a), [~~and~~] (b), (d), and (e), (7), (8), (9), (10), and . . .

SECTION 5, amendment of section 404-414:

Similar to the comments on Section 4 above, the Judiciary respectfully proposes that page 13, lines 7-12 should be changed to amend subsection (1) to be consistent with the examinations ordered under Section 704-404 (page 5, lines 10-20 of HB1842) and state:
In felony cases, the court shall appoint as examiners [~~at least one psychiatrist and at least one licensed psychologist. The third member may be a psychiatrist, a licensed psychologist, or a qualified physician. One~~] psychiatrists, licensed psychologists, or qualified physicians; provided that one of the three shall be a psychiatrist or licensed psychologist designated by the director of health from within the department of health. .
.

In addition, for the same reasons noted in paragraph above, the Judiciary would propose instead the change at page 14, line 1 be:
(5)(a), [~~and~~] (b), (d), and (e), (7), (8), (9), (10), and (11).

Thank you for the opportunity to testify on this measure.

STATE OF HAWAI'I
OFFICE OF THE PUBLIC DEFENDER

Testimony of the Office of the Public Defender, State of Hawai'i to the House Committee on Human Services and Homelessness and to the House Committee on Health

January 27, 2020

H.B. No. 1842: RELATING TO FITNESS TO PROCEED

Chairs San Buenaventura and Mizuno, Vice Chairs Nakamura and Kobayashi, and Members of the Committees:

The Office of the Public Defender respectfully opposes H.B. No. 1842, which would greatly increase the pre-trial (pre-hearing) incarceration time for criminal defendants charged with petty misdemeanors. The length of time for a determination of fitness and for an outcome of a petition for assisted community treatment will be substantial. Therefore, if this bill is enacted, the pre-trial/pre-hearing incarceration time for a defendant charged with a petty misdemeanor offense will far exceed the maximum jail sentence.

Litigating a petition for assisted community treatment is a very lengthy process. Currently, there are five petitions pending in the family court:

Date Filed	Case Name	Next Court Date	"Trial" Date
09.18.19	J.Y.	03.17.20	03.17.20
11.27.19	J.W.	01.29.20	02.25.20
11.27.19	Z.G.	02.13.20	03.09.20
11.27.19	E.H.	01.30.20	
11.27.19	S.L.	02.20.20	03.04.20

Based on the above, a defendant who is found unfit and recommended for assisted community treatment can expect lengthy delays before his/her petition will be resolved. While waiting for the outcome of his/her petition for assisted community treatment, the defendant will likely be placed in a correctional facility such as the Oahu Community Correctional Center (O.C.C.C.) despite the bill's language stating that they "may be held at the appropriate institution pending the family court hearing on the petition for assisted community treatment." (Currently, many, if not all, of the defendants who are pending a determination of fitness are held at O.C.C.C.). This is in addition to the time spent in custody at O.C.C.C. while waiting for a determination of fitness, which is a minimum of thirty days. (Also, it is not uncommon that additional time is required for the completion of a fitness evaluation). Therefore, a defendant charged with a petty misdemeanor will spend several months in custody before his/her petition for assisted community treatment is resolved.

Litigating a petition for assisted community treatment is time consuming because the subject of a petition for assisted community treatment often cannot assist his/her attorney. Therefore, the attorney cannot obtain consent from the subject to stipulate to the admission of any evidence or stipulate to the petition. Indeed, the family court may not even accept any stipulations, as the family court is not able to conduct a meaningful colloquy with the subject in waiving any procedural matters.

Another consequence of referring defendants who are found unfit to proceed to assisted community treatment is that the outcome of petitions for those subjects who are not in the care of custody of the director of health (i.e., the homeless) will be delayed. Petitions for defendants detained (i.e., incarcerated) will certainly take (or at least, should take) precedent over petitions for subjects who are in the community.

Finally, the judiciary already has diversion programs in place for mentally ill defendants charged with petty misdemeanors and misdemeanors. The jail diversion program focuses specifically on defendants who have been diagnosed with serious permanent mental illnesses (SPMI) and provides for alternatives to adjudication and incarceration. The current involuntary outpatient treatment laws strike an appropriate balance between individual rights and public safety.

Thank you for the opportunity to comment on H.B. No. 1842.

EXECUTIVE CHAMBERS
HONOLULU

DAVID Y. IGE
GOVERNOR

January 29, 2020

TO: The Honorable Representative Joy A. San Buenaventura, Chair
House Committee on Human Services & Homelessness

The Honorable Representative John M. Mizuno, Chair
House Committee on Health

FROM: Scott Morishige, MSW, Governor's Coordinator on Homelessness

SUBJECT: **HB 1842 – RELATING TO FITNESS TO PROCEED**

Hearing: Wednesday, January 29, 2020, 10:00 a.m.
Conference Room 329, State Capitol

POSITION: The Governor's Coordinator on Homelessness supports this bill.

PURPOSE: The purpose of this bill is to divert non-violent petty misdemeanants living with mental illness from the criminal justice system to the appropriate community treatment.

The Hawaii Interagency Council on Homelessness (HICH), a 27-member advisory council chaired by the Coordinator, recently voted to prioritize support for behavioral health reforms and programs as part of its 2020 legislative priorities to address homelessness. The diversion of individuals living with mental illness to appropriate treatment programs is consistent with the HICH priorities.

Over the past four years, the State has developed and implemented a range of new programs to divert homeless individuals experiencing severe mental illness or substance use disorders to appropriate treatment and support. These new programs include the Law Enforcement Assisted Diversion (LEAD) program, intensive case management for homeless individuals, and the Assisted Community Treatment (ACT) program.

While the measure does not specifically address the needs of homeless individuals, there is overlap between individuals experiencing severe mental illness and individuals

experiencing homelessness. According to the 2019 Point in Time count, the number of homeless individuals self-reporting severe mental illness on Oahu was 1,060 individuals, representing a 5.8% increase (58 individuals) over the past four years.

Thank you for the opportunity to testify on this bill.

HB-1842
Submitted on: 1/28/2020 6:01:44 AM
Testimony for HSH on 1/29/2020 10:00:00 AM

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

Comments:

HB-1842
Submitted on: 1/27/2020 2:36:12 PM
Testimony for HSH on 1/29/2020 10:00:00 AM

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

Comments:

1. 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. suspect it may not be. would certainly be interested in working with the Committee and relevant stakeholders to further develop and refine this proposal if the measure is advanced.

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. 1842
RELATING TO FITNESS TO PROCEED

REPRESENTATIVE JOY A. SAN BUENAVENTURA, CHAIR
HOUSE COMMITTEE ON HUMAN SERVICES AND HOMELESSNESS

REPRESENTATIVE JOHN M. MIZUNO, CHAIR
HOUSE COMMITTEE ON HEALTH

Hearing Date and Time: Wednesday, January 29, 2020 at 10:00 a.m. Room: 329

Department Position: The Department of Health ("Department") strongly supports the intent of this measure offering comments and proposed amendments.

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 for individuals who are living with behavioral health issues into treatment when appropriate by providing alternative pathways for individuals with lower level charges when found unfit though an expedient fitness evaluation process. The Department has worked closely with the Judiciary to develop more appropriate and effective pathways for this population. If the court-based certified examiner concept is adopted for non-felony cases, the

AMHD intends to implement starting with the First Circuit while building additional capacity to implement in the other circuits statewide.

Respectfully the Department defers to the Judiciary on other items in the bill that impact judicial proceedings but generally agrees with the amendments offered in their testimony. Additionally, we would like to emphasize the following suggested amendments:

Offered Amendments:

1) We respectfully echo the Judiciary's previous testimony on HB1619 proposing that relevant sections of HRS 704-404, 704-406, 704-411, and 704-414 be amended to eliminate specific specialty requirements and reflect the language used on page 5, Lines 12-17, in cases requiring three examiners, "the court shall appoint as examiners psychiatrists, licensed psychologists, or qualified physicians."
2) We respectfully propose that page 1, lines 13-14 be amended to read: "director of health and placed in a hospital or other suitable facility for detention, assessment, care, and treatment for up to seven days" for consistency and to allow for flexibility of placement of patients committed to the custody of the Director of Health.

Thank you for the opportunity to testify.

Fiscal Implications: Undetermined.

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

LATE

ON THE FOLLOWING MEASURE:
H.B. NO. 1842, RELATING TO FITNESS TO PROCEED.

BEFORE THE:
HOUSE COMMITTEES ON HUMAN SERVICES AND HOMELESSNESS AND ON HEALTH

DATE: Wednesday, January 29, 2020 **TIME:** 10:00 a.m.

LOCATION: State Capitol, Room 329

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

Chairs San Buenaventura and Mizuno and Members of the Committees:

The Department of the Attorney General offers the following comments.

This bill, in part, adds a section to Chapter 704 of the Hawaii Penal Code that supplants current provisions that address the placement of a non-violent petty misdemeanor defendant determined to lack fitness to proceed with the defense of a case. This bill would require a dismissal of charges and a diversion of an individual to the custody of the director of health to be placed in an appropriate facility for assessment, care, and treatment for up to seven days.

The mandatory diversion of defendants to the director of health, found in section 1, page 1, lines 11-14, of the bill, raises constitutional due process concerns because it does not require a finding that the defendant poses a danger to self or others. The Ninth Circuit Court of Appeals, in Suzuki v. Yuen, 617 F.2d 173 (1980), held that it is unconstitutional to commit a defendant who does not pose an imminent danger, and opined that "in drafting involuntary commitment statutes, states should be cognizant of the 'significant deprivation of liberty.' "

Section 704-406(1), Hawaii Revised Statutes (HRS), currently provides for the commitment of a defendant to the custody of the director of health to be placed in an appropriate institution for detention, care, and treatment for up to sixty days for non-violent petty misdemeanors. The individual's criminal case is suspended during this

time, with a potential of dismissal if the individual does not regain fitness before the expiration of the commitment period.

Section 704-406(7), HRS, also provides that upon the dismissal of non-violent petty misdemeanor, and a finding of imminent danger to self or others, the court may commit an individual to the custody of the director of health to be placed in an appropriate institution for detention, care, and treatment for up to ninety days.

Our office is available to work further with the Committee to address the intent of this measure.

Thank you for considering our comments.

POLICE DEPARTMENT
COUNTY OF MAUI

MICHAEL P. VICTORINO
MAYOR

OUR REFERENCE

YOUR REFERENCE

55 MAHALANI STREET
WAILUKU, HAWAII 96793
(808) 244-6400
FAX (808) 244-6411

TIVOLI S. FAAUMU
CHIEF OF POLICE

DEAN M. RICKARD
DEPUTY CHIEF OF POLICE

January 27, 2020

LATE

The Honorable Joy A. San Buenaventura, Chair
The Honorable Nadine K. Nakamura, Vice Chair, and
Members of the Committee on Human Services and Homelessness
House of Representatives
Hawaii State Capitol
Honolulu, Hawaii 96813

RE: House Bill No. 1842 – Relating to Fitness to Proceed

Dear Chair San Buenaventura and Members of the Committee on Human Services and Homelessness:

The Maui Police Department supports the passage of H.B. No. 1842.

The issue of mental health has plagued our community over the years resulting in the incarceration of numerous non-violent defendants charged with low-level and petty misdemeanors within our already over-populated state prison facilities. As a result, the defendants who are in need of mental health treatment are sitting idle within these facilities without receiving much needed services. The cost of incarceration is costing taxpayer money as well as a high rate of recidivism upon release of these defendants because of the lack of treatment available.

This bill would enable the defendant an opportunity to be turned over to the custody of the Director of Health and placed in an institution for detention, assessment, care, and treatment for up to seven days. This is a win-win situation for the defendant, their family members and the community as a whole. It would allow the defendant's mental health clinical team to adequately focus on the proper treatment plan for the defendant which will ultimately lower the recidivism rate, decrease the prison population, allow the defendant to reintegrate back into the family and society to include re-employment, and lower the burden on taxpayers.

The Maui Police Department asks that you support the passage of H.B. No. 1842.

Thank you for the opportunity to testify.

Sincerely,

TIVOLI S. FAAUMU
Chief of Police

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

LATE

THE HONORABLE JOY A. SAN BUENAVENTURA, CHAIR
HOUSE COMMITTEE ON HUMAN SERVICES & HOMELESSNESS

THE HONORABLE JOHN M. MIZUNO, CHAIR
HOUSE COMMITTEE ON HEALTH

Thirtieth State Legislature
Regular Session of 2020
State of Hawai`i

January 29, 2020

RE: H.B. 1842; RELATING TO FITNESS TO PROCEED.

Chair San Buenaventura, Chair Mizuno, Vice-Chair Nakamura, Vice-Chair Kobayashi, members of the House Committee on Human Services & Homelessness, and members of the House Committee on Health, the Department of the Prosecuting Attorney of the City and County of Honolulu (Department) submits the following testimony in strong opposition to H.B. 1842.

The purpose of this bill is to dismiss with prejudice all petty misdemeanor cases "not involving violence or attempted violence" if, at any time during the proceedings, the defendant is found (mentally) unfit to proceed. Such defendant would then be placed in an appropriate health facility for up to seven days, while a determination is made whether to pursue involuntary hospitalization, pursue assisted community treatment, or simply discharge and refer to an outpatient mental health program.

First, it is unclear which offenses the new section would be applicable to, as the term "not involving violence or attempted violence" is not defined. For example, it is unclear whether offenses such as Criminal property damage in the 4th degree (HRS §708-823); Open lewdness (HRS §711-1100); or Harassment (non-physical) (HRS §711-1106 (b) through (f)) would be among those dismissed, anytime a defendant is found unfit. The Department is deeply concerned that these types of cases—and others not yet contemplated—could be summarily dismissed, simply because a defendant is found unfit to proceed. Being unfit for purposes of court proceedings is completely separate and apart from one's mental state at the time the offense took

place, and many defendants who are found unfit during the course of a case will "regain fitness" when they receive appropriate treatment.

While it is conceivable that 7 days of treatment could occasionally be sufficient to put a defendant back on course—such that they would regain fitness—the procedure proposed in H.B. 1842 would already have dismissed the case by the time that occurs. Also, as written, we note that H.B. 1842 would not give the court any discretion to consider defendant's past arrest record, or their history of criminal or violent acts, if any, nor could the court consider the defendant's likelihood of regaining fitness.

If H.B. 1842 became law, the Department is also concerned that the State could (potentially) charge someone with a crime—perhaps even a property crime or other "non-violent" offense—then be forced to dismiss the case because the person is unfit at some point...then that person ends up getting discharged and referred to an outpatient mental health program, with no actual requirement or oversight for that person to obtain or maintain treatment. Theoretically, this could occur multiple times, and with no chance of getting a conviction on those lesser offenses, there would be no basis for charging "habitual property crime" or other habitual offenses. Moreover, the Department is unclear whether an individual would qualify for involuntary hospitalization or assisted community treatment program if the extent of their alleged offenses is (persistent but low-level) theft, or other offenses that are non-violent but still have a negative impact on the public. In many petty misdemeanor cases, there are a lot of benefits to obtaining a conviction and perhaps placing someone on probation—aside from establishing a track record of offenses—including receiving court-ordered services and treatment, or referral to specialty courts.

Finally, the Department strongly opposes the proposal to change the current requirement in felony cases—where three examiners are appointed to determine a defendant's fitness to proceed—to have at least one psychiatrist and at least one licensed psychologist among those examining the defendant. 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.

While the Department can appreciate efforts to streamline mental health assessments that are done for court purposes, H.B. 1842 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.

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. 1842. Thank you for the opportunity to testify on this matter.