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

ON THE FOLLOWING MEASURE:
H.B. NO. 2068, 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
Lance Goto, Deputy Attorney General

Chair Baker and Members of the Committee:

The Department of the Attorney General (Department) opposes this bill.

The purpose of this bill is to limit the period of commitment to the Department of Health for those defendants charged with a non-violent class C felony and found to be unfit to proceed under chapter 704, Hawaii Revised Statutes (HRS).

Defendants are unfit to proceed when they are unable to understand the proceedings against them and are unable to assist in their own defense. In this mental state, defendants cannot proceed to trial. As provided in section 704-406, HRS, upon the finding of unfitness, the court shall commit such a defendant to the custody of the Director of Health, unless the court is satisfied that the defendant may be released on conditions without danger to self or another or risk of substantial danger to the property of others.

This bill would require a defendant, found unfit and committed to the Director of Health because the court was not satisfied that the defendant could be released without danger, to be released from custody after a certain period of time (currently unspecified in the bill) and discharged from prosecution of the non-violent class C felony charge. See section 704-406(7), HRS.

The Department is concerned about the release and discharge of defendants charged with serious class C felony offenses after they were just recently charged,

found unfit to proceed, and never prosecuted for the felony offenses. One concern is that felony prosecutions might be terminated after a limited time period that was inadequate to evaluate and address a defendant's fitness to proceed with his or her defense. The current process, in contrast, better contemplates public safety and the interests of the defendants, in that an action to dismiss a felony charge following commitment would be made only on a determination that the defendant will probably remain unfit to proceed. See section 704-406(7), HRS.

A second concern is the potential discharge and dismissal of significant class C felony offenses when a defendant could regain fitness to proceed. These felony offenses, while non-violent, could involve victims and witnesses to the crimes, and could result in up to five years imprisonment. Some of them could be very serious offenses. The following are some examples of such offenses:

- Electronic Enticement of a Child
- Solicitation of a Minor for Prostitution
- Promoting Child Abuse in the Third Degree
- Sexual Assault in the Third Degree
- Violation of Privacy
- Custodial Interference
- Negligent Homicide in the Second Degree
- Negligent Injury in the First Degree
- Custodial Interference in the First Degree
- Burglary in the Second Degree
- Unauthorized Entry into a Dwelling in the Second Degree
- Unauthorized Control of a Propelled Vehicle
- Extortion in the Second Degree
- Criminal Property Damage in the Second Degree
- Theft in the Second Degree
- Aggravated Harassment by Stalking

The Department is also concerned about a possible inconsistency in the law. This bill sets time limits for release of those found unfit and committed. But it does not

set any time limits for those found unfit and granted release on conditions. A committed defendant could have the charge dismissed at the end of the time period, but a defendant charged with the same offense, but granted release on conditions because the defendant was less dangerous, would not have the opportunity to have the charge dismissed.

Based on the foregoing concerns, the Department respectfully requests that this measure be deferred.

DAVID Y. IGE
GOVERNOR OF HAWAII

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Testimony COMMENTING on H.B. 2068 H.D. 2
RELATING TO THE 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

Department Position: The Department of Health ("Department") strongly supports the intent of this measure and offers 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 respectfully echoes comments submitted by the Judiciary on this bill and supports their request to hold this measure. We also agree with the Judiciary that a significant portion of the intent of this measure is outlined in H.B. 1620 H.D. 2. We further believe that the proposed amendments to H.B. 1620 H.D. 2, if adopted by this committee, would more effectively achieve the goals of this measure.

For those reasons, we respectfully stand with the Judiciary in requesting this measure be deferred.

Offered Amendments: None.

Thank you for the opportunity to testify on this measure.

The Judiciary, State of Hawai'i

Testimony to the Senate Committee on Commerce, Consumer Protection, and Health
Senator Rosalyn H. Baker, Chair
Senator Stanley Chang, Vice Chair

Friday March 13, 2020, 9:30 a.m.
State Capitol, Conference Room 229

By

Judge 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. 2068, H.D. 2, Relating to the Administration of Justice.

Purpose: Limits the period of DOH commitment for those defendants charged with a non-violent class C felony and found to be unfit to proceed under chapter 704, H.R.S. Effective 7/1/2050. (HD2)

Judiciary's Position:

The Judiciary appreciates the intent of this proposed bill and the amendments by the House Judiciary Committee, but respectfully opposes the bill in its current form. The introduction of a specific time limitation would lead to defendants who would be penally responsible (as drug-induced psychosis is not a mental disease, disorder or defect excluding responsibility) and convicted (if they were guilty of the conduct alleged), being released and their charges dismissed without conviction or any requirements for drug treatment.

Furthermore, the intent of the bill is already encompassed in the current version of section 704-406(3), which contemplates the court dismissing the case where a defendant has been held for too long after a finding of unfitness. The statute considers this situation upon application of the defendant, the director of health, or on the court's own motion. The last lines of 704-406(3) state:

> If, however, the court is of the view that so much time has elapsed since the commitment or release on conditions of the defendant that it would be unjust to resume the proceeding, the court may dismiss the charge and:
>
> (a) Order the defendant to be discharged;
> (b) Subject to section 334-60.2 regarding involuntary hospitalization criteria, order the defendant to be committed to the custody of the director of health to be placed in an appropriate institution for detention, care, and treatment; or
> (c) Subject to section 334-121 regarding assisted community treatment criteria, order the defendant to be released on conditions the court determines necessary.

Currently, if a defendant is found unfit to proceed they are either committed to the custody of the director of health for detention, care, and treatment, or, if the court is satisfied that they are not a danger to self or others, then they are released to complete a community based fitness restoration program. The determination of fitness, i.e., *whether a defendant has the capacity to understand the proceedings against him/her and the capacity to assist in his/her own defense*, is not a determination that the defendant suffers from a mental illness. When a defendant is determined to be initially unfit, it is quite often difficult to determine whether the lack of fitness to proceed is drug-induced (and therefore would resolve given time) or is actually the result of a mental disease, disorder, or defect. Treatment for each type of condition would be different and having a mandatory time frame for a determination of regained fitness (or likelihood of regaining fitness) in every case would be problematic for C felonies.

Many of the non-violent C felony cases in the First Circuit on the Chapter 704 track are either drug offenses or property-based crimes which can be directly linked back to drugs (unauthorized control of a propelled vehicle, unauthorized entry into a motor vehicle, burglary in the second degree, identity theft, forgery, etc). C felonies are serious crimes, subject to a term of imprisonment of five years. Although some drug-induced psychosis may resolve before a defendant completes an evaluation on fitness, due to forced detox or treatment due to the pending case, those defendants who are actually found unfit due solely to a drug-induced psychosis, would likely not be ready for or complete a panel examination for regained fitness within a time limitations set forth in a statute. This statute would mandate their release and dismissal of the case, regardless of whether they had a serious mental illness or not.

This would lead to defendants who would be penally responsible and convicted if they were guilty of the conduct alleged being released without conviction or any requirements for drug treatment.

Moreover, these defendants could not be diverted into the community programs currently available to them to help with drug addiction or to the treatment courts that may assist them (drug court, veteran's court, mental health court, and HOPE) as they may not be ready to proceed in these programs in a mandated time frame. This would subvert the intent of the bill by potentially creating a revolving door on these drug-related property crime cases as defendants are not offered or engaged in drug treatment, and released and may commit new crimes.

On the other hand, in those cases where a defendant has a serious mental illness, and that mental illness is the reason they are unfit to proceed, forcing the release of an unfit, possibly dangerous, defendant into the community without services right when they may be responding to treatment would be contrary to the intent of the bill. The current statute contemplates the release of unfit defendants who are not dangerous to self or others through a release on conditions order requiring community-based treatment to obtain fitness, and this is done on a regular basis. Restricting the amount of time that these individuals are given supervised community-based treatment aimed at regaining fitness may lead to insufficient treatment and further recidivism.

Finally, this measure proposes to amend section 704-406(1), which is one of several subsections proposed to be amended by H.B. 1620, H.D. 2. To avoid confusion and for the reasons stated above, the Judiciary respectfully requests that this Committee hold this measure.

Thank you for the opportunity to testify on this measure.

HB-2068-HD-2
Submitted on: 3/9/2020 5:30:37 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 were involved with the drafting of the current law that limits the period of commitment of individuals who are not fit to proceed, and we believe that extending it as proposed in this bill has merit. At some point if the person cannot be restored to fitness and they did not commit a violent offense, then they are basically just being deprived of their liberty because they are mentally ill. The HD2 version appears to have cleared up some confusion that existed with the original bill. While some stakeholders have suggested that Class C felonies (even non-violent ones) should not fall into this category, we believe the current version which leaves it to an unspecified amount of time is worth further discussion.

HB-2068-HD-2
Submitted on: 3/12/2020 1:32:45 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:

DEPARTMENT OF THE PROSECUTING ATTORNEY

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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 opposition to H.B. 2068, H.D. 2.

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)

We do understand that two statutes—as both were amended in 2016—currently contain the language of "involving violence or attempted violence." Since passage, that language has indeed been a source of argument and differing opinions in actual court cases, illustrating our concerns regarding inconsistency and fairness.

While the Department understands the desire to streamline mental health assessments that are done for court purposes, H.B. 2068, 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.

For all of the foregoing reasons, the Department of the Prosecuting Attorney of the City and County of Honolulu opposes the passage of H.B. 2068, H.D. 2. Thank you for the opportunity to testify on this matter.