

State of Hawai‘i
The Office of the Public Defender

S.B. No. 2557: RELATING TO LEGAL REPRESENTATION

Chair Karl Rhoads
Vice Chair Mike Gabbard
Honorable Committee Members

The Office of the Public Defender **supports** this bill.

Public defenders represent people accused of committing criminal offenses thereby exposing them to losing their liberty and being put in jail. They also represent people whom the government seeks to involuntarily commit. Assisted community treatment is important and although its goals are somewhat like involuntary committals, their presence is not required in court. It becomes impossible to determine the needs and goals of the client without the client being there. Moreover, these hearings do not result in a significant loss of liberty. The better approach is to have other community organizations provide representation such as Legal Aid or Volunteer Legal Services.



Committee: Judiciary
Hearing Date/Time: Thursday, February 16, 2024, at 9:30am
Place: Conference Room 016 & Via Videoconference
Re: **Testimony of the ACLU of Hawai'i in OPPOSITION to S.B. 2557 Relating to Legal Representation**

Dear Chair Rhoads, Vice Chair Gabbard, and Members of the Committee:

The ACLU of Hawai'i **opposes S.B. 2557 which** proposes to repeal paragraph (3) of section 802-1(a), Hawaii Revised Statutes, which entitles the subject of a petition for assisted community treatment to legal representation by a public defender.

The ACLU of Hawai'i strongly opposes the stripping away of a person's due process Constitutional rights under **S.B. 2557**. Below, we offer historical context to ground our Constitutional objections.

In 2021, the State Legislature introduced a measure to eliminate the right to counsel for persons subject to Assistant Community Treatment ("ACT") petitions. Written testimony from the **Department of Attorney General, dated February 11, 2021**, on HB 345 Relating to Assisted Community Treatment, to amend H.R.S. 334, reflected their constitutional concerns:

"The appointment of counsel is one of the significant provisions of the ACT to afford subjects due process under the Fourteenth Amendment of the U.S. Constitution and article I, section 5, of the Constitution of the State of Hawai'i. This bill's proposed removal of the right to counsel would remove a significant protection afforded by the procedures of the ACT statutes. *For these reasons, the Department recommends the provisions regarding the removal of the right to counsel be deleted from the bill.*"

During discussion of HB 345, the **Department of Health** also expressed their reservations:

"We continue to strive for a balance with individuals suffering from acute mental illness where they can be treated during a time where they are, for all intents and purposes 'unconscious,' but still assure that their right to self-determination and representation during proceedings will be honored," the department wrote in testimony. **"As written, we do not believe that this measure strikes that balance."**

We also understand that the Office of the Public Defenders weighed in on this matter. "The Office of the Public Defender offered the following comments on H.B. No. 345 HD1:

Article I, section 14 of the Hawai'i Constitution provides, "The State shall provide counsel for an indigent defendant charged with an offense punishable by imprisonment." (Emphasis added). Accordingly, OPD did not object to the original bill "as long as a guardian ad litem (GAL) was appointed to represent the interest of the individual because the individuals subject to the ACT petitions are not threatened by confinement or imprisonment."

We respect the Public Defender's interpretation of their mandate under the Hawai'i Constitution. However, we **agree with the Department of Attorney General's prior written testimony that persons subject to an ACT petition must be afforded counsel under the Fourteenth Amendment of the U.S. Constitution and article I, section 5, of the Hawai'i Constitution.**

The appointment of a GAL alone is insufficient to protect the Constitutional rights of all people, including those living with disabilities and mental health conditions, to make informed decisions relating to their own bodies.

*The right of each person to determine his or her medical treatment is one of the most valued liberties in a democratic society. **Only in the most exigent of circumstances—where the patient is an imminent danger to themselves or others, where the treatment is in the patient's best interest, and where no less restrictive means exist—may the State intervene and force an individual to take psychotropic drugs or otherwise undergo medical psychiatric treatment over the patient's objection.** See *State v. Kotis*, 984 P.2d 78, 91 Hawai'i 319 (1999). <https://law.justia.com/cases/hawaii/supreme-court/1999/18823-2.html>*

Of note, **persons subject to ACT or Assisted Outpatient Treatment proceedings in California and New York are entitled to legal representation throughout the proceedings.**

As drafted, the proposed measure will sanction an imbalanced legal proceeding where the State, via the Attorney General's office, **is mandated to file** petitions to the Family Court for an order of continued Assisted Community Treatment (including coercive or forced treatment) against a pro se individual for up to two years – without procedural safeguards in place simply because that person has a mental health condition and/or co-occurring condition.

In short, removing legal counsel, whether a Public Defender or Court appointed Counsel from the ACT process, a legal proceeding, would violate a person's due process rights under our federal and state Constitutions.

We respectfully request that you defer this measure or amend the statute to clarify that indigent persons are entitled to legal representation even if counsel is not provided by the Office of the Public Offender.

Thank you for the opportunity to testify in opposition to **S.B. 2557**.

Sincerely,

Carrie Ann Shiota

Carrie Ann Shiota

Policy Director

ACLU of Hawai'i

cshiota@acluhawaii.org

American Civil Liberties Union of Hawai'i

P.O. Box 3410 Honolulu,

Hawai'i 96801T:

808.522.5900

F: 808.522.5909

E: office@acluhawaii.org www.acluhawaii.org

SB-2557

Submitted on: 2/15/2024 12:29:03 AM

Testimony for JDC on 2/16/2024 9:30:00 AM

Submitted By	Organization	Testifier Position	Testify
Louis Erteschik	Testifying for Hawaii Disability Rights Center	Oppose	Remotely Via Zoom

Comments:

We realize this measure is at this point merely a housekeeping bill. However, we believe it presents an opportunity to the Legislature to revisit what we respectfully believe was a decision made a few years ago that violated the rights of individuals who have a mental illness. When the ACT program was first implemented, the Respondents were afforded legal representation via the Public Defender. A few years ago the Legislature removed that right and substituted a Guardian Ad Litem to assist the individual in the proceeding. It is clearly not the equivalent and is not legal representation. A Guardian Ad Litem may advocate for the so called "best interests" of the Respondent while a Public Defender may be more likely to advocate for the articulated wishes of that individual. We believe it violates the due process rights of these people.

Moreover, a bill is moving currently through the House of Representatives which would have the Attorney General represent the Petitioners. If that were to pass it would substantially tilt the scales even further against these individuals. In light of the possibility that that measure were to pass it would create even more of an imbalance and raise even more serious constitutional issues. Certainly if the Legislature is going to consider having the Attorney General be a full party to the case, it is all the more reason to restore the right to free counsel for the individuals who are the subject of the proceedings. In fact we would argue that it must restore the right to counsel in that case. That would hardly be extraordinary. Essentially, it would provide that the ACT proceedings be conducted in the same traditional manner as virtually all other hearings which occur in the Judicial system .



The Institute for Human Services, Inc.
Ending the Cycle of Homelessness

TO: Honorable Sen. Karl Rhoads,
Chair, Senate Committee on Judiciary

Honorable Sen. Mike Gabbard,
Vice-Chair, Senate Committee on Judiciary

FROM: Connie Mitchell, Executive Director
IHS, The Institute for Human Services, Inc.

RE: SB2557 - RELATING TO LEGAL REPRESENTATION.

HEARING: Friday, February 16, 2024 at 9:30 AM.

POSITION: IHS **supports** the passing of SB2557

IHS, The Institute for Human Services, stands in full support of SB2557. We agree that current Hawaii Revised Statutes should be amended to remove language from Section 802-subsection (a) (3), which includes the subject of a petition for assisted community treatment as an individual that shall be “entitled to representation by a Public Defender.”

This section of the law pertains to persons at risk for detention or incarceration. The subject of a petition for Assisted Community Treatment (ACT) is not at risk for detention. Rather, he/she is the subject of advocacy for appropriate treatment to curb the dangerous behavior that could result in involuntary hospitalization or incarceration.

IHS has been petitioning for assisted community treatment for over four years. In 2021, based on experience with these cases, we advocated for the ACT process to be amended to remove the public defender from the petitioning process. The Public Defender’s office did not object. and legislators understood that the rights of the subject would be protected by the appointment of a guardian ad litem who acts in the subject’s best interest, the evaluation of a board-certified psychiatrist or psychiatric APRN-Rx and the Judge who hears the case.

From a practical standpoint and our team’s experience, the petitioning and appointment of a public defender for the subject adds weeks, if not months, of delay to the assisted community treatment petitioning process, which, at times, can result in adverse outcomes such as injury to self or others, serious illness and/or even death.

We ask you to please pass this bill to remove language that poses a potential barrier to swiftly treating a seriously mentally ill individual.

Thank you for the opportunity to offer our perspective and testimony.

DATE: February 15, 2024

TO: Honorable Sen. Karl Rhoads, Chair, Senate Committee on Judiciary
Honorable Sen. Mike Gabbard, Vice-Chair, Senate Committee on Judiciary

FROM: Christopher D. Thomas, Attorney at Law

RE: Public Comment and Testimony Regarding SB 2557 and Amending HRS §802-1(a)(3)

I support SB 2557 as a practical and commonsense Amendment to our law to match the intent of prior legislation which Amended Assisted Community Treatment process and procedure.

I am an attorney in Honolulu, and I obtain Assisted Community Treatment (ACT) Orders for the Institute of Human Services (IHS). Via IHS, our team of Psychiatrists, Outreach Workers, and Attorneys represent the highest utilizers of our ACT Statute within Hawai'i. We have treated, and continue to treat, a large percentage of O'ahu's seriously mentally ill and substance addicted homeless population. Our ACT statute, housed in HRS Chapter 334, is one of the most useful laws we utilize to ensure the most vulnerable of our citizens receives the treatment they have the right to obtain.

As you are aware, in 2021, Chapter 334 was amended to explicitly relieve the State of Hawai'i Public Defender's (PD's) attorneys from the burden of being appointed as mandatory counsel to ACT Respondents/Patients. Chapter 334 was further amended to make the appointment of a Guardian Ad Litem (GAL) to ACT Respondents mandatory, versus discretionary. Prior to the PD's being removed from mandatory appointment, ACT Petitions were unreasonably delayed due to a myriad of logistical and procedural entanglements. Prior to 2021, my experience is that mandatory PD appointment actually served to *thwart the purpose of ACT Orders: to get patients efficiently treated*. Appointment of a GAL in lieu of PDs has streamlined ACT Orders and produced more efficient treatment.

From a practitioner's standpoint gleaned from the last five years of litigating ACT cases, the mandatory appointment of GALs to ACT cases adequately balances the need for an ACT Respondent to have an advocate to guide them through the ACT process with the need of the community to immediately and swiftly treat illness/substance abuse. An ACT Respondent is provided adequate due process in a civil matter through protection via the statute, a trial judge, a psychiatrist, and a GAL. Public Defender mandatory representation is, therefore, not necessary. The neglected corresponding Amendment to HRS §802-1(a)(3) is overdue.

Unfortunately, while Chapter 334 was Amended to remove PD representation, a corresponding edit to Chapter 802 Section 1(a)(3) was neglected. As a result, HRS §802-1(a)(3) arguably remains in conflict with HRS 334-121 through 136. While HRS §802-1(a)(3) does not *force* Public Defender involvement, it does not explicitly *prohibit* it, either. Under Section 14 of Article I of Hawai'i's Constitution, "the State *shall* provide counsel for an indigent defendant charged with an offense punishable *by imprisonment*." Assisted Community Treatment does not allow imprisonment or confinement; ACT is a civil, not criminal process. An Amendment is necessary to remove the possibility of PD appointment remaining in Chapter 802. SB 2557 represents that necessary Amendment.

I respectfully request that SB 2557 be given your full support through the legislative process.

Respectfully submitted,

Christopher D. Thomas, (808) 261-7710, cthomas@hawaiianfamilylaw.com

SB-2557

Submitted on: 2/15/2024 12:54:41 AM

Testimony for JDC on 2/16/2024 9:30:00 AM

Submitted By	Organization	Testifier Position	Testify
Raelyn Reyno Yeomans	Individual	Oppose	Remotely Via Zoom

Comments:

I am submitting testimony in **STRONG OPPOSITION**. As the Attorney General of the State Of Hawai‘i wrote in their 2/9/2021 testimony to the State Legislature on then bill SB199 (Relating To Assisted Community Treatment):

"The appointment of counsel is one of the significant provisions of the ACT to afford subjects due process under the Fourteenth Amendment of the U.S. Constitution and article I, section 5, of the Constitution of the State of Hawai‘i."

By removing an individual's right to counsel and substituting a Guardian Ad Litem during Assisted Community Treatment (ACT) hearings, the State is violating a basic Due Process right afforded to all, even those suffering from mental illness.

Again, I oppose this bill and hope that this State's Legislature does the right thing and restores the basic right to legal counsel during ACT hearings.