

ACT 161

S.B. NO. 1188

A Bill for an Act Relating to Sentencing for Drugs and Intoxicating Compounds Offenses.

Be It Enacted by the Legislature of the State of Hawaii:

SECTION 1. The legislature finds that drug abuse is a serious problem in the State of Hawaii, and current policies and practices in the criminal justice system have not adequately addressed the issue. Hawaii's criminal justice system requires a major shift in philosophy to deal with the needs of drug offenders by requiring nonviolent drug possession offenders to participate in community-based supervision and treatment, instead of incarceration. This approach has been instituted in a number of states, including Arizona and California, which are discussed in detail below.

Other states are also considering a less punitive approach to dealing with the less serious drug offenders. New Mexico Governor Gary Johnson included in his 2001 State of State address a call to "reform our drug policies. The goal should be to help those addicted to drugs find a better way. The answer is not imprisonment and legal attack." He wants New Mexico to "lead the nation in drug policy reform that will reduce the overall harmful effects of drugs." New York Governor George Pataki, in January 2001, has also stated he wants to "dramatically" reform the state's notoriously harsh Rockefeller drug laws and replace them with a less punitive approach, including expanded treatment.

The relationship between substance abuse and crime is well established. The Department of Justice reports that of thirty-five urban sites included in the Arrestee Drug Abuse Monitoring Program, one thousand nine hundred ninety-eight arrestees tested positive for drug use at an alarming rate, with cocaine use indicated in as many as sixty-seven per cent and marijuana use indicated in as many as fifty-three per cent. The use of methamphetamine among national arrestee populations has increased substantially since 1990, with western states showing the greatest prevalence for methamphetamine.

The legislature finds that a growing body of research demonstrates the destructive impact of alcohol and other substance abuse on personal health and health care costs, the spread of communicable disease, educational performance and attainment, work force participation, safety and productivity in the workplace, and financial stability. These indicators of social erosion are in turn related to crime in many obvious but hard to measure ways. Given the recognized relationship between crime and substance abuse and addiction, it is necessary and appropriate to use, adapt, and expand the resources and remedies available within the criminal justice

system to address the problem of substance abuse dependency and thereby to help reduce the demand for illicit drugs and the incidence of drug-related crimes.

Studies, such as the drug use forecasting studies conducted by the National Institute of Justice, reveal that a large percentage of persons who are arrested for both drug and nondrug offenses (such as thefts, burglaries, robberies, assaults, rapes, and homicides) test positive for recent drug use. Adults who are under the influence of a controlled substance or alcohol commit many offenses to raise revenues to support their habits. Some mind and mood altering drugs induce criminal and often violent behavior, reducing the person's inhibitions as well as the person's ability to anticipate future consequences, thereby undermining the deterrent thrust of the criminal law. Some drugs may also reduce an offender's ability to empathize with a potential victim, resulting in episodes of seemingly mindless violence.

Finally, some crimes, including crimes of violence, are committed in the normal course of conducting illicit drug businesses and enterprises. These include strong-arm robberies and "rip-offs," violent retaliations for these offenses, and efforts to protect markets and "turf" by means of intimidation and terrorism directed against "would be" competitors and drug purchasers who patronize competing drug distributors.

Research has demonstrated that substance abuse and addiction are treatable within the offender population and appropriate actions by criminal justice professionals can foster the effectiveness of treatment. This research further demonstrates that the effectiveness of substance abuse treatment is directly related to the length of stay in treatment. The threat of criminal justice sanctions, in turn, can be used to motivate offenders to enter treatment and stay in treatment for as long as necessary to effect positive change. To achieve this change, treatment must:

- (1) Be of sufficient duration and intensity;
- (2) Be supported by periodic comprehensive drug testing to maintain program integrity;
- (3) Be provided by professional staff who have received adequate training and who continue to receive training and adequate supervision; and
- (4) Provide for the continued collection and analysis of program data to allow for both process and impact evaluation.

Moreover, the drug and alcohol treatment programs must be accredited by the department of health and must be appropriate in type, duration, and intensity based upon the length and level of treatment derived from an alcohol and other drug assessment of each individual's needs, balanced with the public's right to protection.

Most addicted offenders who are convicted of serious crimes and who are sentenced to terms of imprisonment will eventually be released back into the community either on parole or at the expiration of their sentences. Without proper treatment, an offender is at risk to continue to be drug dependent and to commit new offenses, resulting in further injury to victims, loss of property, and the expenditure of limited resources to identify, apprehend, prosecute, and return the offender to confinement.

Under these circumstances, the overriding need to protect the public safety requires that all substance abusing and addicted offenders receive appropriate treatment and monitoring services. The treatment and services should be based on the individual's need as determined by an alcohol and other drug assessment, either in lieu of or during the course of traditional imprisonment, and the individual should continue to receive needed treatment or appropriate after-care, support, or monitoring services as a condition of parole or other release from confinement.

Persons charged with repeat offenses, who actively abuse or are addicted to a controlled substance or alcohol and who are not undergoing appropriate treatment and monitoring, pose a proportionately greater risk of criminal recidivism.

To ensure uniformity and the best possible use of limited resources, the department of health must develop and enforce accreditation and operational standards for all programs, whether public or private, that provide substance abuse assessment services or treatment services to adults who are repeat offenders and inmates in correctional centers and facilities.

For treatment and intervention services to be most effective, alcohol and other drug abusing and addicted offenders must be assured that information provided during the course of treatment and counseling will be kept confidential in accordance with title 42 United States Code section 290dd-2 and title 42 Code of Federal Regulations - part 2, which govern the confidentiality of alcohol and other drug abuse treatment records. Without these protections, an offender in need of alcohol and other drug treatment services may be discouraged from constructively engaging in the treatment process. Preserving the confidentiality of treatment information and records is consistent with the vital goal of holding alcohol and other drug abusing and addicted offenders fully accountable for their past and future actions.

Statistics for Hawaii show that seventy per cent of pretrial offenders annually placed on supervised release under the auspices of the intake service centers have substance abuse problems. During fiscal year 1998-1999, one hundred fifty (twenty-five per cent) of the six hundred offenders had their supervised release status revoked; one hundred twenty (eighty per cent) of the one hundred fifty were drug related revocations. Of the approximately one thousand fifty pretrial and presentence individuals who are incarcerated, the rate of substance abuse is even higher.

Currently, there are about sixteen thousand offenders on probation in Hawaii, including five hundred under the supervision of federal probation authorities. An estimated thirteen thousand six hundred (eighty-five per cent) of the probationers are in need of substance abuse treatment. During fiscal year 1998-1999, five hundred ninety-five state probationers were incarcerated for violating conditions of probation; one hundred fifty (twenty-five per cent) violated their probation only for drug related reasons.

The department of public safety currently has four thousand eight hundred offenders incarcerated in state and mainland correctional facilities. Of those, three thousand six hundred are sentenced to greater than one year. Substance abuse assessments indicate that eighty-five per cent require substance abuse treatment.

The Hawaii paroling authority is responsible for supervising an active parole population of two thousand two hundred sixty-five. During fiscal year 1998-1999, four hundred thirty-three parolees were incarcerated for violating conditions of parole; one hundred seventy-five (forty per cent) of the four hundred thirty-three violated their parole only for drug related reasons.

Arizona (Proposition 200, 1996) and California (Proposition 36, 2000) have passed initiatives providing for mandatory community supervision of nonviolent drug possession offenders, with substance abuse treatment requirements. These measures change state law so that certain drug offenders who use or possess illegal drugs would receive drug treatment and supervision in the community, rather than being sent to prison or jail or supervision in the community without treatment.

Representing a shift in philosophy from a criminal justice model of controlling drug use to a public health model based on harm reduction, the Arizona and California initiatives received substantial support from the voters, garnering approximately two-thirds of the votes. The goal of harm reduction measures is found in California's Proposition 36, "Purpose and Intent" section:

- (1) To divert from incarceration into community-based substance abuse treatment program nonviolent defendants, probationers, and parolees charged with simple drug possession or drug use offenses;

- (2) To halt the wasteful expenditure of hundreds of millions of dollars each year on the incarceration of nonviolent drug possession defendants who would be better served by community-based treatment;
- (3) To enhance public safety by reducing drug-related crime and preserving jails and prison cells for serious and violent offenders, and to improve public health by reducing drug abuse and drug dependence through proven and effective drug treatment strategies.

The measure excludes certain offenders from its provisions, such as those who refuse treatment, have failed drug treatment two or more times, or were convicted in the same criminal proceeding of a non-drug use misdemeanor or felony.

The California legislative analyst provided an overview of Proposition 36 for the voters and included a summary of fiscal effects. The reports states, "This measure is likely to result in net savings to the state after several years of between \$100 and \$150,000,000 annually due primarily to lower costs for prison operations. Assuming the inmate population growth would have otherwise continued, the state would also be able to delay the construction of additional prison beds for a one-time cost avoidance of capital outlay costs of between \$450,000,000 and \$550,000,000 in the long term. Counties would probably experience net savings of about \$4,000,000 annually due primarily to lower jail population."

The defining strength of the Arizona Justice Model is the incorporation of a continuum of "best practice" services as opposed to the reliance on a single program intervention. The designed continuum of care service delivery system comprises substance abuse education programming for the low-risk offender, standard and intensive outpatient programming for the medium- to low-risk offender, and day treatment, short-term and long-term residential treatment for the high risk offender. This service delivery continuum is based on the assessment and matching process that is critical in the effort to maximize positive client outcomes and the effective use of funding, time, and resources.

The purpose of this Act is to require first time non-violent drug offenders, including probation and parole violators, to be sentenced to undergo and complete drug treatment instead of incarceration.

SECTION 2. Chapter 321, Hawaii Revised Statutes, is amended by adding a new section to be appropriately designated and to read as follows:

"§321- Interagency coordination. (a) The department of public safety, Hawaii paroling authority, judiciary, department of health, department of human services, and any other agencies assigned oversight responsibilities for offender substance abuse treatment by law or administrative order, shall establish a coordinating body through an interagency cooperative agreement to oversee the development and implementation of offender substance abuse treatment programs in the State to ensure compliance with the intent of the master plan developed under chapter 353G. The coordinating body shall also include a representative from a community based prisoner advocacy group and a substance abuse treatment provider selected by the director of health, and an ex-offender selected by the director of public safety subject to the approval of the chairperson of the Hawaii paroling authority and the chief justice. The coordinating body shall meet not less than quarterly in a meeting subject to chapter 92. The interagency cooperative agreement shall set forth the role of the coordinating body and the responsibilities of each agency that is a party to the agreement.

(b) The department of health shall be the lead agency for interagency coordination of substance abuse treatment. As the lead agency, the department shall act as facilitator of and provide administrative support to the coordinating body.

(c) Notwithstanding any other provision to the contrary, any agency that is part of the interagency cooperative agreement shall provide, upon the request of any other participating agency, all medical, psychological, or mental health records of any offender receiving supervision or treatment while under custody of the State. Any participating agency receiving such records of any offender receiving supervision or treatment while under custody of the State, shall keep that information confidential in accordance with the requirements of 42 United States Code section 290dd-2.”

SECTION 3. Chapter 706, Hawaii Revised Statutes, is amended by adding a new section to part II to be appropriately designated and to read as follows:

“§706- Sentencing for first-time drug offenders; expungement. (1) Notwithstanding any penalty or sentencing provision under part IV of chapter 712, a person convicted for the first time for any offense under part IV of chapter 712 involving possession or use, not including to distribute or manufacture as defined in section 712-1240, of any dangerous drug, detrimental drug, harmful drug, intoxicating compound, marijuana, or marijuana concentrate, as defined in section 712-1240, or involving possession or use of drug paraphernalia under section 329-43.5, who is non-violent, as determined by the court after reviewing the:

- (a) Criminal history of the defendant;
- (b) Factual circumstances of the offense for which the defendant is being sentenced; and
- (c) Other information deemed relevant by the court;

shall be sentenced in accordance with subsection (2); provided that the person does not have a conviction for any violent felony for five years immediately preceding the date of the commission of the offense for which the defendant is being sentenced.

(2) A person eligible under subsection (1) shall be sentenced to probation to undergo and complete a drug treatment program. If the person fails to complete the drug treatment program and if no other suitable treatment is amenable to the offender, the person shall be returned to court and subject to sentencing under the applicable section under this part. As a condition of probation under this subsection, the court shall require an assessment as to the treatment needs of the defendant, conducted by a person certified by the department of health to conduct the assessments. The drug treatment program for the defendant shall be based upon the assessment. The court may require the person to contribute to the cost of the drug treatment program.

(3) For the purposes of this section, “drug treatment program” means drug or substance abuse services provided outside a correctional facility, but the services do not require the expenditure of state moneys beyond the limits of available appropriations.

(4) The court, upon written application from a person sentenced under this part, shall issue a court order to expunge the record of arrest for that particular conviction; provided that a person shall be eligible for one time only for expungement under this subsection.

(5) Nothing in this section shall be construed to give rise to a cause of action against the State, state employee, or treatment provider.”

SECTION 4. Section 353-66, Hawaii Revised Statutes, is amended to read as follows:

“§353-66 Terms and conditions of parole; suspension and revocation. (a) Every parole granted under this part to any prisoner shall be subject to the express condition, to be set forth in the official written notification of parole to the prisoner,

but to be binding upon the prisoner in any event, that all or any portion of the prisoner's credits earned or to be earned may be forfeited by order of the Hawaii paroling authority in the event that the prisoner breaks the prisoner's parole or violates any law of the State or rule of the paroling authority or any of the terms or conditions of the prisoner's parole.

(b) No parole shall be revoked and no credits forfeited without cause, which cause must be stated in the order revoking the parole, or forfeiting the credits after notice to the paroled prisoner of the paroled prisoner's alleged offense and an opportunity to be heard; provided that when a person is convicted in the State of a crime committed while on parole and is sentenced to imprisonment, or when it is shown by personal investigation that a parolee has left the State without permission from the paroling authority and due effort is made to reach the parolee by registered mail directed to the parolee's last known address, no hearing shall be required to revoke the parolee's parole; and provided further that when any duly licensed psychiatrist or licensed psychologist finds that continuance on parole will not be in the best interests of a parolee or the community, the paroling authority, within the limitations of the sentence imposed, shall order the detention and treatment of the prisoner until such time as the prisoner shall be found by any duly licensed psychiatrist or licensed psychologist to be eligible for continuance on parole.

(c) If any paroled prisoner leaves the State without permission from the paroling authority, or if the whereabouts of any paroled prisoner is not known to the paroling authority because of the neglect or failure of the prisoner to so inform it, the paroling authority may order the parole suspended pending apprehension. From and after the suspension of the parole of any paroled prisoner and until the paroled prisoner's return to custody, the paroled prisoner shall be deemed an escapee and a fugitive from justice, and no part of the time during which the paroled prisoner is an escapee and a fugitive from justice shall be part of the paroled prisoner's term.

(d) The paroling authority may at any time order the arrest and temporary return to custody of any paroled prisoner, as provided in section 353-65, for the purpose of ascertaining whether or not there is sufficient cause to warrant the paroled prisoner's reimprisonment or the revoking of the paroled prisoner's parole or other action provided for by this part.

(e) Any paroled prisoner retaken and reimprisoned as provided in this chapter shall be confined according to the paroled prisoner's sentence for that portion of the paroled prisoner's term remaining unserved at time of parole, but successive paroles may, in the discretion of the paroling authority, be granted to the prisoner during the life and in respect of the sentence.

(f) Parole shall not be revoked for a first violation of the terms and conditions of parole involving possession or use, not including to distribute or manufacture as defined in section 712-1240, of any dangerous drug, detrimental drug, harmful drug, intoxicating compound, marijuana, or marijuana concentrate, as defined in section 712-1240, or involving possession or use of drug paraphernalia under section 329-43.5; provided that the person shall be required to undergo and complete a drug treatment program as a condition of continued parole. If the person fails to complete the drug treatment program and if no other suitable treatment is amenable to the offender, the person shall be subject to revocation of parole and return to incarceration. The Hawaii paroling authority may require the person to contribute to the cost of the drug treatment program.

As used in this subsection "drug treatment program" means drug or substance abuse services provided outside a correctional facility, but the services do not require the expenditure of state moneys beyond the limits of available appropriations.

Nothing in this subsection shall be construed to give rise to a cause of action against the State, state employee, or treatment provider."

SECTION 5. Section 706-625, Hawaii Revised Statutes, is amended to read as follows:

“§706-625 Revocation, modification of probation conditions. (1) The court, on application of a probation officer, the prosecuting attorney, the defendant, or on its own motion, after a hearing, may revoke probation^[,] except as provided in subsection 7, reduce or enlarge the conditions of a sentence of probation, pursuant to the provisions applicable to the initial setting of the conditions and the provisions of section 706-627.

(2) The prosecuting attorney, the defendant’s probation officer, and the defendant shall be notified by the movant in writing of the time, place, and date of any such hearing, and of the grounds upon which action under this section is proposed. The prosecuting attorney, the defendant’s probation officer, and the defendant may appear in the hearing to oppose or support the application, and may submit evidence for the court’s consideration. The defendant shall have the right to be represented by counsel. For purposes of this section the court shall not be bound by the Hawaii rules of evidence, except for the rules pertaining to privileges.

(3) The court shall revoke probation if the defendant has inexcusably failed to comply with a substantial requirement imposed as a condition of the order or has been convicted of a felony. The court may revoke the suspension of sentence or probation if the defendant has been convicted of another crime other than a felony.

(4) The court may modify the requirements imposed on the defendant or impose further requirements, if it finds that such action will assist the defendant in leading a law-abiding life.

(5) When the court revokes probation, it may impose on the defendant any sentence that might have been imposed originally for the crime of which the defendant was convicted.

(6) As used in this section, “conviction” means that a judgment has been pronounced upon the verdict.

(7) Probation shall not be revoked for a first violation of the terms and conditions of probation involving possession or use, not including to distribute or manufacture as defined in section 712-1240, of any dangerous drug, detrimental drug, harmful drug, intoxicating compound, marijuana, or marijuana concentrate, as defined in section 712-1240, or involving possession or use of drug paraphernalia under section 329-43.5; provided that the person shall be required to undergo and complete a drug treatment program as a condition of continued probation. If the person fails to complete the drug treatment program and if no other suitable treatment is amenable to the offender, the person shall be subject to revocation of probation and return to incarceration. The court may require the person to contribute to the cost of the drug treatment program.

As used in this subsection, “drug treatment program” means drug or substance abuse services provided outside a correctional facility, but the services do not require the expenditure of state moneys beyond the limits of available appropriations.

Nothing in this subsection shall be construed to give rise to a cause of action against the State, state employee, or treatment provider.”

SECTION 6. Section 712-1241, Hawaii Revised Statutes, is amended by amending subsection (3) to read as follows:

“(3) Notwithstanding any law to the contrary, except for first time offenders sentenced under section 706-_____, if the commission of the offense of promoting a dangerous drug in the first degree under this section involved the possession, distribution, or manufacture of methamphetamine, or any of its salts, isomers, and salts of isomers, the person convicted shall be sentenced to an indeterminate term of

imprisonment of twenty years with a mandatory minimum term of imprisonment, the length of which shall be not less than one year and not greater than ten years, at the discretion of the sentencing court for a conviction under subsection (1)(a), (1)(b), or (1)(c) and not less than ten years for a conviction under subsection (1)(d). The person convicted shall not be eligible for parole during the mandatory term of imprisonment.”

SECTION 7. Section 712-1242, Hawaii Revised Statutes, is amended by amending subsection (3) to read as follows:

“(3) Notwithstanding any law to the contrary, except for first time offenders sentenced under section 706- , if the commission of the offense of promoting a dangerous drug in the second degree under this section involved the possession or distribution of methamphetamine, or any of its salts, isomers, and salts of isomers, the person convicted shall be sentenced to an indeterminate term of imprisonment of ten years with a mandatory minimum term of imprisonment, the length of which shall be not less than six months and not greater than five years, at the discretion of the sentencing court. The person convicted shall not be eligible for parole during the mandatory period of imprisonment.”

SECTION 8. Section 712-1243, Hawaii Revised Statutes, is amended by amending subsection (3) to read as follows:

“(3) Notwithstanding any law to the contrary, except for first time offenders sentenced under section 706- , if the commission of the offense of promoting a dangerous drug in the third degree under this section involved the possession or distribution of methamphetamine, the person convicted shall be sentenced to an indeterminate term of imprisonment of five years with a mandatory minimum term of imprisonment, the length of which shall be not less than thirty days and not greater than two-and-a-half years, at the discretion of the sentencing court. The person convicted shall not be eligible for parole during the mandatory period of imprisonment.”

SECTION 9. The Hawaii paroling authority shall conduct a review of all current incarcerated persons serving a sentence for conviction under section 712-1243, Hawaii Revised Statutes, to determine if they are eligible for the drug treatment program under section 3 of this Act. If the Hawaii paroling authority determines that a person is eligible for the drug treatment program rather than further incarceration, the authority shall grant parole to any person who has served at least thirty days of incarceration, with the mandatory condition of undergoing and completing drug treatment program.

SECTION 10. The department of health shall submit an annual report to the legislature before the convening of each regular session, beginning with the regular session of 2004, on the status and progress of the interagency cooperative agreement required under section 2 of this Act and the effectiveness of the delivery of services thereto, and expenditures made under this Act.

SECTION 11. Statutory material to be repealed is bracketed and stricken. New statutory material is underscored.¹

SECTION 12. This Act shall take effect on July 1, 2002.

(Approved June 7, 2002.)

ACT 161

Note

1. Edited pursuant to HRS §23G-16.5.