

ACT 127

S.B. NO. 937

A Bill for an Act Relating to Mental Health.

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

SECTION 1. Act 100, Session Laws of Hawaii 2008, enacted several statutory changes “to minimize the census at Hawaii State Hospital and promote community based health services for forensic patients” largely based on recommendations stemming from the task force established through Senate Concurrent Resolution No. 117, S.D. 1, H.D. 1, in 2006. The task force focused on the provisions of chapter 704, Hawaii Revised Statutes, which govern penal responsibility and fitness to proceed and provide an affirmative defense in criminal cases for defendants who do not meet the test for penal responsibility on account of physical or mental disease, disorder, or defect.

The statutes in chapter 704 authorize the courts to commit defendants to a hospital or to the custody of the director of health at several stages of the criminal process related to the affirmative defense. These provisions govern the large majority of admissions to, and discharges from, the Hawaii state hospital. The time elapsed in cases involving hospital services during chapter 704 processes and procedures directly affects the rate of hospital admissions and discharges and, therefore, directly affects the Hawaii state hospital census.

During its consideration of the actual time involved in the application of chapter 704 procedures, the task force received information about the long time frames usually involved in each stage of the procedures, and many of the task force’s recommendations were aimed at shortening those time frames. Senate Bill No. 2396, H.D. 1, considered during the regular session of 2008, set forth the task force’s proposed statutory amendments, including an initial provision requiring judicial review of commitments resulting from felony charges and all conditional releases on an annual basis for the first five years, and in biennial intervals thereafter.

As the bill continued through the legislative process, this proposed judicial call back provision drew concern. The bill was enacted as Act 100, Session Laws of Hawaii 2008, and added the call back provision to section 704-411, Hawaii Revised Statutes as subsections (5), (6), and (7). The enactment of these call back provisions appears to have resulted, inadvertently, in a two-tiered procedure for conditional release or discharge from the custody of the director of health, or at least, raised confusion about the interplay between the new call back subsections and the conditional release and discharge processes set forth in section 704-412, Hawaii Revised Statutes.

The purpose of this Act is to clarify that the provisions of section 704-412, Hawaii Revised Statutes, govern the timing and standards of decision for applications for conditional release or discharge from the custody of the director of health by:

- (1) Repealing the judicial call back provisions added to section 704-411, Hawaii Revised Statutes, by Act 100, Session Laws of Hawaii 2008; and
- (2) Including in section 704-412, Hawaii Revised Statutes, a time frame for decisions on motions for conditional release or discharge.

SECTION 2. Section 704-411, Hawaii Revised Statutes, is amended to read as follows:

“§704-411 Legal effect of acquittal on the ground of physical or mental disease, disorder, or defect excluding responsibility; commitment; conditional release; discharge; procedure for separate post-acquittal hearing. (1) When a defendant is acquitted on the ground of physical or mental disease, disorder, or defect excluding responsibility, the court, on the basis of the report made pursuant to section 704-404, if uncontested, or the medical or psychological evidence given at the trial or at a separate hearing, shall make an order as follows:

(a) The court shall order the defendant to be committed to the custody of the director of health to be placed in an appropriate institution for custody, care, and treatment if the court finds that the defendant:

- (i) Is affected by a physical or mental disease, disorder, or defect;
- (ii) Presents a risk of danger to self or others; and
- (iii) Is not a proper subject for conditional release;

provided that the director of health shall place defendants charged with misdemeanors or felonies not involving violence or attempted violence in the least restrictive environment appropriate in light of the defendant’s treatment needs and the need to prevent harm to the person confined and others. The county police departments shall provide to the director of health and the defendant copies of all police reports from cases filed against the defendant which have been adjudicated by the acceptance of a plea of guilty or no contest, a finding of guilt, acquittal, acquittal pursuant to section 704-400, or by the entry of a plea of guilty or no contest made pursuant to chapter 853, so long as the disclosure to the director of health and the defendant does not frustrate a legitimate function of the county police departments, with the exception of expunged records, records of or pertaining to any adjudication or disposition rendered in the case of a juvenile, or records containing data from the United States National Crime Information Center. The county police departments shall segregate or sanitize from the police reports information that would result in the likelihood or actual identification of individuals who furnished information in connection with the investigation of who were of investigatory interest. Records shall not be re-disclosed except to the extent permitted by law;

- (b) The court shall order the defendant to be granted conditional release with conditions as the court deems necessary if the court finds that the defendant is affected by physical or mental disease, disorder, or defect and that the defendant presents a danger to self or others, but that the defendant can be controlled adequately and given proper care, supervision, and treatment if the defendant is released on condition; or
- (c) The court shall order the defendant discharged if the court finds that the defendant is no longer affected by physical or mental disease, disorder, or defect or, if so affected, that the defendant no longer presents a danger to self or others and is not in need of care, supervision, or treatment.

(2) The court, upon its own motion or on the motion of the prosecuting attorney or the defendant, shall order a separate post-acquittal hearing for the purpose of taking evidence on the issue of physical or mental disease, disorder, or defect and the risk of danger that the defendant presents to self or others.

(3) When ordering a hearing pursuant to subsection (2):

- (a) In nonfelony cases, the court shall appoint a qualified examiner to examine and report upon the physical and mental condition of the

defendant. The court may appoint either a psychiatrist or a licensed psychologist. The examiner may be designated by the director of health from within the department of health. The examiner shall be appointed from a list of certified examiners as determined by the department of health. The court, in appropriate circumstances, may appoint an additional examiner or examiners; and

- (b) In felony cases, the court shall appoint three qualified examiners to examine and report upon the physical and mental condition of the defendant. In each case, the court shall appoint 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 of the three shall be a psychiatrist or licensed psychologist designated by the director of health from within the department of health. The three examiners shall be appointed from a list of certified examiners as determined by the department of health.

To facilitate the examination and the proceedings thereon, the court may cause the defendant, if not then confined, to be committed to a hospital or other suitable facility for the purpose of examination for a period not exceeding thirty days or such longer period as the court determines to be necessary for the purpose upon written findings for good cause shown. The court may direct that qualified physicians or psychologists retained by the defendant be permitted to witness the examination. The examination and report and the compensation of persons making or assisting in the examination shall be in accord with section 704-404(3), (4)(a) and (b), (6), (7), (8), and (9). As used in this section, the term "licensed psychologist" includes psychologists exempted from licensure by section 465-3(a)(3).

(4) Whether the court's order under subsection (1) is made on the basis of the medical or psychological evidence given at the trial, or on the basis of the report made pursuant to section 704-404, or the medical or psychological evidence given at a separate hearing, the burden shall be upon the State to prove, by a preponderance of the evidence, that the defendant is affected by a physical or mental disease, disorder, or defect and may not safely be discharged and that the defendant should be either committed or conditionally released as provided in subsection (1).

~~[(5) The director of health may apply to the court to conduct a hearing to assess any further need for inpatient hospitalization of a person who is acquitted on the ground of physical or mental disease, disorder, or defect excluding responsibility. The director shall make this application in a report to the circuit from which the order was issued. The director shall transmit a copy of the application and report to the prosecuting attorney of the county from which the order was issued.]~~

~~(6) Any person committed pursuant to this chapter may apply to the court to conduct a hearing to assess any further need for inpatient hospitalization of the committed person acquitted on the ground of physical or mental disease, disorder, or defect excluding responsibility. The application shall be accompanied by a letter from or supporting affidavit of a qualified physician or licensed psychologist. A copy of the application and letter or affidavit shall be transmitted to the circuit from which the order was issued. The person shall transmit a copy of the application and letter or affidavit to the prosecuting attorney of the county from which the order was issued.~~

~~(7) Upon application to the court by either the director of health or the person committed, the court shall complete the hearing process and render a decision within sixty days of the application, provided that for good cause the~~

~~court may extend the sixty day time frame upon the request of the director of health or the person.~~

~~(8)] (5) In any proceeding governed by this section, the defendant's fitness shall not be an issue."~~

SECTION 3. Section 704-412, Hawaii Revised Statutes, is amended to read as follows:

"§704-412 Committed person; application for conditional release or discharge; by the director of health; by the person. (1) After the expiration of at least ninety days following an original order of commitment pursuant to section 704-411(1)(a), or after the expiration of at least sixty days following the revocation of conditional release pursuant to section 704-413, if the director of health is of the opinion that the person committed is still affected by a physical or mental disease, disorder, or defect and may be granted conditional release or discharged without danger to self or to the person or property of others or that the person is no longer affected by a physical or mental disease, disorder, or defect, the director shall make an application for either the conditional release or discharge of the person, as appropriate. In such a case, the director shall submit a report to the court by which the person was ordered committed and shall transmit copies of the application and report to the prosecuting attorney of the county from which the person was committed and to the person committed.

(2) After the expiration of ninety days from the date of the order of commitment pursuant to section 704-411, or after the expiration of sixty days following the revocation of conditional release pursuant to section 704-413, the person committed may apply to the court from which the person was committed for an order of discharge upon the ground that the person is no longer affected by a physical or mental disease, disorder, or defect. The person committed may apply for conditional release or discharge upon the ground that, though still affected by a physical or mental disease, disorder, or defect, the person may be released without danger to self or to the person or property of others. A copy of the application shall be transmitted to the prosecuting attorney of the county from which the person was committed. If the court denies the application, the person shall not be permitted to file another application for either conditional release or discharge until one year after the date of the hearing held on the immediate prior application.

(3) Upon application to the court by either the director of health or the person committed, the court shall complete the hearing process and render a decision within sixty days of the application; provided that for good cause the court may extend the sixty-day time frame upon the request of the director of health or the person committed."

SECTION 4. Statutory material to be repealed is bracketed and stricken. New statutory material is underscored.

SECTION 5. This Act shall take effect upon its approval.

(Approved June 16, 2009.)