

**ACT 26**

H.B. NO. 1620

A Bill for an Act Relating to the Administration of Justice.

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

**PART I**

SECTION 1. Chapter 704, Hawaii Revised Statutes, is amended by adding a new section to be appropriately designated and to read as follows:

**“§704- Proceedings for defendants charged with petty misdemeanors**

**not involving violence or attempted violence; criminal justice diversion program.**

(1) In cases where the defendant is charged with a petty misdemeanor not involving violence or attempted violence, if, at the hearing held pursuant to section 704-404(2)(a) or at a further hearing held after the appointment of an examiner pursuant to section 704-404(2)(b), the court determines that the defendant is fit to proceed, then the proceedings against the defendant shall resume. In all other cases where fitness remains an outstanding issue, the court shall continue the suspension of the proceedings and commit the defendant to the custody of the director of health to be placed in a hospital or other suitable facility for further examination and assessment.

(2) Within seven days from the commitment of the defendant to the custody of the director of health, or as soon thereafter as is practicable, the director of health shall report to the court on the defendant's current capacity to understand the proceedings against defendant and defendant's current ability to assist in defendant's own defense. If, following the report, the court finds defendant fit to proceed, the proceedings against defendant shall resume. In all other cases, the court shall dismiss the charge with or without prejudice in the interest of justice. The director of health may at any time proceed under the provisions of section 334-60.2 or 334-121.”

SECTION 2. Section 704-404, Hawaii Revised Statutes, is amended as follows:

1. By amending subsections (1) and (2) to read:

“(1) Whenever there is reason to doubt the defendant's fitness to proceed, the court may immediately suspend all further proceedings in the prosecution; provided that for any defendant not subject to an order of commitment to ~~[a hospital]~~ the director of health for the purpose of the examination, neither the right to bail nor proceedings pursuant to chapter 804 shall be suspended. If a trial jury has been ~~[empaneled,]~~ empaneled, it shall be discharged or retained at the discretion of the court. The discharge of the trial jury shall not be a bar to further prosecution.

(2) Upon suspension of further proceedings in the prosecution[-];

(a) In cases where the defendant is charged with a petty misdemeanor not involving violence or attempted violence, if a court-based certified examiner is available, the court shall appoint the court-based certified examiner to examine and provide an expedited report solely upon the issue of the defendant's capacity to understand the proceedings against the defendant and defendant's ability to assist in the defendant's own defense. The court-based certified examiner shall file the examiner's report with the court within two days of the appointment of the examiner, or as soon thereafter is practicable. A hearing shall be held to determine if the defendant is fit to proceed within two days of the filing of the report, or as soon thereafter as is practicable;

(b) In all other nonfelony cases, and where a court-based certified examiner is not available in cases under paragraph (a), the court shall appoint ~~[three qualified examiners in felony cases, and]~~ one qualified examiner ~~[in nonfelony cases,]~~ to examine and report upon the defendant's fitness to proceed. The court may appoint as the examiner either a psychiatrist or a licensed psychologist designated by the director of health from within the department of health; and

- (c) In felony cases, the court shall appoint three qualified examiners to examine and report upon the defendant's fitness to proceed. The court shall appoint as examiners [at least one psychiatrist and at least one licensed psychologist. The third examiner may be a psychiatrist, licensed psychologist, or qualified physician. One] psychiatrists, licensed psychologists, or qualified physicians; provided that one of the three examiners shall be a psychiatrist or licensed psychologist designated by the director of health from within the department of health.

[In nonfelony cases, the court may appoint as examiners either a psychiatrist or a licensed psychologist.] All examiners 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. The examination may be conducted while the defendant is in custody or on release or, in the court's discretion, when necessary the court may order the defendant to be committed to a hospital or other suitable facility for the purpose of the examination for a period not exceeding thirty days, or a longer period as the court determines to be necessary for the purpose. The court may direct that one or more qualified physicians or psychologists retained by the defendant be permitted to witness the examination. As used in this section, the term "licensed psychologist" includes psychologists exempted from licensure by section 465-3(a)(3) and "qualified physician" means a physician qualified by the court for the specific evaluation ordered."

2. By amending subsection (5) to read:

"(5) [The] Except in the case of an examination pursuant to subsection (2)(a), the report of the examination for fitness to proceed shall include the following:

- (a) A description of the nature of the examination;
- (b) A diagnosis of the physical or mental condition of the defendant;
- ~~[(b)]~~ (c) An opinion as to the defendant's capacity to understand the proceedings against the defendant and to assist in the defendant's own defense;
- ~~[(e)]~~ (d) An assessment of the risk of danger to the defendant or to the person or property of others for consideration and determination of the defendant's release on conditions; and
- ~~[(d)]~~ (e) Where more than one examiner is appointed, a statement that the opinion rendered was arrived at independently of any other examiner, unless there is a showing to the court of a clear need for communication between or among the examiners for clarification. A description of the communication shall be included in the report. After all reports are submitted to the court, examiners may confer without restriction."

3. By amending subsection (7) to read:

"(7) [Three copies] A copy of the report of the examination, including any supporting documents, shall be filed with the clerk of the court [, who shall cause copies to be delivered to the prosecuting attorney and to counsel for the defendant]."

SECTION 3. Section 704-406, Hawaii Revised Statutes, is amended by amending subsection (1) to read as follows:

"(1) If the court determines that the defendant lacks fitness to proceed, the proceeding against the defendant shall be suspended, except as provided in

~~[section]~~ sections 704-407[.] and 704-, and the court shall commit the defendant to the custody of the director of health to be placed in an appropriate institution for detention, assessment, care, and treatment; provided that ~~[the commitment shall be limited in certain cases as follows]:~~

- (a) When the defendant is charged with a petty misdemeanor not involving violence or attempted violence, the ~~[commitment shall be limited to no longer than sixty days from the date the court determines the defendant lacks fitness to proceed;]~~ defendant shall be diverted from the criminal justice system pursuant to section 704- ; and
- (b) When the defendant is charged with a misdemeanor not involving violence or attempted violence, the commitment shall be limited to no longer than one hundred twenty days from the date the court determines the defendant lacks fitness to proceed.

If the court is satisfied that the defendant may be released on conditions without danger to the defendant or to another or risk of substantial danger to property of others, the court shall order the defendant's release, which shall continue at the discretion of the court, on conditions the court determines necessary; provided that ~~[the release on conditions of a defendant charged with a petty misdemeanor not involving violence or attempted violence shall continue for no longer than sixty days, and]~~ the release on conditions of a defendant charged with a misdemeanor not involving violence or attempted violence shall continue for no longer than one hundred twenty days. A copy of all reports filed pursuant to section 704-404 shall be attached to the order of commitment or order of release on conditions that is provided to the department of health. When the defendant is committed to the custody of the director of health for detention, assessment, care, and treatment, 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 that have been adjudicated by the acceptance of a plea of guilty or nolo contendere, a finding of guilt, acquittal, acquittal pursuant to section 704-400, or by the entry of a plea of guilty or nolo contendere made pursuant to chapter 853; provided that the disclosure to the director of health and the defendant does not frustrate a legitimate function of the county police departments; provided further that 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 shall not be provided. The county police departments shall segregate or sanitize from the police reports information that would result in the likely or actual identification of individuals who furnished information in connection with the investigation or who were of investigatory interest. No further disclosure of records shall be made except as provided by law."

SECTION 4. Section 704-411, Hawaii Revised Statutes, is amended by amending subsection (3) to read as follows:

- “(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]~~ as examiners 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. 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 a 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 accordance with section 704-404(3), (5)(a) ~~[and]~~, (b), ~~(d), and (e)~~, (7), (8), (9), (10), and (11). As used in this section, the term “licensed psychologist” includes psychologists exempted from licensure by section 465-3(a)(3) and “qualified physician” means a physician qualified by the court for the specific evaluation ordered.”

SECTION 5. Section 704-414, Hawaii Revised Statutes, is amended by amending subsection (1) to read as follows:

“(1) Upon filing of an application pursuant to section 704-412 for discharge or conditional release, or upon the filing of an application pursuant to section 704-413 for discharge, the court shall appoint three qualified examiners in felony cases, and one qualified examiner in nonfelony cases, to examine and report upon the physical and mental condition of the defendant. In felony cases, 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]~~ as examiners 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. The 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 the examination and 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 accordance with section 704-404(3), (5)(a) ~~[and]~~, (b), ~~(d), and (e)~~, (7), (8), (9), (10), and (11). As used in this section, the term “licensed psychologist” includes psychologists exempted from licensure by section 465-3(a)(3) and “qualified physician” means a physician qualified by the court for the specific evaluation ordered.”

## PART II

SECTION 6. The legislature finds that the recommendations of the Hawaii Summit on Improving the Governmental Response to Community Mental Illness hosted by the State Justice Institute, National Center for State Courts, Conference of Chief Justices, and the Conference of State Court Administrators on November 6, 2019, as well as studies such as the 2016-2017 Policy Paper by the Conference of State Court Administrators' "Decriminalization of Mental Illness: Fixing a Broken System", demonstrate that jails nationwide have become the default mental health method of treatment for numerous low-level defendants whose needs could be far more effectively addressed by diversion into behavioral health treatment. Moreover, once the issue of mental health surfaces during a judicial proceeding, the defendant more often than not actually spends far more time being incarcerated without being treated and being denied due process while awaiting mental health evaluations. With the cost of incarceration in Hawaii averaging over \$150 per day and the high rate of recidivism shown by these studies because of the lack of treatment, the legislature finds that allowing the parties to opt out of judicial proceedings by entering into agreements at any stage of the process is more cost-effective with respect to time, money, and community results.

The purpose of this part is to:

- (1) Authorize the courts to enter into agreements with the parties where there is reason to believe that the defendant has a physical or mental disease, disorder, or defect that will or has become an issue in the criminal case;
- (2) Amend the requirements for appointing qualified examiners to perform examinations for penal responsibility; and
- (3) Remove the time requirement for the ordering of the penal responsibility evaluation.

SECTION 7. Section 704-407.5, Hawaii Revised Statutes, is amended as follows:

1. By amending subsections (1) and (2) to read:

"(1) Whenever the defendant has filed a notice of intention to rely on the defense of physical or mental disease, disorder, or defect excluding penal responsibility, or there is reason to believe that the physical or mental disease, disorder, or defect of the defendant will or has become an issue in the case, the court may order an examination as to the defendant's physical or mental disease, disorder, or defect at the time of the conduct alleged.

Whenever there is reason to believe that the physical or mental disease, disorder, or defect of the defendant will or has become an issue in the case, the court may enter into an agreement with the parties at any stage of the proceeding to divert the case into an evaluation of the defendant, treatment of the defendant, including residential or rehabilitation treatment; or any other course or procedure, including diversion into specialized courts. Such agreements may include in-court clinical evaluations.

(2) [The] For those cases not diverted by an agreement pursuant to subsection (1), the court shall appoint three qualified examiners [in felony cases] for class A and class B felonies, as well as for class C felonies involving violence or attempted violence, and one qualified examiner in nonfelony cases to examine and report upon the physical or mental disease, disorder, or defect of the defendant at the time of the conduct. For class C felonies not involving violence or attempted violence, the court may appoint one or three qualified examiners to examine and report upon the physical or mental disease, disorder, or defect

of the defendant at the time of the conduct. In [felony] cases[;] where the court appoints three examiners, the court shall appoint [at least one psychiatrist and at least one licensed psychologist. The third examiner may be a psychiatrist, licensed psychologist, or qualified physician. One] as examiners psychiatrists, licensed psychologists, or qualified physicians; provided that one of the three examiners shall be a psychiatrist or licensed psychologist designated by the director of health from within the department of health. In nonfelony cases[;] and class C felonies not involving violence or attempted violence where one examiner is appointed, the court may appoint as examiners either a psychiatrist or a licensed psychologist. The examiner may be designated by the director of health from within the department of health. All examiners 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. The court may direct that one or more qualified physicians or psychologists retained by the defendant be permitted to witness the examination. As used in this section, the term “licensed psychologist” includes psychologists exempted from licensure by section 465-3(a)(3) and “qualified physician” means a physician qualified by the court for the specific evaluation ordered.”

2. By amending subsection (4) to read:

“(4) For defendants charged with felonies, the examinations for fitness to proceed under section 704-404 and penal responsibility under this section shall be conducted separately unless a combined examination has been ordered by the court upon a request by the defendant or upon a showing of good cause to combine the examinations. ~~[When the examinations are separate, the examination for penal responsibility under this section shall not be ordered more than thirty days after a finding of fitness to proceed.]~~ The report of the examination for fitness to proceed shall be separate from the report of the examination for penal responsibility unless a combined examination has been ordered. For defendants charged with offenses other than felonies, a combined examination is permissible when ordered by the court.”

### PART III

SECTION 8. The judiciary, in consultation with the prosecuting attorney of each county, shall submit a report of its findings and recommendations, including any proposed legislation, on the effectiveness of this Act to the legislature no later than forty days prior to the convening of the regular sessions of 2021, 2022, and 2023.

SECTION 9. This Act does not affect rights and duties that matured, penalties that were incurred, and proceedings that were begun before its effective date.

SECTION 10. Statutory material to be repealed is bracketed and stricken. New statutory material is underscored.<sup>1</sup>

SECTION 11. This Act shall take effect upon its approval.

(Approved September 15, 2020.)

#### Note

1. Edited pursuant to HRS §23G-16.5.