The Judiciary, State of Hawaii

Testimony to the Twenty-Fourth State Legislature, 2008 Session
House Committee on Judiciary
The Honorable Tommy Waters, Chair
The Honorable Blake K. Oshiro, Vice Chair

Tuesday, March 18, 2008, 3:50 p.m.
State Capitol, Conference Room 325

by

Dee Dee Letts
First Circuit Treatment Court Coordinator

Bill No. and Title: Senate Bill No. 2396, S. D. 1, H. D. 1, Relating to Mental Health.

Purpose: Makes assault of a person employed at a state-operated or contracted mental health facility a class C felony. Requires the department of health to submit an annual report on forensic patients; requires yearly court status hearings for individuals ordered to be conditionally released or hospitalized as an inpatient by the mental health court; reduces the minimum length of hospitalization from ninety to thirty days for individuals who are recommitted after conditional release; makes appropriation for mental health court operations.

Judiciary's Position:

The Judiciary takes no position on Part I of Senate Bill No. 2396, S. D. 1, H. D. 1, relating to making assault of a person employed at a state-operated or –contracted mental health facility a class C felony.

Also, the Judiciary takes no position on the sections in Part II of Senate Bill No. 2396, S. D. 1, H. D. 1, relating to conditional release. Generally speaking, the intent of this omnibus bill is consistent with the report of the SCR 117 Task Force (2006), in which the Judiciary participated. Should the provision for yearly review hearings become law, the Judiciary would need to assess what additional resources might be necessary to implement this requirement.

C00045

The Judiciary supports Section 7 of this bill that appropriates monies to support the operation and expansion of the mental health court. Since its inception in February 2004, the mental health court has operated entirely on federal funding provided by grants through the Office of the Attorney General. This funding will end in December 2008.

The mental health court was started in response to statistics which showed that more than 16% of the adults incarcerated in the United States have a serious and persistent mental illness. The court is currently operating at capacity and had its first graduation on February 19, 2008. Aside from the obvious benefits of providing better outcomes for its clients, improving public safety, and significantly reducing recidivism in this population, the diversion of these clients also saves the corrections system on Oahu approximately $90,882 per client per year. In the words of our first graduates: "I used to think of 100 reasons to use, now I think of 100 reasons not to" and "this program gives hope".

House Bill No. 466, H. D. 1, Proposed S. D.1, if funded at the level requested below will provide the Judiciary the necessary funds to continue providing Mental Health Court services at the existing level as well as provide funds to explore the expansion of the court into the area of conditional release clients. The amounts requested include $241,522 for FY 08-09, $327,346 each year for FY 09-10 and FY 10-11. The requested funding would allow the Judiciary to cover staffing and client services costs (i.e., assessment, training, etc.), to increase the number of clients served from 30 to 50, and to explore expanding the program to deal with the population on conditional release. We would also like to note that the Prosecuting Attorney's Office and the Public Defender's Office are partners with the Judiciary's Mental Health Court and should receive additional funding to support their continued role in providing attorneys for this court.

Thank you for the opportunity to comment on this measure.

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LINDA LINGLE
GOVERNOR OF HAWAII

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In reply, please refer to:
File:

House Committee on Judiciary

S.B. 2396, S.D. 1, H.D. 1 RELATING TO MENTAL HEALTH

Testimony of Chiyome Leinaala Fukino, M.D.
Director of Health

March 18, 2008

Department's Position: The Department supports this measure, which incorporates two Administration-sponsored proposals, so long as it does not adversely impact the priorities outlined in the Executive Supplemental Budget.

Fiscal Implications: In Part 2 there is an unspecified appropriation for the establishment of the Mental Health Court.

Purpose and Justification: Part I: This part establishes a criminal charge for a person who "intentionally or knowingly causes bodily injury to a person employed in a state operated or contracted mental health facility" a Class C felony. Currently, such an assault could be charged as a misdemeanor.

Although most of the assaults on staff are quite minor (not causing any injury and not requiring any treatment) a very small number can be serious. In addition, while most of the assaults are committed by patients during the first part of their hospitalization or when they are acutely psychotic, a very small number seem to be the result of patient behavior by an individual who has adequate self control and who knows what he is doing. It is with respect to this latter group that it appears the legislation is directed.

The Department has worked over the course of the past year with the City and County of Honolulu Police Department (HPD) to standardize and regularize their follow-up with the victim's

C00047

report of assault: The Hawaii State Hospital (HSH) has a much more effective communication and coordination with HPD now than previously. Nevertheless, the proposed changes in this bill will align legal treatment by specifically making assault on an HSH (or Kahi Mohala, or contracted unit) staff a Class C felony, as it would be if the assault occurred either in a school or Correctional Facility. This can be seen as a basic issue in fair treatment for the mental health professionals. If implemented, this measure would resolve the potential contradiction of having a perpetrator who intentionally and knowingly assaults an Adult Correction Officer (ACO) on one day be charged with a possible felony but the same person the next day (in HSH) who intentionally and knowingly assaults a mental health worker, or doctor, or nurse, be charged with a misdemeanor.

Part II: The SCR 117 taskforce was convened in September 2006 by the Governor under the joint direction of Senator Rosalyn Baker and Representative Josh Green. The taskforce included members of the Department of Health (DOH), Adult Mental Health Division (AMHD), Hawaii State Hospital (HSH), the judiciary, probation, community hospitals, police, sheriffs, Department of Public Safety (PSD), consumer rights advocates, consumers, and others. SCR 117 was developed to identify changes in statute, procedure, and public policy that could reduce the census at HSH. The department refers the committee to www.amhd.org/SCR117 to review the final report that was submitted to the 2007-2008 Legislature. This measure was developed with some of those recommendations and has also incorporated language from S.B. 3070 and S.B. 3071, two administrative proposals which were also based on recommendations by the SCR 117 task force.

Section 2: This section statutorily requires an annual report to the Legislature on forensic data as it relates to the Hawaii State Hospital. The department has continued to highlight how utilization of the hospital is or is not changing over time. This information has assisted decision makers to determine how best to allocate resources and may provide an objective basis for policy review and revision. There

is, however, currently no consistently available, comprehensive description of this important aspect of our mental health and forensic system. The department is supportive of this new report requirement.

Section 3: This section requires an annual judicial review (for five years and bi-annually thereafter) for an individual committed pursuant to 704-411(1) a – (Not guilt by reason of mental disease, defect or disorder). The proposed legislation will require a hearing on an annual basis which does not currently occur. The hospital is prepared and can provide whatever clinical information is required for these hearings.

Section 4: This legislation simply shortens the wait for post Conditional Release (CR) revocation from 90 to 30 days. The proposed legislation would let the person or the Director, DOH, acting on their behalf, apply for CR up to 60 days earlier than is permitted presently. The proposed legislation would provide the small number of patients whose Conditional Release has been revoked and who are clinically stable and able to abide by conditions of release the opportunity to apply for CR reinstatement between their 31st and 89th days of hospitalization.

Section 5: In addition to its original contents (Section 5 (5)) statutorily requiring status hearings for persons on conditional release, the S.D. 2, Section 5 (1) incorporates the contents of S.B. 3070, while Section 5 (2) incorporates the contents of S.B. 3071.

Section 5 (1) provides statutory guidance and clarification on the seventy-hour (72) hour hold and extended hold process as it relates to patients under Conditional Release from the Hawaii State Hospital or related facility.

It is important to understand that Conditional Release revocation is not the same as a 72-hour hold or extended hold. Conditional Release revocation mandates the commitment of an individual back to the custody of the director of health for at least ninety-days, as currently outlined in Section 704-412, Hawaii Revised Statutes. A 72-hour hold mandates a maximum of 72 hours in DOH care and custody, followed by a hearing at which the court may extend the hold for additional amounts of time. Any

extension is considered an extended hold. Courts or treatment teams that may not understand the difference may recommend a CR revocation when a 72-hour hold or extended hold may have addressed the clinical and supervision needs in a more timely and cost-effective manner. Creating explicit language in the statute should assist in providing this clarification for treatment teams or courts.

By promoting the use of 72-hour holds or extended holds, this measure will likely result in decreasing the utilization of bed space at Hawaii State Hospital by those mental health consumers who do not require prolonged hospitalization otherwise mandated by CR revocation.

Section 5 (2) will enable the Director of the Department of Health to petition the court in appropriate cases, on behalf of any individual served by the DOH, for legal discharge from Conditional Release (CR). Persons on CR are released by the courts to be discharged from the custody of the Department of Health, including but not limited to Hawaii State Hospital, back into the community. In the community, persons on CR continue to be supervised jointly by both the Adult Mental Health Division of the DOH and the Adult Client Services Branch of the Judiciary. Currently, the State of Hawaii has more than 400 people in the community on CR. To include CR consumers who are in a hospital setting, the number balloons to more than 500. This is the largest number of CR consumers per capita in the nation. Only one other state, Ohio with 550, has been identified as having more consumers on CR than Hawaii.

In Hawaii, there is no time limit for CR. A person can, and often is, on CR for the rest of his or her life. More than half of the states with CR statutes similar to Hawaii's have a time limit on CR. Some states have a prescribed limit (no more than 5 years, for example) while others have a time frame equivalent to the maximum time they would have otherwise served in jail or probation. However, in Hawaii, CR is an indefinite commitment. For example, 3% of Hawaii's misdemeanor CR cases have been on CR for more than 20 years—crimes that would have otherwise carried a sentence of no more than one year. Many people remain on CR indefinitely and under unnecessary supervision.

There is no mechanism for the director to petition the courts when the clinical staff determines that an individual is clinically ready for discharge from conditional release. By allowing the Director of Health to apply for discharge from conditional release for those who no longer are appropriate for conditional release:

1) The effectiveness of forensic coordinators and available community resources is enhanced as time and energies are focused on appropriate individuals who need higher levels of support and supervision;

2) An individual's exposure to court-directed hospitalization is limited. In many cases court-directed hospitalization results in extended hospitalization considerably beyond what is clinically determined to be necessary. When a person is on conditional release, it is possible for the individual be readmitted to inpatient care based on violations of conditional release orders which are no longer clinically necessary. In such instances, individuals do not need, nor meet clinical criteria for, inpatient hospital care, but will remain hospitalized for the duration of the legal proceedings. The hospitalization of these individuals thereby contributes to a higher inpatient census.

Section 5 (5) addresses the need for the courts to hear all Conditional Release cases at least once a year. Overall, the CR process is a very positive and progressive system to aid in the recovery of mentally ill individuals. The downside to this process is the back end. Very few individuals are ever legally discharged from their CR, even though state statute allows for it. This results in a disproportionately high number of mentally ill consumers in the community who may be doing quite well, but still have outstanding court-ordered requirements. It is incompatible with a consumer's recovery goals to remain under court jurisdiction if no longer clinically required. In the worst case scenarios, people on CR may be involuntarily committed to HSH as a result of minor infractions of their CR, which may often be heavy-handed or out of step with clinical need, simply as an artifact of their

continuing legal status. We believe that one of the most salient reasons is that the courts do not have a process in place to hear the CR cases regularly. The language highlighted in this portion of the bill attempts to ensure that the court hears all CR cases on a regular basis, to ensure that appropriate cases are continued on CR and other cases are legally discharged from CR.

Section 6: Oahu has the state's only Mental Health Court (MHC). This court is a specialty court which hears, exclusively, cases of mentally ill defendants. Very briefly, the point of the current ideation of the MHC is to steer defendants out of jail and into treatment. The MHC, mirrored after successful MHCs on the mainland and tailored for implementation in Hawaii, has shown encouraging outcome results. However, the MHC is funded entirely by a grant, and therefore is limited in its scope and influence. It continues to be a pilot project of the judiciary. Only 30 defendants can participate in the MHC at any one time, for example, and only one dedicated staff position has been created to help run the court. Also, current funding and staffing limits the impact of the MHC on the correctional population, but the impact on the HSH census has been minimal. If the MHC is expanded, there is much greater potential for including HSH consumers in the program, which would likely allow for their release from HSH more quickly.

We look forward to continuing the dialog and collaborating with the legislature on this measure. Thank you for this opportunity to provide testimony.

Thank you for the opportunity to testify on this important measure.

Testimony of the Office of the Public Defender
State of Hawaii
to the House Committee on Judiciary

March 18, 2008

S.B. 2396, SD1, HD1: Relating to Mental Health.

Representative Waters and Members of the Committee:

This bill proposes to amend H.R.S. Section 707-711 (1) by adding a new subsection (g) which would elevate what is now misdemeanor conduct, i.e. "intentionally or knowingly causing bodily injury to another person" to a class "C" felony if the offense is committed against "a person employed at a State-operated or State-contracted mental health facility". In other words, conduct which is currently classified as Assault in the Third Degree punishable by up to one year in prison would become Assault in the Second Degree punishable by up to five years in prison, if committed against a mental health facility employee.

The definition of "a person employed at a State-operated or State-contracted mental health facility" includes "health care professionals" as defined in HRS section 451D-2 where the term is defined as "physicians and surgeons and others licensed to pursuant to chapters 453 and 460, podiatrists licensed pursuant to chapter 463E, dentists licensed pursuant to chapter 448, psychologists licensed pursuant to chapter 465, nurses licensed pursuant to chapter 457, veterinarians licensed pursuant to chapter 471, acupuncturists licensed pursuant to chapter 436E, massage therapists licensed pursuant to chapter 452, naturopathic physicians licensed pursuant to chapter 455, chiropractors licensed pursuant to chapter 442, and pharmacists licensed pursuant to chapter 461"; the definition of "a person employed at a State-operated or State-contracted mental health facility" in this bill also includes "administrators, orderlies, security personnel, volunteers, and any other person who is engaged in the performance of a duty at or who is within a State-operated or State-contracted mental health facility".

This definition would, therefore, include all other patients, visitors, etc. who were "within a State-operated or State-contracted mental health facility", i.e. persons who were NOT employees of the State.

Further, as a matter of legislative drafting, we note that it is not a good idea to reference definitions that are outside the penal code as they may be changed at any time in relation to the statute within which they are contained and without consideration of the ramifications for other statutes that reference them. Any definition for purposes of this proposal should be contained in the penal code.

This bill is the latest in a long line of attempts to single out a particular group for special treatment as a class of victims. One problem with such legislation is that it creates an ongoing desire by other groups to be afforded the same special treatment.

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Currently, our Second Degree assault statute gives special consideration to correctional workers, educational workers and emergency medical services personnel. In recent years, we have seen legislation proposed seeking to add others because those groups have asked for the same consideration. Next might come fire fighters, security guards, or any other of a legion of occupations, which would ask why their group was not entitled to the same special treatment.

Other than the exceptions noted above for specified occupational personnel, the structure of our penal code bases the level of an assault charge on three general criteria:

- the level of injury, if any, if caused by the defendant's conduct,
- the state of mind with which the conduct was done, and
- the actual conduct itself, including whether or not a weapon was used.

We believe that the current structure should not be further changed to include the category of "a person employed at a State-operated or State-contracted mental health facility". Misdemeanor level conduct should continue to be charged as a misdemeanor.

Legislation such as S.B. 2396, SD1, HD1 is often referred to as affording special protection for a specified group. Realistically, that is not the case. It is highly doubtful that an individual who is about to commit an assault on a mental health worker, from doctor to orderly to janitor, is not going to refrain from doing so if this bill is passed. In other words, a perpetrator doesn't stop to say I'll engage in this conduct if it is only a misdemeanor offense, but I won't do it if it's a felony. This is particularly true of persons who are suffering from mental illness. It seems particularly cruel to punish this class of disabled persons so harshly, by punishing misdemeanor conduct with felony punishment.

In fact, the situations in which these personnel find themselves where this type of behavior might occur does not lend itself to a higher degree of penalty having a deterrent effect. What legislation such as this provides in reality are not special protections, but special treatment. As such, it is not appropriate, especially considering that not only will it simply open the door to more groups seeking the same special treatment, but this legislation targets a particular class of offenders who have already been determined to be in need of mental health treatment.

For the reasons set out above, the Office of the Public Defender does not support passage of this bill.

Thank you for the opportunity to comment on this bill.

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Hawaii Government Employees Association
AFSCME Local 152, AFL-CIO

Working Together for Hawaii

The Twenty-Fourth Legislature, State of Hawaii
Hawaii State House of Representatives
Committee on Judiciary

Testimony by
HGEA/AFSCME, Local 152, AFL-CIO
March 18, 2008

S.B. 2396, S.D. 1, H.D. 1 – RELATING TO MENTAL HEALTH

The Hawaii Government Employees Association, AFSCME Local 152, AFL-CIO supports the purpose and intent of S.B. 2396, S.D. 1, H.D. 1. We believe that violence against health care workers should be added to the offenses of assault in the second degree. Similar protection already exists for teachers, other educational workers emergency medical technicians, and employees who work in a correctional or detention facility.

Part I of this legislation will send a message that if a patient seriously assaults a nurse or other health care worker, that person can be prosecuted and put in prison. The Bureau of Labor Statistics found that health care providers are at 16 times greater risk for violence than other workers. Health care workers have significantly higher rates of on-the-job nonfatal assaults. Nurses are often the primary targets of nonfatal assaults and psychiatric nurses have the highest rate of assault. At Hawaii State Hospital, nurses and other workers have been the targets of serious assaults by patients.

Violence against nurses includes a range of behavior from verbal abuse and threats to physical assault, and at the extreme homicide. Even the fear of assault or witnessing an assault on a co-worker can cause serious health problems for workers. As a safeguard to persons under treatment, a provision is included which shields them from application of the law unless they knowingly or intentionally cause bodily injury.

We also support Part II of the bill, which implements recommendations from the S.C.R. 117 Task Force. Part II contains several statutory changes that we believe are improvements to the current situation. Therefore, we support the amendments to Chapter 334, HRS that will require HSH to produce an annual report containing relevant data on the forensic patients admitted and discharged, including the type of forensic patients by types of underlying crimes and the grade of offenses committed.

We also support the authority granted to the courts in periodically assessing the need for further inpatient hospitalization of individuals who are acquitted of a felony on the grounds of a physical or mental disease, and the changes to the conditional release statutes. Finally, we support the appropriation to support the expansion and operation of the mental health court by the Judiciary. We respectfully request changing the effective date of the bill to July 1, 2008. Thank you for the opportunity to testify in support of this important legislation.

Respectfully submitted,

Kevin Malejan
for Nora A. Nomura
Deputy Executive Director

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THE QUEEN'S MEDICAL CENTER

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HOUSE COMMITTEE ON JUDICIARY
Representative Tommy Waters, Chair
Representative Blake K. Oshiro, Vice Chair

Tuesday, March 18, 2008 – 3:50 p.m.
State Capitol, Conference Room 325
Deliver to: Room 302, 5 copies

In Support with Amendments of SB 2396 SD1 HD1, Relating to Mental Health

Chair Waters, Vice Chair Oshiro, and Members of the Committee:

My name is Karen Schultz, and I am the Vice President of Patient Care/Behavioral Health Services, Surgical Services, & Trauma at The Queen's Medical Center. I am testifying for The Queen's Medical Center in support for Senate Bill 2396 SD1 HD1, which makes assault of a person employed at a state-operated or -contracted mental health facility a class C felony.

We respectfully request that the measure be amended to include assaults on persons employed at private mental health facilities. The Queen's Medical Center is the largest private, non-profit provider of mental health services in the State of Hawaii. During 2007, QMC had 1400 inpatient admissions and over 20,000 outpatient visits for patients with mental health conditions. We see these services as filling a critical need in the state and part of our mission to take care of the people of Hawaii. And we believe that our employees, and those in other private mental health facilities, deserve equal protection from assault.

I strongly urge you to support Senate Bill 2396 SD1 HD1 with the requested amendment. Thank you for this opportunity to testify.

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