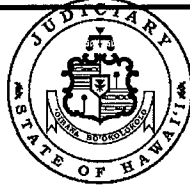


**SB2154**



*The Judiciary, State of Hawaii*

**Testimony to the Twenty-Fifth State Legislature, Regular Session of 2010**

**Senate Committee on Judiciary and Government Operations**

The Honorable Brian T. Taniguchi, Chair

The Honorable Dwight Y. Takamine, Vice Chair

Wednesday, February 10, 2010, 9:30 a.m.

State Capitol, Conference Room 016

by

Janice Yamada

Probation Administrator, Adult Client Services

First Circuit

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**Bill No. and Title:** Senate Bill No. 2154, Relating Adult Probation Records.

**Purpose:** The bill seeks to realign wording regarding the disclosure of information to victim(s), and probation officer liability and culpability in the disclosure or non-disclosure of information covered by § 806-73 (b) of the Hawaii Revised Statutes. It also seeks to expand the release of information on supervised adult offenders to treatment providers, when the information has therapeutic and rehabilitative benefit. Additionally, it will allow release of drug test results to treating physicians as well as allow the release of information to law enforcement pursuant to a new crime or relevant to a criminal investigation or law enforcement effort.

**Judiciary's Position:**

The Judiciary strongly supports Senate Bill No. 2154, which is part of the Judiciary's 2010 legislative package.

The Adult Client Services Branches (Adult Probation) are recommending a realignment of wording referencing the release of information to victims of domestic abuse to improve the flow of the section's content. In addition, under the legislative intent of § 706-605, Hawaii Revised Statutes, the Judiciary created the Interagency Council on Intermediate Sanctions to further its development of correctional options and to reduce offender recidivism. The Council's effort has focused on using evidence based practices that maximize the collaborative relationship



Senate Bill No. 2154, Relating to Adult Probation Records  
Senate Committee on Judiciary and Government Operations  
Wednesday, February 10, 2010  
Page 2

between probation officer, treatment vendors and other correctional staff. The proposed language will encourage timely communication amongst treating professionals and the probation officer. Treatment providers have found it beneficial to enlist the support of the probation officer in moving the client toward treatment goals by using the influence of the courts. Current statute however restricts the kind of information the probation officer can release to the provider, even when the information being shared is therapeutically in the best interests of the offender. When the offender understands that there is a flow of information between the officer and the provider, there is less room for misrepresentation. Often times it allows the provider, the probation officer and the offender to establish common, meaningful, and individualized treatment goals.

There are similar situations with medical professionals, where probation officers through drug testing know that there is misuse of prescription medication or that the offender is combining illicit drug use with use of legally obtained medication. Currently, information, such as a laboratory confirmation cannot be shared with the offender's physician, even if the offender signs a consent form. This change will allow the probation officer to inform a doctor of the offender's use and misuse of drugs and substances to aid in the individual's rehabilitation.

Finally, the recommended amendment seeks to allow the probation officer to provide a county, state or federal law enforcement officer information from a case record, to report a crime, provide information of possible criminal activity, or to provide information believed by the officer to be relevant to a criminal investigation or law enforcement effort.

Thank you for the opportunity to present testimony on this measure.

**Testimony of the Office of the Public Defender, State of Hawaii,  
to the Senate Committee on Judiciary and Government Operations**

February 10, 2010

**S.B. No. 2154: RELATING TO ADULT PROBATION RECORDS**

Chair Taniguchi and Members of the Committee:

We have concerns about S.B. No. 2154 and oppose it as it is currently written. S.B. No. 2154 on page 6 would amend H.R.S. § 806-73(b)(5) to allow probation officers to provide, among other information, the defendant's risk assessment and the need for treatment services to the defendant's treating physician when "probation drug test results indicate illicit alcohol or drug use that may compromise the defendant's medical care and treatment." While we understand that a person's physician may need to know if his/her patient is consuming illicit drugs or alcohol, the proposed amendment to this section allows the probation officer to disclose much more information than a positive substance test to the physician. The defendant's "risk assessment" could include, among other highly sensitive information, probation officer opinions as to the potential dangerousness of the defendant. This type of information, if disclosed to the defendant's physician could make it difficult for the defendant to obtain medical services. Some doctors might be hesitant to accept a defendant as a patient if that defendant has a negative probation background.

Another proposed amendment to H.R.S. § 806-73 on page 6 of the bill would allow a probation officer to provide law enforcement with a copy of a defendant's probation case record in order to: 1) report a crime; 2) provide information of possible criminal activity; or 3) provide information that the probation officer believes is relevant to a criminal investigation or law enforcement effort. A probation officer is an arm of the judiciary and is not a law enforcement officer. It is essential to the probation system that the probationer develop a level of trust with his/her probation officer. If the probation officer has the ability to disclose a probationer's record to law enforcement, the relationship between probationer and probation officer will seriously erode. The proposal on page 6 is very broad and contains no limitation on the disclosure of such records to law enforcement. We question how a probation officer would be in a position to accurately determine when information is "relevant to a criminal investigation or law enforcement effort."

Thank for the opportunity to comment on this measure.

**SB 2154 Relating to Adult Probation Records** Authorizes disclosure of adult probation records to a defendant's doctor when substance use may compromise medical treatment and to law enforcement to report a crime or crime-related information.

COMMITTEE ON JUDICIARY AND GOVERNMENT OPERATIONS: Senator Brian T. Taniguchi, Chair; Senator Dwight Y. Takamine, Vice Chair

Wednesday, Feb. 10, 2010, 9:30: am, Conference Room 016

## **HAWAII SUBSTANCE ABUSE COALITION**

GOOD MORNING CHAIR TANIGUCHI, VICE CHAIR TAKAMINE AND DISTINGUISHED COMMITTEE MEMBERS:

My name is Alan Johnson. I am the current chair of the Hawaii Substance Abuse Coalition (HSAC), a statewide hui of more than twenty non-profit treatment and prevention agencies.

### **HSAC SUPPORTS THE INTENT OF SB 2342 WITH RESERVATIONS:**

While we support the overall intent of the bill, the particular information and targeted recipients needs clarity from the Attorney General's office and Legal Action Center with respect to federal confidentiality laws, specifically 42 CFR Part 2 and HIPAA laws. While we can place caveats in the bill such as "subject to 42 CFR Part 2 and HIPAA regulations," it may be confusing to administrate if several parts of the bill are in violation of 42 CFR Part 2.

While treatment agencies work with probation offenders to follow distinct practices to share information with their probation officers (PO), having the PO share 2<sup>nd</sup> hand information with 3<sup>rd</sup> party recipients is much more complex and necessitates a legal review to ensure compliance with federal laws including if applicable, what would be the compliant procedures.

### **RESERVATIONS AND RECOMMENDATIONS**

**We recommend a thorough review by the Attorney General's office and the Legal Action Center first before enacting this bill to ensure that it is not in violation of federal confidentiality laws and secondarily, what ever release of information is in compliance with laws, have the proper language to define processes that ensure compliance with 42 CFR Part 2 and HIPAA such as informed consent language and how and to what extent the recipient can use the information.**

We appreciate the opportunity to testify today and are available for questions, if needed.

**SB 2154 Relating to Adult Probation Records** Authorizes disclosure of adult probation records to a defendant's doctor when substance use may compromise medical treatment and to law enforcement to report a crime or crime-related information.

COMMITTEE ON JUDICIARY AND GOVERNMENT OPERATIONS: Senator Brian T. Taniguchi, Chair; Senator Dwight Y. Takamine, Vice Chair

Wednesday, Feb. 10, 2010, 9:30: am, Conference Room 016

## **HAWAII SUBSTANCE ABUSE COALITION**

### **REVISED**

GOOD MORNING CHAIR TANIGUCHI, VICE CHAIR TAKAMINE AND DISTINGUISHED COMMITTEE MEMBERS:

My name is Alan Johnson. I am the current chair of the Hawaii Substance Abuse Coalition (HSAC), a statewide hui of more than twenty non-profit treatment and prevention agencies.

#### **HSAC SUPPORTS SB 2342 SUBJECT TO CHANGES:**

We present REVISED testimony due to recent information presented by the Legal Action Center.

#### **PROPOSED CHANGES:**

Page 5, lines 9 through 18 should be amended to read as follows:

~~[(5)]~~ (6) Notwithstanding ~~[subsection (b)(3),]~~ paragraph (3) and upon notice to the defendant, records and information relating to the defendant's risk assessment and need for treatment services [ø];-information related to the defendant's past treatment and assessments, with prior written consent of a defendant for information from a substance abuse treatment provider; and information which has therapeutic or rehabilitative benefit, may be provided to:

Page 6, lines 12 through 19 should be amended to read as follows:

(7) A copy of any adult probation case record or part thereof, or the contents of any record, may be provided by an adult probation officer to any county, state, or federal law enforcement officer to report a crime, provide information of possible criminal activity, or provide information that the adult probation officer believes is relevant to a criminal investigation or law enforcement effort, provided that for any substance abuse records such release *shall be subject to Title 42 Code of Federal Regulations Part 2, relating to the confidentiality of alcohol and drug abuse patient records;*

The question will be whether sharing this information is along the intent of federal confidentiality laws and the process of informed consent may preclude sharing. Without a clear definition of the actual process, information may or may not be actually shared.

We appreciate the opportunity to testify today and are available for questions, if needed.