



STATE OF HAWAII
DEPARTMENT OF HEALTH
P.O. Box 3378
HONOLULU, HAWAII 96801-3378

In reply, please refer to:
File:

House Committee on Judiciary

H.B. 0247 HD1, RELATING TO INVOLUNTARY HOSPITALIZATION

**Testimony of Loretta J. Fuddy, A.C.S.W., M.P.H.
Acting Director of Health**

February 17, 2011, 2:00 p.m., Room 325

1 **Department's Position:** The Department of Health (DOH) appreciates the intent of the bill, but
2 respectfully opposes it as currently drafted.

3 **Fiscal Implications:** The fiscal implications are incalculable at this time, but are estimated to be in the
4 millions of dollars for additional construction or procurement of hospital buildings, maintenance of that
5 space, and the costs associated with adding incremental numbers of additional staffing to treat
6 individuals hospitalized under this statute.

7 **Purpose and Justification:** While it can be argued that there might be reasonable public safety policy
8 considerations which support the concept of civil commitment of individuals with a high likelihood of
9 sexual dangerousness, we believe the proposed legislation is not the best means to accomplish this goal.

10 The proposed legislation contains terms which appear ambiguously defined as a matter of law.

11 We do not find that there is a category of the "crime of sexual violence" in the Hawaii Revised Statutes.

12 It is not clear if the qualifier "violence" pertains to any or all sexual offenses.

13 The criteria "suffers from a mental illness..." is a concern as it is very broad and could, in the
14 determination of some experts, apply to the majority of individuals who sexually offend. The definition
15 of 'sexually violent predator' that includes those only charged with a crime of sexual violence is broad
16 and the number of individuals to whom these criteria apply is not known, is possibly large, and may

1 exceed the amount of resources available to fund such a program. The proposed legislation also
2 appears to combine the proposal to provide for the civil commitment of sexually violent predators into
3 the statute for involuntary civil commitment of mentally ill persons. These are very different groups and
4 combining them will likely complicate attempts to manage the relevant public policy considerations for
5 each.

6 The National Association of State Mental Health Program Directors (NASMHPD) issued a
7 position statement on this matter, which we believe raises salient points of concern about this issue,
8 including the following:

- 9 • Statutes used to civilly commit dangerous sex offenders who do not have a mental illness
10 should be distinct from existing statutes for the civil commitment of people with mental
11 illnesses;
- 12 • Facilities and treatment programs for dangerous sex offenders should be administered
13 and funded outside the state mental health agency in order to maintain the mission and
14 integrity of the public mental health system. Confinement and treatment of dangerous
15 sex offenders or others who do not have a diagnosable mental illness are beyond the
16 scope of those currently administered by state mental health agencies.
- 17 • Treatment programs for dangerous sex offenders should be administered under
18 programmatic guidelines and philosophies that recognize the differences between these
19 criminal offenders and people with diagnosable psychiatric illnesses.
- 20 • Facilities for the confinement of dangerous sex offenders should be separate from
21 facilities for the treatment of people diagnosed with mental illnesses to ensure the safety
22 of others and to maintain the distinct commitment status of the criminal offenders.

- 1 • Laws providing for the civil commitment of dangerous sex offenders should be narrowly
2 drafted to ensure that they apply only to dangerous and violent sex offenders who pose a
3 significant risk to society if released.

4 The proposed legislation does not adequately address these issues as articulated by NASMHPD,
5 the treatment needs of individuals subject to the commitment, and does not specify criteria for
6 continuing commitment or discharge of these individuals. Therefore, we respectfully request that this
7 measure be held.

8 Thank you for the opportunity to testify on this bill.

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

February 17, 2011

H.B. No. 247, H.D. 1: RELATING TO INVOLUNTARY HOSPITALIZATION.

Chair Keith-Agaran and Members of the Committee:

This bill provides for the involuntary hospitalizaion of “sexually violent predators” who have been convicted of or charged with a crime of sexual violence and who suffers from a mental illness which makes the person likely to engage in acts of predatory violence if not confined in a secure facility. Our office does not support this legislation.

The term “crime of sexual violence” is not defined. The term “predatory violence” is not defined. Furthermore, the proposed bill provides that a determination that a person requires treatment in a psychiatric facility as a sexually violent predator shall not be made unless “at least one licensed physician or psychologist who is an expert on sexually violent predators has personally examined the individual and testifies in person at a hearing”. There are no provisions for what criteria a licensed physician or psychologist would have to satisfy in order to be considered an “expert” on sexually violent predators.

Currently, under Hawaii Revised Statutes (HRS) chapter 704 of the penal code, a person found to have committed any felony offense, from theft to drug possession to property damage, etc., must be examined by three doctors before the court may make a determination that would result in an order for hospitilization. Under chapter 704, such court ordered hospitalization would be instead of incarceration. This bill does not make clear whether the hospitalization referred to is instead of incarceration or in addition to incarceration.

If the latter, the bill is proposing that, in addition to whatever sentence of incarceration a “sexually violent predator” might be eligible to receive (ranging from five years to a sentence of life with the possibility of parole under Hawaii Revised Statutes), such a defendant would also be subject to involuntary hospitalization in a psychiatric facility. If the bill intends that the hospitalization would be in addition to incarceration, is the Department of Public Safety going to undertake significant psychiatric treatment for those individuals who are serving sentences for crimes of sexual violence? If not, why not? Aside from the unfairness to the defendant, how is the public being served if a defendant is being housed at tax payer expense in a correctional facility for a period of years or decades, only to then be housed at even greater tax payer expense in a psychiatric facility because the defendant suffers from a mental illness that went untreated all the years the defendant was incarcerated?

While we understand the intentions of proponents of this legislation, this proposed bill is significantly flawed and should not be passed. Thank for the opportunity to comment on this measure.

DEPARTMENT OF THE PROSECUTING ATTORNEY
CITY AND COUNTY OF HONOLULU

ALII PLACE
1060 RICHARDS STREET • HONOLULU, HAWAII 96813
PHONE: (808) 768-7400 • FAX: (808) 768-6552

KEITH M. KANESHIRO
PROSECUTING ATTORNEY



ARMINA A. CHING
FIRST DEPUTY PROSECUTING ATTORNEY

THE HONORABLE GILBERT S.C. KEITH-AGARAN, CHAIR
HOUSE JUDICIARY COMMITTEE
Twenty-Sixth State Legislature
Regular Session of 2011
State of Hawai`i

February 17, 2011

RE: H.B. 247; RELATING TO INVOLUNTARY HOSPITALIZATION.

Chair Keith-Agaran, Vice Chair Rhoads, and members of the House Committee on Judiciary, the Department of the Prosecuting Attorney submits the following testimony in support of H.B. 247.

The purpose of this bill is to civilly commit sexually violent predators to involuntary hospitalization. Chapter 334 of the Hawaii Revised Statutes is amended to define "sexually violent predator" as any person who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility." We also included the prosecuting attorney of the appropriate county as one of the designated agencies that can initiate petition proceedings and present the case at hearings for involuntary hospitalization of an individual. In addition, we require at least one licensed physician or psychologist who is an expert on sexually violent predators to examine the individual being considered for involuntary hospitalization, and testify at the hearing(s). Having an expert will help us identify sexually violent predators to ensure they are removed from society to stop them from harming other individuals, and receive the proper treatment at a hospital.

It is our understanding that other states have developed similar laws, and one such statute was upheld by the U.S. Supreme Court. *See Kansas v. Hendricks*, 521 U.S. 346, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997), *attached*. In that case, the Court noted that Kansas' legislature had passed its Sexually Violent Predators Act ("SVP Act") to address certain cases requiring more specific statutory language than what was provided in its general civil commitment statutes. The Court upheld the SVP Act's use of the terms "mental abnormality" and "personal disorder" (in lieu of "mental illness"), and further held that proceedings under the SVP Act were properly interpreted as civil—not criminal—in nature. Thus, the Court maintained, there was no violation of the Double Jeopardy nor Ex Post Facto Clauses.

More recently, the U.S. District Court of Hawaii upheld a federal statute commonly known as the "Adam Walsh Act" (18 U.S.C.A. 4248, *attached*), which is also comparable to H.B. 247 and allows for civil commitment of sexually dangerous persons ("SDP") by the federal government. *See U.S. v. Abregana*, 574 F.Supp.2d 1123 (2008), *attached*. Similar to the decision in *Hendricks*, Chief Judge Helen Gillmor held that civil commitment of SDP was civil, not criminal, in nature, and did not violate any rights pertaining to Double Jeopardy, Ex Post Facto, Cruel or Unusual Punishment, Self-Incrimination or Jury Trial. Moreover, Respondent's due process rights were met as he was permitted to seek regular review of his continued confinement, and was statutorily entitled to (and/or provided with) counsel throughout the civil commitment proceedings. Finally, in light of prior U.S. Supreme Court findings that a "clear and convincing standard" is constitutionally sufficient for civil commitment purposes, our District Court held that the clear and convincing standard was sufficient to find Respondent was a SDP. We hope that you will find these cases to be informative, and have attached copies hereto for your reference.

For all of the foregoing reasons, the Department of the Prosecuting Attorney of the City and County of Honolulu strongly supports the passage of H.B. 247. Thank you for this opportunity to testify.

JUDtestimony

From: Dara Carlin, M.A. [breaking-the-silence@hotmail.com]
Sent: Monday, February 14, 2011 1:54 PM
To: JUDtestimony
Subject: HB247 HD1 to be heard Thursday, 02/17/11, at 2:00pm in Room 325

TO: Representative Keith-Agaran, Chair
Representative Rhoads, Vice Chair
Judiciary Committee Members

FROM: Dara Carlin, M.A.
Domestic Violence Survivor Advocate
881 Akiu Place
Kailua, HI 96734

DATE: 02/17/11

RE: SUPPORT for HB247 HD1

Good Afternoon Representatives and thank you for this opportunity to provide testimony in SUPPORT of HB247 HD1.

This is just simply a wise and prudent proposal to ensure the safety of our citizens.

Respectfully,

Dara Carlin, M.A.
Domestic Violence Survivor Advocate

JUDtestimony

From: Lynnehi@aol.com
Sent: Tuesday, February 15, 2011 9:01 AM
To: JUDtestimony
Subject: Downtown Neighborhood Board 13 Testimony in Favor of HB247 HD1, public hearing
Thursday, Feb. 21, 2 pm

Dear Chair Agaron and Committee Members:

At its monthly meeting on February 3, the Downtown Neighborhood Board voted to endorse the legislative package submitted by Honolulu Prosecuting Attorney Keith Kaneshiro. Included in that package was HB 247 HD 1, Relating to Involuntary Hospitalization. We believe this tool is necessary to protect the public and urge you to pass the bill.

Thank you for the opportunity to submit testimony

Sincerely,

Alvin Au, Chair
Downtown Neighborhood Board
60 N. Beretania St., #PHA-2
Honolulu, HI 96817
alvinau1945@hotmail.com
536-7997