



STATE OF HAWAII
DEPARTMENT OF HEALTH
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In reply, please refer to:
File:

Senate Committee on Health

S.B. 1022, Relating to Involuntary Hospitalization

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

February 13, 2012

1 **Department's Position:** The Department of Health (DOH) respects the intent of this legislation, but
2 opposes this bill.

3 **Fiscal Implications:** No funds are appropriated; therefore, if this bill is enacted, it would create
4 substantial financial challenges for the department.

5 **Purpose and Justification:** The department joins with the author of this bill, the legislature, and the
6 community in supporting increased community safety. However, this legislation raises policy and
7 pragmatic concerns that cause us to take our position in opposition. The comments in the department's
8 testimony are directed to the proposed new language as underlined in the bill.

9 This bill places the definition of a "sexually violent predator" in chapter 334, which is the mental
10 health, mental illness, and substance abuse chapter. Combining language applicable to individuals with
11 mental illness and "sexually violent predators" in the same statute may complicate public policy
12 decisions for each group and is not recommended.

13 The term "predator" applies to an individual with criminogenic behavior rather than treatable
14 psychiatric illness. The term "mental abnormality" as used is not necessarily a treatable mental illness,
15 but may be deviant thinking, personal choice, or purposeful behavior. None of the descriptions of

1 “personality disorders” in the Diagnostic and Statistical Manual of Mental Disorders, fourth edition with
2 text revisions, include sexual violence as a diagnostic criterion.

3 The description in the bill that a “sexually violent predator” is likely to engage in sexual violence
4 “if not confined in a secure facility” is inconsistent with the other language in Hawaii Revised Statutes
5 (HRS) section 334-60.2. That section describes involuntary hospitalization for “care and treatment” in
6 “a psychiatric facility.” “Psychiatric facility” is defined in 334-1 as a hospital which provides care and
7 treatment for persons with mental illness. A psychiatric hospital is not a place of confinement or
8 custodial care. The bill does not describe the place of commitment, but does, in the definition of
9 “sexually violent predator;” specifically say these individuals are likely to engage in predatory acts “if
10 not confined in a secure facility.” The definition of such a facility is not included in the bill, nor is the
11 requirement that any such place of custody be obliged to provide at least minimally adequate treatments
12 which have a reasonable likelihood of ameliorating the sexual violence.

13 The definition of “sexually violent predator” contains the phrase “crime of sexual violence,”
14 which is an ambiguous term that does not seem to have a foundation in the HRS.

15 The bill does not provide for discharge criteria to be met before an individual committed under
16 the bill may be released from custody. This opens the possibility a person could be committed under the
17 bill, but not have a mechanism to be released from custody.

18 There are no definitions of what is the objective definition by which a mental health professional
19 is considered an “expert on sexually violent predators.” It is recommended this term be defined more
20 clearly.

21 There is no estimate of how many individuals are subject to being included in this category of
22 eligibility for involuntary civil commitment. The number is unknown, is possibly large, and may exceed
23 the current physical capacity and financial resources available.

1 Following the 1997 U.S. Supreme Court decision in the *Kansas v. Hendricks* case on the
2 constitutional issues involved in this area, the National Association of State Mental Health Program
3 Directors (NASMHPD) issued a position statement on “Laws Providing for the Civil Commitment of
4 Sexually Violent Criminal Offenders.” A copy is attached to this testimony. NASMHPD took the
5 position that the constitutionality of civilly committing sexually violent offenders does not necessarily
6 equate to good public policy. Risks of legislation allowing civil commitment of these persons creates
7 risks, including the risks of safety to other individuals in civil commitment facilities and of
8 disproportional expenditures of limited resources on those who are not likely to respond at the expense
9 of others with more treatable conditions.

10 NASMHPD recommended several principles if civil commitment is pursued by states, including
11 creating separate distinct statutes for the commitment of sexually violent predators in sections of statute
12 other than the mental health statutes; providing facilities and funding for the management of these
13 individuals separately from the mental health authority; administering treatment management programs
14 separately from the mental health authority, and measuring the outcomes on recidivism of these
15 individuals so as to determine the effectiveness of new statutes.

16 The department respectfully suggests this measure be held, and legislation in this matter be
17 placed in a different section of the HRS, if it moves forward.

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

19

National Association of State Mental Health Program Directors

**POSITION STATEMENT ON LAWS PROVIDING FOR THE
CIVIL COMMITMENT OF SEXUALLY VIOLENT CRIMINAL OFFENDERS**

In its June, 1997 decision in *Kansas v. Hendricks*, the U.S. Supreme Court upheld the constitutionality of the use of a civil commitment process to continue the confinement of sexually violent criminal offenders who are found to have a "mental abnormality" that causes them to pose a danger to others, even if they are not found to have a "mental illness." In upholding the statute, the Court gave the states broad discretion to define mental abnormality and to determine whether a violent sex offender who has completed his or her prison sentence poses a continuing danger to others.

The Court's conclusion that the civil commitment of dangerous sex offenders who do not have a mental illness is constitutional does not necessarily mean that such laws represent good policy. The National Association of State Mental Health Program Directors (NASMHPD) believes that some statutes could have severe and negative consequences for people with mental illnesses and for the public mental health system.

Specifically, NASMHPD believes that legislation allowing for the civil commitment of dangerous sex offenders who do not have a mental illness to psychiatric hospitals following completion of their prison sentences creates the following significant risks:

Laws which provide for the civil commitment of dangerous sex offenders for purposes that are principally punitive or for the purpose of continuing confinement, rather than for the purpose of providing treatment or psychiatric services, disrupt the state's ability to provide services for people with treatable psychiatric illnesses and undermine the mission and integrity of the public mental health system.

The civil commitment of dangerous sex offenders who may or may not respond to existing treatment modalities and who will require enormous resources for very long lengths of stay diverts scarce resources away from people who have been diagnosed with a mental illness and who both need and desire treatment.

The commitment of dangerous sex offenders to psychiatric facilities could endanger the safety of others in those facilities that have treatable psychiatric illnesses.

NASMHPD recognizes concerns about the dangers that criminally violent sex offenders may pose upon release from prison. NASMHPD believes that these concerns should be addressed through sentencing or other alternatives within the criminal justice system. Nonetheless, if civil commitment processes are adopted to address these concerns, such statutes should adhere to the following principles:

- Statutes used to civilly commit dangerous sex offenders who do not have a mental illness should be distinct from existing statutes for the civil commitment of people with mental illnesses. Laws which do not clearly distinguish these procedures stigmatize the civil commitment process and people diagnosed with mental illnesses who receive services under a commitment process. Such stigma prevents people from seeking necessary and effective treatment for diagnosable mental illnesses.
- Facilities and treatment programs for dangerous sex offenders should be administered and funded outside the state mental health agency in order to maintain the mission and integrity of the public mental health

1 system. Confinement and treatment of dangerous sex offenders or others who do not have a diagnosable
2 mental illness are beyond the scope of that traditionally administered by state mental health agencies.

- 3 • Treatment programs for dangerous sex offenders should be administered under programmatic guidelines
4 and philosophies that recognize the differences between these criminal offenders and people with
5 diagnosable psychiatric illnesses.
- 6 • Facilities for the confinement of dangerous sex offenders should be separate from facilities for the
7 treatment of people diagnosed with mental illnesses to ensure the safety of others and to maintain the
8 distinct commitment status of the criminal offenders.
- 9 • If dangerous sex offenders are confined in facilities under the purview of the state mental health agency, it
10 is imperative that the mental health agency play a significant role in determining committability and
11 diagnoses, treatment strategies, and lengths of stay for sex offenders civilly committed under the statute.
- 12 • Laws providing for the civil commitment of dangerous sex offenders should be narrowly drafted to ensure
13 that they apply only to dangerous and violent sex offenders who pose a significant risk to society if
14 released.
- 15 • Treatment for people determined to be dangerous sex offenders should be initiated during criminal
16 incarceration. Treatment programs should be rigorously examined, both during incarceration and after, to
17 determine effectiveness and to measure outcomes based on the reduction of recidivism rates.

18 NASMHPD joins the American Psychiatric Association in calling for an increased investment in
19 research on paraphilic disorders and in the clinical training of mental health professionals regarding
20 assessment and treatment of people with those disorders. In addition, NASMHPD believes that state
21 mental health agencies should initiate and participate in broader early prevention and intervention efforts
22 to facilitate development of skills and competencies that help all people to build healthy, meaningful,
23 and socially responsible lives.

24 *Adopted by the NASMHPD membership on 9/9/97.*

25 The National Association of State Mental Health Program Directors (NASMHPD) represents the public
26 mental health service delivery system serving 6.1 million people annually in all 50 states and 5
27 territories.

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THE HONORABLE JOSH GREEN, CHAIR
HOUSE JUDICIARY COMMITTEE
Twenty-Sixth State Legislature
Regular Session of 2011
State of Hawai'i

February 17, 2011

RE: S.B. 1022; RELATING TO INVOLUNTARY HOSPITALIZATION.

Chair Green, Vice Chair Nishihara, and members of the Senate Committee on Health, the Department of the Prosecuting Attorney submits the following testimony in support of S.B. 1022.

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 assist the petitioner in initiating the proceedings and presenting the case for hearings for involuntary hospitalization of an individual. Further, 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 S.B. 1022 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 S.B. 1022. Thank you for this opportunity to testify.



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The Twenty-Sixth Legislature, State of Hawaii
The Senate
Committee on Health

Testimony by
Hawaii Government Employees Association
February 13, 2012

S.B. 1022-- RELATING TO
INVOLUNTARY HOSPITALIZATION

The Hawaii Government Employees Association, AFSCME Local 152, AFL-CIO opposes the purpose and intent of S.B. 1022, which would permit the placement of sexually violent predators at the Hawaii State Hospital. We believe the appropriate placement of sexually violent predators is either in an existing correctional facility or a forensic facility if the state builds one.

Hawaii State Hospital does not have the necessary level of security or the staff to manage this dangerous population. Because the state does not have a forensic facility, violent mentally ill patients are placed inappropriately at Hawaii State Hospital putting both staff and other patients at risk of assault. This situation is unacceptable. Therefore, we are opposed to S.B. 1022.

Thank you for the opportunity to testify in opposition to S.B. 1022.

Respectfully submitted,

Leiomalama E. Desha
Deputy Executive Director