The Judiciary, State of Hawaii

Testimony to the House Committees on Health and Human Services
Representative Ryan I. Yamane, Chair
Representative Dee Morikawa, Vice Chair

Representative John M. Mizuno, Chair
Representative Jo Jordan, Vice Chair

Tuesday, March 13, 2012 at 11:00 a.m.
State Capitol, Conference Room 329
by

R. Mark Browning
Deputy Chief Judge/Senior Judge
Family Court of the First Circuit

Bill No. and Title: Senate Bill No. 2121, S.D.1, Relating to Mental Health.

Purpose: Permits any interested person to file a written petition for emergency admission and requires a court hearing on the petition. Requires an independent evaluation of a patient admitted to a licensed psychiatric facility for involuntary hospitalization in certain circumstances. Amends the criteria and removes the word, "imminently," from "imminently dangerous."

Judiciary's Position:

The Judiciary takes no position on this bill. We offer the following comments out of a deep concern for the people this bill intends to serve.

(1) The deletion of the requirement that the danger and/or harm be "imminent" may run afoul of constitutional case law.

(2) This bill will allow "[a]ny interested person with a clear and abiding interest in the well-being of the individual" to file a petition and request that a "Respondent" be subject to a court order for involuntary emergency civil commitment. How will courts define "a clear and abiding interest" in the absence of a statutory definition?

We note that the specifically stated legislative intent in Stand. Con. Rep. No. 2260 "is to limit involvement to persons who have knowledge of or a relationship with, *but not necessarily a familial relationship*, the individual for whom care is sought" (italics added). There are no notice requirements in this bill. In the event that this "interested person" is not a family member, the court cannot be assured about the existence of family members or their position. If the "Respondent" is an adult, the "interested person" may not even have the authority to file a petition on behalf of the "Respondent" absent a legal guardianship. There would be a similar issue if an "interested person", who is not a parent or legal guardian of a child, seeks to file a petition for the child.

(3) We are concerned about the following new language:

> "(3)... The judge shall conduct an ex parte hearing to determine if there is probable cause to believe that the subject of the petition meets the criteria for involuntary admission. Upon a finding of probable cause that the subject of the petition is mentally ill or suffering from substance abuse, is dangerous to self or others, or is gravely disabled, or is obviously ill, and in need of care or treatment, or both, the judge shall issue a written order, giving the findings on which the probable cause is based and directing a law enforcement officer or other suitable individual to take the person into custody and deliver the person to the nearest facility designated by the director for emergency examination and treatment. The ex parte order shall be made a part of the patient's clinical record."

Currently, the court depends on the professional training and knowledge of law enforcement officers, trained crisis workers, and mental health professionals in order to make emergency ex parte civil commitment orders. Relying on lay persons for psychiatric observations and opinions may be problematic.

Furthermore, it seems inconsistent to authorize a judge to order that an individual be delivered to an emergency room by a police officer based on an ex parte hearing with no input from a mental health professional, when this same bill places a higher requirement on medical doctors:

> "If the licensed physician, physician assistant, or psychologist who has directed transportation of a person to a licensed psychiatric facility for further evaluation and possible emergency hospitalization is not an employee or agent of the licensed psychiatric facility, a psychiatrist or psychologist at the licensed psychiatric facility shall independently

> examine the patient to diagnose the presence or absence of a mental disorder, assess the risk that the patient may be dangerous to self or others, or is gravely disabled, or is obviously ill, and assess whether or not the patient needs to be hospitalized."

(4) We are unclear why there is a need to expand the pool of possible petitioners. As noted by the Hawaii Disability Rights Center in their February 24, 2012, written testimony submitted to the Senate Ways and Means Committee:

> "It is not clearly stated why the current law is not sufficient or needs to be broadened as to who can file a petition for commitment. *Current law allows a variety of individuals to make such an application to a Judge – these include doctors and psychologists and other health or social service professionals or state or county workers. . . . If a person is exhibiting behavior that may justify an emergency examination there are many individuals under the current law who are permitted to contact the court.* No evidence has been presented to explain why the law needs to be expanded." (italics added)

(5) The Judiciary will need appropriations (above our current budget requests) in order to adequately address the additional work that will likely result from the implementation of this law. The family court is already straining to meet the *current* needs in all our divisions, including the Special Division, which has the responsibility over paternities, adoptions, guardianships, domestic abuse protective orders, civil commitments, and miscellaneous cases. We will not be able to guarantee timeliness given the equally pressing nature of the other types of cases such as domestic abuse protective orders.

We will also need increased funds for appointments of guardians ad litem. Because this statute deals with basic liberties, the guardians ad litem will have to be attorneys. We have to be able to pay them.

(6) Perhaps the most important concern is this: We fear that this bill sets up a system that provides false hope to the family and friends of persons suffering from mental illness and/or drug addiction. Those family and friends with experience in the court system for these problems will attest that using the courts is not the best way to deliver services to their loved ones.

In this Legislative session, other bills have been introduced and passed out of committees with Legislative findings that the Department of Health, due to fiscal constraints, has constricted and decreased services available to both adults and children. This community and these people

in need require more resources, more programming, less red tape, and a better "delivery system." Using the court as a triage system is a very expensive way to deliver mental health services, especially if they are not even available.

On nearly all of our family court calendars, the court struggles along with families to find and secure timely appropriate services and placement for adults and children with mental illnesses as well as to find and secure adequate funds. We see the pain of the affected persons and their families. We do not underestimate that pain and the toll on the person, the family, and our community. The possibility of adding legal ambiguities to an already extraordinary challenging intolerable situation may require more conversation among the proponents of this bill before its passage.

Thank you for the opportunity to testify on Senate Bill No. 2121, S.D.1.

NEIL ABERCROMBIE
GOVERNOR OF HAWAII

LORETTA J. FUDDY, A.C.S.W., M.P.H
DIRECTOR OF HEALTH

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

In reply, please refer to:
File:

House Committees on Health and Human Services

S.B. 2121 SD1, Relating to Mental Health

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

March 13, 2012

Department's Position: The Department of Health supports the bill's provisions that modify those who may become involved in petitioning for involuntary treatment, and has no position on the provision calling for the deletion of a threshold requirement which describes an imminency criterion for dangerousness. As with other service-expansion bills proposed in this year's session, the department understands the Legislature's desire to offer services to more individuals who need them. This bill will create additional mechanisms by which individuals may receive evaluation for involuntary mental health services.

Fiscal Implications: There do not appear to be financial implications for the department if this bill is enacted.

Purpose and Justification: The bill amends several sections of Chapter 334 of the Hawaii Revised Statutes (HRS).

The changes modify who may petition a court for involuntary hospitalization. The amendments:

1) Broaden the categories of individuals who are able to petition a court for involuntary psychiatric hospitalization on behalf of an individual in need;

2) Allow all law enforcement officers, not only police, to formally request emergency treatment for those who appear to need it;

3) Continue to protect the due process rights of the individual who is the subject of the petition by making a provision for the appointment of a guardian ad litem for the person; and

4) Are likely to enable more individuals to receive necessary treatment.

The bill also deletes the term "imminently" when it appears before the phrase "dangerous to self or others." The department has no position on this proposed modification to the statute.

Thank you for the opportunity to testify on this bill.

TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
TWENTY-SIXTH LEGISLATURE, 2012

ON THE FOLLOWING MEASURE:
S.B. NO. 2121, S.D. 1, RELATING TO MENTAL HEALTH.

BEFORE THE:
HOUSE COMMITTEES ON HEALTH AND ON HUMAN SERVICES

DATE: Tuesday, March 13, 2012 **TIME:** 11:00 a.m.

LOCATION: State Capitol, Room 329

TESTIFIER(S): David M. Louie, Attorney General, or
Julio C. Herrera, Deputy Attorney General

Chairs Yamane and Mizuno and Members of the Committees:

The Department of the Attorney General supports the intent of this bill, but recent amendments to the bill raise legal concerns.

This bill is similar to the original draft introduced in the Senate in that it allows an interested person to file a written petition for emergency admission alleging that a person located in the county meets criteria for commitment to a psychiatric facility, pursuant to chapter 334, Hawaii Revised Statutes (HRS). However, this latest draft removes the requirement of imminency in the determination of dangerousness, allows the court to appoint a guardian ad litem at any stage of the proceedings, and requires an independent evaluation of a patient admitted to a psychiatric facility for emergency examination.

Sections 1, 2, 4, 5 and 6 of this bill remove "imminently" from the term "imminently dangerous" as it relates to establishing one of the criteria necessary to commit someone involuntarily to a psychiatric facility. We strongly recommend that this wording be kept in, because it is constitutionally required by Suzuki v. Yuen, 617 F.2d 173 (9th Cir. 1980) (Court declaring that it is unconstitutional to commit one who does not pose an imminent danger).

Sections 1 and 3 of this bill replace the term "police officer" with the term "law enforcement officer," but do not include a specific definition. We recommend that this chapter include a definition, as provided in section 710-1000, HRS:

> "Law enforcement officer" means any public servant, whether employed by the State or subdivisions thereof or by the United States, vested by law with a duty to maintain public order or, to make arrests for offenses or to

enforce the criminal laws, whether that duty extends to all offenses or is limited to a specific class of offenses.

We respectfully ask the Committees to incorporate these recommendations before passing this bill.

AMERICAN CIVIL LIBERTIES UNION of HAWAI'I

Committee:	Committee on Health Committee on Human Services
Hearing Date/Time:	Tuesday, March 13, 2012, 11:00 a.m.
Place:	Conference Room 329
Re:	*Testimony of the ACLU of Hawaii in Opposition to S.B. 2121, SD1 Relating to Mental Health*

Dear Chairs Yamane and Mizuno and Members of the Committees on Health and Human Services:

The American Civil Liberties Union of Hawaii ("ACLU of Hawaii") writes in opposition to S.B. 2121, SD1 relating to involuntary psychiatric hospitalization. While the co-sponsors of this bill no doubt have the best of intentions, S.B. 2121, SD1 erodes the current standard such that otherwise competent individuals may be involuntarily committed in violation of their constitutional rights.

Involuntary commitment is a serious deprivation of liberty than can be justified only in the narrow circumstance where there is mental illness and an *imminent* physical danger to the person to be committed or to others, evidenced by observed behavior and where there is no less restrictive alternative. In such cases, strong procedural safeguards must be in place throughout to insure that the due process rights of the individual are protected.

Eliminating the requirement that the person be "imminently" dangerous to him/herself or others removes the justification required to involuntarily hospitalize and forcibly treat a person and opens the door to abuse. This bill would allow the involuntary commitment and forced treatment of individuals who may not be a danger to themselves or others in violation of their constitutional rights. No justification has been given to show why it is necessary to lessen this standard nor has any information been given to show that there are no less restrictive alternatives.

S.B. 2121, SD1 would allow an otherwise functioning person who is fighting addiction to be committed against his or her will; the court would simply have to find that the person is "suffering from substance abuse, is dangerous to self or others, and in need of care or treatment. The ACLU of Hawaii has great concern that passing this bill into law raises the possibility of misuse by family members who petition the court ("My wife is doing drugs").

Committing a person to treatment against his or her will is a significant loss of liberty and freedom and it is a policy that is inherently doomed to failure due to its punitive nature. Because

American Civil Liberties Union of Hawai'i
P.O. Box 3410
Honolulu, Hawai'i 96801
T: 808.522-5900
F: 808.522-5909
E: office@acluhawaii.org
www.acluhawaii.org

this legislation invites abuse and puts otherwise competent individuals at risk of losing their freedom, the ACLU of Hawaii opposes S.B. 2121, SD1.

The mission of the ACLU of Hawaii is to protect the fundamental freedoms enshrined in the U.S. and State Constitutions. The ACLU of Hawaii fulfills this through legislative, litigation, and public education programs statewide. The ACLU of Hawaii is a non-partisan and private non-profit organization that provides its services at no cost to the public and does not accept government funds. The ACLU of Hawaii has been serving Hawaii for over 45 years.

Thank you for this opportunity to testify.

Sincerely,

Laurie A. Temple
Staff Attorney
ACLU of Hawaii

American Civil Liberties Union of Hawaii
P.O. Box 3410
Honolulu, Hawaii 96801
T: 808.522-5900
F: 808.522-5909
E: office@acluhawaii.org
www.acluhawaii.org

HAWAII DISABILITY RIGHTS CENTER
1132 Bishop Street, Suite 2102, Honolulu, Hawaii 96813
Phone/TTY: (808) 949-2922 *Toll Free*: 1-800-882-1057 *Fax*: (808) 949-2928
E-mail: info@hawaiidisabilityrights.org *Website*: www.hawaiidisabilityrights.org

THE SENATE
THE TWENTY-SIIXTH LEGISLATURE
REGULAR SESSION OF 2012

Committee on Ways and Means
Testimony on S.B.2121, SD1
Relating to Mental Health

Friday, February 24, 2012, 9:00 A.M.
Conference Room 211

Chair Ige, and Members of the Committee:

The Hawaii Disability Rights Center offers the following comments on this bill.

This is one in a series of bills introduced and heard this session designed to make it easier to involuntarily detain, commit or treat (medicate) individuals with mental illness. We are concerned that the legislature is not focusing on the more important aspects of the problem that it appears to be trying to solve. In our experience, we really have not seen a significant number of individuals who refused medication, where they were sufficiently in distress that involuntary treatment was warranted. On the other hand, we frequently see many clients attempting to obtain mental health services from the state and who are denied. For that reason, we believe the legislature would be better off addressing the issue of the many mental health consumers who seek, but do not receive, mental health services, as opposed to forcing services upon those who do not want them.

As to some of the specific provisions of the bill, we fail to understand the necessity for the provision on page 3 that allows **"any interested person with a clear and abiding interest in the well being of the individual"** to file a petition for emergency admission to a psychiatric facility. It seems to us that this is such a broad term that it is too open ended and very difficult to define. Further, the procedure set forth in the bill is one that allows a Judge to issue an ex parte order to take the subject of the petition into custody and be transported to a psychiatric facility. An ex parte hearing is one where the person is not present and therefore has no chance to represent themselves or present evidence. So, the result of this provision is that anyone who claims to have an

interest in the well being of another can petition the court and talk to the Judge privately and force another individual to be subject to an emergency examination and treatment.

This ought to raise red flags as to the potential for an infringement on a person's liberty. It is not clearly stated why the current law is not sufficient or needs to be broadened as to who can file a petition for commitment. Current law allows a variety of individuals to make such an application to a Judge – these include doctors and psychologists and other health or social service professionals or state or county workers. There is no need or justification to expand the list of individuals who can petition the court in such an open ended fashion. If a person is exhibiting behavior that may justify an emergency examination there are many individuals under the current law who are permitted to contact the court. No evidence has been presented to explain why the law needs to be expanded.

While the bill purports to protect the subjects of these proceedings by permitting the appointment of a guardian ad litem, we are concerned that since much of the bill creates an ex parte proceeding where the subject will never be present, that this provision is illusory and offers no real protection. It is noteworthy that the bill does not require a guardian ad litem – it merely authorizes the court to do the appointment.

The other, very troubling concern in this bill is that it undermines and reverses a long standing body of law which established the concept of "imminently dangerous" as a requirement for involuntary hospitalization or treatment. This bill would delete the requirement that the danger be "imminent" and allow merely that the person be or "predictably" become a danger. The deletion of the requirement that individuals be **imminently** dangerous will no longer require a showing of any immediacy. It will allow for the possibility of future harm that may result and we have concerns that this is potentially so speculative as to infringe upon the civil liberties of various individuals.

In fact, Hawaii's prior law in this area was declared unconstitutional by the federal court, specifically because it failed to specify that the danger be imminent. **See Suzuki v. Yuen, 617 F.2d 173 (US Court of Appeals for the Ninth Circuit 1980)** in which the Appeals Court upheld Judge Samuel King's declaration that the statute was unconstitutional. Inasmuch as the Federal Court has spoken on this subject and held that the requirement of dangerousness must be imminent, we question why the legislature would entertain a proposal to amend the law to revert to its prior unconstitutional state.

Without a clear example of why the current law needs to be changed we urge that the Legislature exercise caution. This is a complex area of the law, posing many questions of civil liberties and is governed by several constitutional precedents decided by the U.S. Supreme Court. Further, the concept of trying to predict future behavior of an individual is extremely difficult at best and fraught with peril in a free society to say the least. We would hope that the Legislature would seek to clarify what problems, if any, would be solved by this bill, and that it would conduct more discussion before taking action.

This is a highly charged issue, and there are well intentioned individuals with very varying points of view on different sides of the debate. That, coupled with the fact that there is a vast body of settled law on the subject, complicates any attempt to suggest that the changes proposed in this bill will produce any positive results.

Thank you for the opportunity to testify on this measure.

House Committee on Health
House Committee on Human Services
March 13, 2012
11:00 a.m.
Room 329
Re: SB 2121, SD1, Relating to Mental Health

On behalf of Kāhi Mōhala Behavioral Health, we are writing in support of SB 2121, SD1, relating to Mental Health.

SB 2121, SD1, would permit any interested person, as defined under section 334-1, HRS, to file a written petition for emergency admission and it would make other changes relevant to our provision of mental health services in the state.

We believe that this measure is an important step for the benefit of the community and we hope to continue to be positively engaged in discussions about it and other important mental health policy issues as the legislative session progresses.

Kāhi Mōhala Behavioral Health is a center for health care services. Kāhi Mōhala embraces an inter-disciplinary approach to services, incorporating an integrative perspective in emotional, physical, cognitive and behavioral health care treatment. The Kāhi Mōhala C.A.R.E.S. philosophy (Culture of Aloha, Relationship Based, and Environment of Safety) enhances excellence of care by incorporating the feedback of both patients and staff in developing the most positive healing environment.

Kāhi Mōhala's 88-bed facility is located on 14.5 acres on the rural west side on the island of Oahu. It is Hawaii's only freestanding, community-based, not-for-profit psychiatric hospital; serving the needs of not only individuals and families in Hawaii, but also those throughout the Pacific Rim. Kahi Mohala is accredited by The Joint Commission, certified by TRICARE and Medicare/Medicaid.

Mahalo,

Leonard Licina
Kāhi Mōhala Behavioral Health
91-2301 Old Fort Weaver Road
Ewa Beach, HI 96706

Re: SB2121 SD1

Aloha Chair Ryan, Vice-Chair Morikawa, and members of the committee.

My name is Scott Wall and I am writing on behalf of United Self Help. We are strongly against SB2121 SD1 on many grounds. Laws must be written with the worse case scenario in mind.

We believe that the bill is fundamentally unconstitutional. We believe that it violates the Fourth Amendment in that it could deny a citizen of this country of their liberty warrentlessly and without due process.

In Section Two of the proposed bill it would remove the requirement that a person be imminently dangerous to themselves or others. In Section Three of the bill it goes further and states that all that is required for commitment is probable cause. No American should be denied their liberty because they "might" hurt themselves or someone else. This alone appears to be a violation of Habeas Corpus.

The concept of probable cause to this date has always been used relative to events that had or are taking place. To the best of my knowledge probable cause has never been used to prognosticate the future. Locking someone up because they "might" hurt themselves or someone else is simply wrong.

Under these conditions anyone could be locked up. In the hearings in the Senate Ways and Means Committee Sen. Sloam joked that he was unsure about the bill because one of his neighbors might use it against him.

Unfortunately his joke could very well foretell the plight of the consumers of Hawai'i. The current problem with the homeless population comes to mind. Under this law someone could decide that the easiest way to deal with the homeless would be to just

rule that they all "might" be a danger to themselves or others and then throw them all into the wards.

One might think that that could never happen yet in Section Three of the bill it states that any interested person can initiate proceedings. Up until now such proceedings could only be initiated by multiple family members, law enforcement personnel, or trained medical professionals.

To date our main worry has been that a law such as this could be used against a consumer by a family member. You might think that this is an exaggeration but I assure you that any professional social worker or medical professional who deals with behavioral health will tell you that, albeit it rare, people do try to lock their relatives up to settle familial disputes and/or to acquire money or property.

Since under this law any "interested" person can initiate proceedings motives which might not be quite benevolent could come into play. What if the consumer was simply inconvenient, or perhaps offensively drove away customers from a particular district of town. What if, God forbid, they drove away tourists?

Were that to be the case then love of family, the safety of the public, or legitimate medical concern for the patient, would no longer be the sole motives for involuntary commitment. Under this bill there could be commercial economic motives or even political motives.

I know that no politician in Hawai'i would ever do that. However I'm sure that the majority of the public in Germany in 1936 thought that that could never happen there either. It did end their homeless and mental health problems though.

That was, of course, the worst case scenario. In America anyone subject to the provisions of this bill will have to be treated. Therein lays another problem. We do not currently have the facilities to care for all of our mental health consumers that are actively seeking help, much less those who aren't. We certainly don't have the funds to build new facilities for the people that, under this law, would be forced into treatment.

There already is a law on our books for the involuntary commitment of the mentally ill. Granted it is slow and cumbersome but could that not just possibly be a good thing when we are talking about denying one of our fellow citizens their liberty?

The only good thing we, the consumers, see in this bill is the provision that should it pass it mandates not only that the process remain under judicial oversight but that proper legal representation must be provided to the consumer in question.

Robert Scott Wall

United Self Help

Committee on Health
Committee on Human Services
Testimony on SB2121 SD1
Relating to Mental Health

Tuesday, March 13, 2012, 11:00 A.M.
Conference Room 329

Honorable Chair Yamane, Chair Mizuno, Vice-Chairs, and Members of the Committees:

I am Erik Acuna, Master's of Social Work student at the University of Hawaii and intern at United Self Help, under Executive Director, Bud Bowles.

I am opposed to SB2121 SD1.

Allowing "any interested person" to submit a petition for admission will give a lot of power to potentially ill-intentioned people or people who are not qualified to make these types of judgment calls. It could also unfairly result in committing people based on suspicion or supposed risk, and not based on any solid evidence of imminent danger to self or others. Although involuntary hospitalization has the potential for helpful treatment, maintaining an individual's right to decide to be hospitalized or not is more important and must not be taken from the individual unnecessarily. Allowing "any interested person" to submit a petition will make it easier for others to take advantage of them and possibly abuse them.

Creating an emergency commitment procedure is necessary, but not at the expense of individual freedom and safety.

Thank you for the opportunity to testify.