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A BILL FOR AN ACT

RELATING TO FORENSIC MENTAL HEALTH PROCEDURES.

**BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:**

1           SECTION 1. The purpose of this Act is to shorten the  
2 amount of time defendants spend in state custody awaiting  
3 forensic mental health examinations and the resultant rulings on  
4 fitness to proceed and penal responsibility, by separating the  
5 two evaluations. Under section 704-404, Hawaii Revised  
6 Statutes, when a defendant's fitness to proceed comes into  
7 question, the criminal proceedings are stopped, and the court  
8 must order a physical or mental examination of the defendant to  
9 determine both the defendant's fitness to proceed and whether  
10 the defendant was penally responsible for the alleged crime.  
11 Section 704-404(4) requires the court to order a forensic  
12 examiner to conduct an evaluation and report on several elements  
13 including: fitness to stand trial; a diagnosis; and penal  
14 responsibility. Penal responsibility is a measure of the  
15 capacity of the defendant to appreciate the wrongfulness of the  
16 defendant's conduct or to conform the defendant's conduct to the  
17 requirements of law at the time of the conduct alleged. An  
18 evaluation of fitness does not necessarily require determining a

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1 diagnosis or an exhaustive record review, as it involves an  
2 examination of a defendant's current cognitive capacity and  
3 state. An evaluation of penal responsibility and clinical  
4 diagnosis is a more involved and time consuming endeavor  
5 requiring a thorough record review and a more complex  
6 examination of both current cognitive status and the defendant's  
7 state of mind at various points in the past. While evaluations  
8 of fitness to proceed are utilized by the court in each instance  
9 that they are ordered, only some of the evaluations of penal  
10 responsibility are ever utilized, because they only become  
11 relevant if the affirmative defense of lack of penal  
12 responsibility is found to be appropriate by the court. Pairing  
13 them together is more burdensome to the process, lengthens the  
14 time to complete the evaluation and report to the court, and  
15 generates a product that may not be utilized during  
16 adjudication.

17 Furthermore, pairing fitness and penal responsibility in  
18 one evaluation implicates ethical and legal concerns, because  
19 defendants who are unfit to proceed, by definition, may not have  
20 sufficient capacity to consult with defense counsel to determine  
21 the impact of providing incriminating information to the  
22 examiner relevant to the defendant's state of mind at the time

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1 of the crime. The American Bar Association's Criminal Justice  
2 Mental Health Standards, Standard 7-4.4, recommends that an  
3 evaluation of the defendant's mental condition at the time of  
4 the alleged offense and penal responsibility should not be  
5 combined in any evaluation to determine fitness to stand trial  
6 unless the defense requests it or unless good cause is shown.

7 This Act also provides for a process for the reevaluation  
8 of a defendant who had been found unfit to proceed, but has  
9 participated in fitness restoration services either at Hawaii  
10 state hospital or in the community. Section 704-406, Hawaii  
11 Revised Statutes, is currently silent on that issue, but the  
12 custom has been for the court to order new three-panel  
13 evaluations for defendants charged with felonies. The proposed  
14 procedure would require only one evaluation for defendants who  
15 have been charged with crimes other than murder in the first and  
16 second degrees, attempted murder in the first and second  
17 degrees, and class A felonies, which, along with not requiring a  
18 combined evaluation of penal responsibility, should speed up the  
19 process of obtaining these evaluations, especially for  
20 defendants accused of committing felonies.

21 The purposes of this Act are to ensure the timely and  
22 relevant administration of mental health examinations, and to

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1 support the process of expedient administration of justice and  
2 due process for defendants who may have mental health issues.

3 SECTION 2. Section 704-404, Hawaii Revised Statutes, is  
4 amended by adding a new section to be appropriately designated  
5 and to read as follows:

6 "§704-404 Examination of defendant with respect to  
7 physical or mental disease, disorder, or defect excluding penal  
8 responsibility. (1) Whenever the defendant has filed a notice  
9 of intention to rely on the defense of physical or mental  
10 disease, disorder, or defect excluding responsibility, or there  
11 is reason to believe that the physical or mental disease,  
12 disorder, or defect of the defendant will or has become an issue  
13 in the case, the court may order an examination as to the  
14 defendant's physical or mental disease, disorder, or defect at  
15 the time of the conduct.

16 (2) The court shall appoint three qualified examiners in  
17 felony cases and one qualified examiner in nonfelony cases to  
18 examine and report upon the physical or mental disease,  
19 disorder, or defect of the defendant at the time of the  
20 conduct. In felony cases the court shall appoint at least one  
21 psychiatrist and at least one licensed psychologist. The third  
22 member may be a psychiatrist, licensed psychologist, or

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1 qualified physician. One of the three shall be a psychiatrist  
2 or licensed psychologist designated by the director of health  
3 from within the department of health. In nonfelony cases the  
4 court may appoint either a psychiatrist or a licensed  
5 psychologist. All examiners shall be appointed from a list of  
6 certified examiners as determined by the department of  
7 health. The court, in appropriate circumstances, may appoint an  
8 additional examiner or examiners. The court may direct that one  
9 or more qualified physicians or psychologists retained by the  
10 defendant be permitted to witness the examination. As used in  
11 this section, the term "licensed psychologist" includes  
12 psychologists exempted from licensure by section 465-3(a)(3).

13 (3) An examination performed under this section may employ  
14 any method that is accepted by the professions of medicine or  
15 psychology for the examination of those alleged to be affected  
16 by a physical or mental disease, disorder, or defect; provided  
17 that each examiner shall form and render diagnoses and opinions  
18 upon the physical and mental condition of the defendant  
19 independently from the other examiners, and the examiners, upon  
20 approval of the court, may secure the services of clinical  
21 psychologists and other medical or paramedical specialists to  
22 assist in the examination and diagnosis.

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1           (4) The examinations for fitness to proceed and penal  
2 responsibility shall be conducted separately unless a combined  
3 examination has been requested by the defendant or for good  
4 cause shown. If separate, the examination for penal  
5 responsibility may be ordered within 30 days of a finding of  
6 fitness to proceed. The report of the examination for fitness to  
7 proceed shall be separate from the report of the examination for  
8 penal responsibility.

9           (5) The report of the examination for penal responsibility  
10 shall include the following:

- 11           (a) A description of the nature of the examination;  
12           (b) A diagnosis of the physical or mental condition of the  
13           defendant;  
14           (c) An opinion as to the extent, if any, to which the  
15           capacity of the defendant to appreciate the  
16           wrongfulness of the defendant's conduct or to conform  
17           the defendant's conduct to the requirements of law was  
18           impaired at the time of the conduct alleged;  
19           (d) When directed by the court, an opinion as to the  
20           capacity of the defendant to have a particular state  
21           of mind that is required to establish an element of  
22           the offense charged; and

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- 1        (e) Where more than one examiner is appointed, a statement  
2        that the diagnosis and opinion rendered were arrived  
3        at independently of any other examiner, unless there  
4        is a showing to the court of a clear need for  
5        communication between or among the examiners for  
6        clarification. A description of the communication  
7        shall be included in the report. After all reports  
8        are submitted to the court, examiners may confer  
9        without restriction.
- 10       (6) If the examination cannot be conducted by reason of  
11       the unwillingness of the defendant to participate therein, the  
12       report shall so state and shall include, if possible, an opinion  
13       as to whether such unwillingness of the defendant was the result  
14       of physical or mental disease, disorder, or defect.
- 15       (7) Three copies of the report of the examination,  
16       including any supporting documents, shall be filed with the  
17       clerk of the court, who shall cause copies to be delivered to  
18       the prosecuting attorney and to counsel for the defendant.
- 19       (8) Any examiner shall be permitted to make a separate  
20       explanation reasonably serving to clarify the examiner's  
21       diagnosis or opinion.

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1       (9) The court shall obtain all existing medical, mental  
2 health, social, police, and juvenile records, including those  
3 expunged, and other pertinent records in the custody of public  
4 agencies, notwithstanding any other statutes, and make such  
5 records available for inspection by the examiners and by the  
6 prosecution and defense counsels. Records shall not be re-  
7 disclosed except to the extent permitted by law.

8       (10) All public agencies in possession of medical, mental  
9 health, social, and juvenile records, and any other pertinent  
10 records of a defendant ordered to be examined under this  
11 chapter, shall provide those records to the court,  
12 notwithstanding any other state statute.

13       (11) The compensation of persons making or assisting in  
14 the examination, other than those retained by the nonindigent  
15 defendant, who are not undertaking the examination upon  
16 designation by the director of health as part of their normal  
17 duties as employees of the State or a county, shall be paid by  
18 the State."

19       SECTION 3. Section 704-404, Hawaii Revised Statutes, is  
20 amended to read as follows:

21       "**§704-404 Examination of defendant with respect to**  
22 **physical or mental disease, disorder, or defect[-] excluding**



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1 fitness to proceed. (1) ~~Whenever the defendant has filed a~~  
2 ~~notice of intention to rely on the defense of physical or mental~~  
3 ~~disease, disorder, or defect excluding responsibility, or there~~  
4 ~~is reason to doubt the defendant's fitness to proceed, or reason~~  
5 ~~to believe that the physical or mental disease, disorder, or~~  
6 ~~defect of the defendant will or has become an issue in the case,~~  
7 the court may immediately suspend all further proceedings in the  
8 prosecution. If a trial jury has been empanelled, it shall be  
9 discharged or retained at the discretion of the court. The  
10 discharge of the trial jury shall not be a bar to further  
11 prosecution.

12 (2) Upon suspension of further proceedings in the  
13 prosecution, the court shall appoint three qualified examiners  
14 in felony cases and one qualified examiner in nonfelony cases to  
15 examine and report upon the physical and mental condition of the  
16 defendant. In felony cases the court shall appoint at least one  
17 psychiatrist and at least one licensed psychologist. The third  
18 member may be a psychiatrist, licensed psychologist, or  
19 qualified physician. One of the three shall be a psychiatrist  
20 or licensed psychologist designated by the director of health  
21 from within the department of health. In nonfelony cases the  
22 court may appoint either a psychiatrist or a licensed

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1 psychologist. All examiners shall be appointed from a list of  
2 certified examiners as determined by the department of  
3 health. The court, in appropriate circumstances, may appoint an  
4 additional examiner or examiners. The examination may be  
5 conducted on an out-patient basis or, in the court's discretion,  
6 when necessary the court may order the defendant to be committed  
7 to a hospital or other suitable facility for the purpose of the  
8 examination for a period not exceeding thirty days, or such  
9 longer period as the court determines to be necessary for the  
10 purpose. The court may direct that one or more qualified  
11 physicians or psychologists retained by the defendant be  
12 permitted to witness the examination. As used in this section,  
13 the term "licensed psychologist" includes psychologists exempted  
14 from licensure by section 465-3(a)(3).

15 (3) An examination performed under this section may employ  
16 any method that is accepted by the professions of medicine or  
17 psychology for the examination of those alleged to be affected  
18 by a physical or mental disease, disorder, or defect; provided  
19 that each examiner shall form and render diagnoses and opinions  
20 upon the physical and mental condition of the defendant  
21 independently from the other examiners, and the examiners, upon  
22 approval of the court, may secure the services of clinical

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1 psychologists and other medical or paramedical specialists to  
2 assist in the examination and diagnosis.

3 (4) The examinations for fitness to proceed and penal  
4 responsibility shall be conducted separately unless a combined  
5 examination has been requested by the defendant or for good  
6 cause shown. The report of the examination for fitness to  
7 proceed shall be separate from the report of the examination for  
8 penal responsibility.

9 ~~[(4)]~~ (5) The report of the examination for fitness to  
10 proceed shall include the following:

11 (a) A description of the nature of the examination;

12 ~~[(b) A diagnosis of the physical or mental condition of~~  
13 ~~the defendant;~~

14 ~~-(e)]~~ (b) An opinion as to the defendant's capacity to  
15 understand the proceedings against the defendant and  
16 to assist in the defendant's own defense;

17 ~~[(d) An opinion as to the extent, if any, to which the~~  
18 ~~capacity of the defendant to appreciate the~~  
19 ~~wrongfulness of the defendant's conduct or to conform~~  
20 ~~the defendant's conduct to the requirements of law was~~  
21 ~~impaired at the time of the conduct alleged;~~

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1 ~~(e) When directed by the court, an opinion as to the~~  
2 ~~capacity of the defendant to have a particular state~~  
3 ~~of mind that is required to establish an element of~~  
4 ~~the offense charged; and~~

5 ~~(f) Where more than one examiner is appointed, a statement~~  
6 ~~that the diagnosis and opinion rendered were arrived~~  
7 ~~at independently of any other examiner, unless there~~  
8 ~~is a showing to the court of a clear need for~~  
9 ~~communication between or among the examiners for~~  
10 ~~clarification. A description of the communication~~  
11 ~~shall be included in the report. After all reports~~  
12 ~~are submitted to the court, examiners may confer~~  
13 ~~without restriction.]~~

14 (c) An assessment of the risk of danger to the defendant  
15 or to the person or property of others for  
16 consideration and determination of the defendant's  
17 release on conditions; and

18 (d) Where more than one examiner is appointed, a statement  
19 that the opinion rendered was arrived at independently  
20 of any other examiner, unless there is a showing to  
21 the court of a clear need for communication between or  
22 among the examiners for clarification. A description

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1           of the communication shall be included in the  
2           report. After all reports are submitted to the court,  
3           examiners may confer without restriction.

4           ~~[(5)]~~ (6) If the examination cannot be conducted by reason  
5 of the unwillingness of the defendant to participate therein,  
6 the report shall so state and shall include, if possible, an  
7 opinion as to whether such unwillingness of the defendant was  
8 the result of physical or mental disease, disorder, or defect.

9           ~~[(6)]~~ (7) Three copies of the report of the examination,  
10 including any supporting documents, shall be filed with the  
11 clerk of the court, who shall cause copies to be delivered to  
12 the prosecuting attorney and to counsel for the defendant.

13           ~~[(7)]~~ (8) Any examiner shall be permitted to make a  
14 separate explanation reasonably serving to clarify the  
15 examiner's diagnosis or opinion.

16           ~~[(8)]~~ (9) The court shall obtain all existing medical,  
17 mental health, social, police, and juvenile records, including  
18 those expunged, and other pertinent records in the custody of  
19 public agencies, notwithstanding any other statutes, and make  
20 such records available for inspection by the examiners~~[-]~~ and by  
21 the prosecution and defense counsels. If, pursuant to this  
22 section, the court orders the defendant committed to a hospital

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1 or other suitable facility under the control of the director of  
2 health, then the county police departments shall provide to the  
3 director of health and the defendant copies of all police  
4 reports from cases filed against the defendant which have been  
5 adjudicated by the acceptance of a plea of guilty or no contest,  
6 a finding of guilt, acquittal, acquittal pursuant to section  
7 704-400, or by the entry of plea of guilty or no contest made  
8 pursuant to chapter 853, so long as the disclosure to the  
9 director of health and the defendant does not frustrate a  
10 legitimate function of the county police departments, with the  
11 exception of expunged records, records of or pertaining to any  
12 adjudication or disposition rendered in the case of a juvenile,  
13 or records containing data from the United States National Crime  
14 Information Center. The county police departments shall  
15 segregate or sanitize from the police reports information that  
16 would result in the likelihood or actual identification of  
17 individuals who furnished information in connection with its  
18 investigation, or who were of investigatory interest. Records  
19 shall not be re-disclosed except to the extent permitted by law.

20 [~~9~~] (10) All public agencies in possession of medical,  
21 mental health, social, and juvenile records, and any other  
22 pertinent records of a defendant ordered to be examined under

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1 this chapter, shall provide those records to the court,  
2 notwithstanding any other state statute.

3 [~~10~~] (11) The compensation of persons making or  
4 assisting in the examination, other than those retained by the  
5 nonindigent defendant, who are not undertaking the examination  
6 upon designation by the director of health as part of their  
7 normal duties as employees of the State or a county, shall be  
8 paid by the State."

9 SECTION 4. Section 704-406, Hawaii Revised Statutes, is  
10 amended to read as follows:

11 "**§704-406 Effect of finding of unfitness to**  
12 **proceed.** (1) If the court determines that the defendant lacks  
13 fitness to proceed, the proceeding against the defendant shall  
14 be suspended, except as provided in section 704-407, and the  
15 court shall commit the defendant to the custody of the director  
16 of health to be placed in an appropriate institution for  
17 detention, care, and treatment; provided that the commitment  
18 shall be limited in certain cases as follows:

19 (a) When the defendant is charged with a petty misdemeanor  
20 not involving violence or attempted violence, the  
21 commitment shall be limited to no longer than sixty

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1 days from the date the court determines the defendant  
2 lacks fitness to proceed; and

3 (b) When the defendant is charged with a misdemeanor not  
4 involving violence or attempted violence, the  
5 commitment shall be limited to no longer than one  
6 hundred twenty days from the date the court determines  
7 the defendant lacks fitness to proceed.

8 If the court is satisfied that the defendant may be released on  
9 conditions without risk of substantial danger to the defendant  
10 or to the person or property of others, the court shall order  
11 the defendant's release, which shall continue at the discretion  
12 of the court, on conditions the court determines necessary;  
13 provided that the release on conditions of a defendant charged  
14 with a petty misdemeanor not involving violence or attempted  
15 violence shall continue for no longer than sixty days, and the  
16 release on conditions of a defendant charged with a misdemeanor  
17 not involving violence or attempted violence shall continue for  
18 no longer than one hundred twenty days. A copy of the report  
19 filed pursuant to section 704-404 shall be attached to the order  
20 of commitment or order of release on conditions. When the  
21 defendant is committed to the custody of the director of health  
22 for detention, care, and treatment, the county police



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1 departments shall provide to the director of health and the  
2 defendant copies of all police reports from cases filed against  
3 the defendant that have been adjudicated by the acceptance of a  
4 plea of guilty or nolo contendere, a finding of guilt,  
5 acquittal, acquittal pursuant to section 704-400, or by the  
6 entry of a plea of guilty or nolo contendere made pursuant to  
7 chapter 853, so long as the disclosure to the director of health  
8 and the defendant does not frustrate a legitimate function of  
9 the county police departments; provided that expunged records,  
10 records of or pertaining to any adjudication or disposition  
11 rendered in the case of a juvenile, or records containing data  
12 from the United States National Crime Information Center shall  
13 not be provided. The county police departments shall segregate  
14 or sanitize from the police reports information that would  
15 result in the [±]likely[+] or actual identification of  
16 individuals who furnished information in connection with the  
17 investigation or who were of investigatory interest. Records  
18 shall not be re-disclosed except to the extent permitted by law.

19 (2) When the defendant is released on conditions after a  
20 finding of unfitness to proceed, the department of health shall  
21 establish and monitor a fitness restoration program consistent  
22 with conditions set by the court order of release, and shall

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1 inform the prosecuting attorney of the county that charged the  
2 defendant of the program and report the defendant's compliance  
3 therewith.

4       [+] (3) [+] When the court, on its own motion or upon the  
5 application of the director of health, the prosecuting attorney,  
6 or the defendant, [~~determines, after a hearing if a hearing is~~  
7 ~~requested,~~] has reason to believe that the defendant has  
8 regained fitness to proceed, [~~the penal proceeding shall be~~  
9 ~~resumed.~~] the court shall appoint three qualified examiners in  
10 murder in the first and second degrees, attempted murder in the  
11 first and second degrees, and class A felony cases and one  
12 qualified examiner in all other cases to examine and report upon  
13 the physical and mental condition of the defendant. In murder  
14 in the first and second degrees, attempted murder in the first  
15 and second degrees, and class A felony cases the court shall  
16 appoint at least one psychiatrist and at least one licensed  
17 psychologist. The third member may be a psychiatrist, licensed  
18 psychologist, or qualified physician. One of the three shall be  
19 a psychiatrist or licensed psychologist designated by the  
20 director of health from within the department of health. In all  
21 other cases, the one qualified examiner shall be a psychiatrist  
22 or licensed psychologist designated by the director of health

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1 from within the department of health. All examiners shall be  
2 appointed from a list of certified examiners as determined by  
3 the department of health. After a hearing, if a hearing is  
4 requested, if the court determines that the defendant has  
5 regained fitness to proceed the penal proceeding shall be  
6 resumed and the defendant shall no longer be committed to the  
7 custody of the director of health. In murder in the first and  
8 second degrees, attempted murder in the first and second  
9 degrees, and class A felony cases, upon the request of the  
10 prosecuting attorney, or the defendant, and in consideration of  
11 information provided by the defendant's clinical team, the court  
12 may order that the defendant remain in the custody of the  
13 director of health, for good cause shown, until the finding of  
14 fact with respect to criminal responsibility of the defendant  
15 (note: Debbie suggested alternative: "until a determination of  
16 penal responsibility, by the court or jury, has been made". If,  
17 however, the court is of the view that so much time has elapsed  
18 since the commitment or release on conditions of the defendant  
19 that it would be unjust to resume the proceeding, the court may  
20 dismiss the charge and:

21 (a) Order the defendant to be discharged;

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1 (b) Subject to the law governing the involuntary civil  
2 commitment of persons affected by physical or mental  
3 disease, disorder, or defect, order the defendant to  
4 be committed to the custody of the director of health  
5 to be placed in an appropriate institution for  
6 detention, care, and treatment; or

7 (c) Subject to the law governing involuntary outpatient  
8 treatment, order the defendant to be released on  
9 conditions the court determines necessary.

10 (4) An examination for fitness to proceed performed under  
11 this section may employ any method that is accepted by the  
12 professions of medicine or psychology for the examination of  
13 those alleged to be affected by a physical or mental disease,  
14 disorder, or defect, and shall include a review of records where  
15 defendant, while under the custody of the director of health,  
16 was placed; provided that the examiner, upon approval of the  
17 court, may secure the services of clinical psychologists and  
18 other medical or paramedical specialists to assist in the  
19 examination.

20 (5) The report of the examination for fitness to proceed  
21 shall include the following:

22 (a) A description of the nature of the examination;

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1        (b) An opinion as to the defendant's capacity to  
2                    understand the proceedings against the defendant and  
3                    to assist in the defendant's own defense; and  
4        (c) Where more than one examiner is appointed, a statement  
5                    that the opinion rendered was arrived at independently  
6                    of any other examiner, unless there is a showing to  
7                    the court of a clear need for communication between or  
8                    among the examiners for clarification. A description  
9                    of the communication shall be included in the  
10                   report. After all reports are submitted to the court,  
11                   examiners may confer without restriction.  
12        (6) All other procedures as set out in sections 704-404(6)  
13 through 704-404(11) shall be followed for the completion of the  
14 report of the examination for fitness to proceed performed under  
15 this section.  
16        [~~(4)~~] (7) If a defendant committed to the custody of the  
17 director of health for a limited period pursuant to subsection  
18 (1) is not found fit to proceed prior to the expiration of the  
19 commitment, the charge for which the defendant was committed for  
20 a limited period shall be dismissed. Upon dismissal of the  
21 charge, the defendant shall be released from custody unless the  
22 defendant is subject to prosecution for other charges, in which

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1 case, unless the defendant is subject to the law governing  
2 involuntary civil commitment, the court shall order the  
3 defendant's commitment to the custody of the director of health  
4 to be placed in an appropriate institution for detention, care,  
5 and treatment. Within a reasonable time following any other  
6 commitment under subsection (1), the director of health shall  
7 report to the court on whether the defendant presents a  
8 substantial likelihood of becoming fit to proceed in the  
9 future. The court, in addition, may appoint a panel of three  
10 qualified examiners in felony cases or one qualified examiner in  
11 nonfelony cases to make a report. If, following a report, the  
12 court determines that the defendant probably will remain unfit  
13 to proceed, the court may dismiss the charge and:

- 14 (a) Release the defendant; or  
15 (b) Subject to the law governing involuntary civil  
16 commitment, order the defendant to be committed to the  
17 custody of the director of health to be placed in an  
18 appropriate institution for detention, care, and  
19 treatment.

20 ~~[(5)]~~ (8) If a defendant released on conditions for a  
21 limited period pursuant to subsection (1) is not found fit to  
22 proceed prior to the expiration of the release on conditions

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1 order, the charge for which the defendant was released on  
2 conditions for a limited period shall be dismissed. Upon  
3 dismissal of the charge, the defendant shall be discharged from  
4 the release on conditions unless the defendant is subject to  
5 prosecution for other charges or subject to the law governing  
6 involuntary civil commitment, in which case the court shall  
7 order the defendant's commitment to the custody of the director  
8 of health to be placed in an appropriate institution for  
9 detention, care, and treatment. Within a reasonable time  
10 following any other release on conditions under subsection (1),  
11 the court shall appoint a panel of three qualified examiners in  
12 felony cases or one qualified examiner in nonfelony cases to  
13 report to the court on whether the defendant presents a  
14 substantial likelihood of becoming fit to proceed in the  
15 future. If, following the report, the court determines that the  
16 defendant probably will remain unfit to proceed, the court may  
17 dismiss the charge and:

- 18 (a) Release the defendant; or  
19 (b) Subject to the law governing involuntary civil  
20 commitment, order the defendant to be committed to the  
21 custody of the director of health to be placed in an

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1           appropriate institution for detention, care, and  
2           treatment."

3           SECTION 5. Statutory material to be repealed is bracketed  
4 and stricken. New statutory material is underscored.

5           SECTION 6. This Act shall take effect upon its approval.

6  
7  
8

INTRODUCED BY:

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BY REQUEST

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**Report Title:**

Forensic Mental Health Procedures.

**Description:**

Ensures the timely administration of mental health examinations; supports the process of expedient administration of justice; and clarifies the procedure for reevaluation of fitness to proceed after a finding of unfitness and attempts at restoration.

*The summary description of legislation appearing on this page is for informational purposes only and is not legislation or evidence of legislative intent.*

JUSTIFICATION SHEET

DEPARTMENT: HEALTH

TITLE: A BILL FOR AN ACT RELATING TO FORENSIC MENTAL HEALTH PROCEDURES.

PURPOSE: To: (1) ensure the timely and relevant administration of mental health examinations; (2) support the process of expedient administration of justice; and (3) clarify the procedure for re-evaluation of fitness to proceed after a finding of unfitness and attempts at restoration have been made.

MEANS: Add new section to chapter 704, Hawaii Revised Statutes (HRS); amend sections 704-404 and 704-406, HRS.

JUSTIFICATION: Under section 704-404(4), Hawaii Revised Statutes, if the defendant's fitness to proceed comes into question, a court must order a physical or mental examination of a criminal defendant to determine the defendant's fitness to proceed and penal responsibility simultaneously. During this period of time, a pretrial defendant, who may have a serious mental disease or defect, may be held in state custody for more than thirty days awaiting the evaluation due to the complexity of conducting an evaluation that examines both fitness to proceed and penal responsibility. It is in the best interest of the defendants and the judiciary for the examination process to proceed in a timely, expedient manner, and to separate these two different evaluations.

The current statute requires an examiner to conduct an evaluation and report on several elements: fitness to stand trial, penal responsibility, and a diagnosis. An evaluation of fitness does not necessarily

require determining a diagnosis or an exhaustive record review as it involves an examination of a defendant's current cognitive capacity and state. An evaluation of penal responsibility and clinical diagnosis is a more involved and time consuming endeavor requiring a thorough record review and a more complex examination of both current cognitive status and the defendant's state of mind at various points in the past. While evaluations of fitness to proceed are utilized by the court in each instance that they are ordered, only some of the evaluations of penal responsibility are utilized, because they only become relevant if the affirmative defense of lack of penal responsibility is found to be appropriate by the court. Pairing them together is more burdensome to the process, lengthens the time to complete the evaluation and report to the court, and generates a product that may not be utilized during adjudication. Furthermore, pairing fitness to stand trial and penal responsibility in one evaluation implicates ethical and legal concerns as an unfit defendant may not have sufficient capacity to consult with defense counsel to determine the impact of providing information to the examiner that may be incriminating. The American Bar Association's Criminal Justice Mental Health Standards (Standard 7-4.4) recommends that an evaluation of the defendant's mental condition at the time of the alleged offense and penal responsibility not be combined in any evaluation to determine fitness to stand trial unless the defense requests it or unless good cause is shown. The proposed amendment separates evaluations of fitness and evaluations of penal responsibility to improve the efficiency of the evaluation process and contribute the expedient administration of justice.

Section 704-406, Hawaii Revised Statutes, addresses the effect of a finding of unfitness to proceed including the

Department of Health's responsibility to establish and monitor a fitness restoration program consistent with the conditions set by the courts' orders. However, the statute is silent on procedures related to the re-evaluation of fitness after attempts have been made to restore fitness. The proposed amendment provides a needed procedure for this re-evaluation. It only requires one evaluation for fitness, rather than three if the alleged crime is a felony, because by this time the evaluator would have access to both the previous three evaluations, and the records from Hawaii state hospital or other facility where the defendant is residing pending fitness restoration. The amendment would require the evaluator to review the facility's records on the defendant as part of the examination.

Impact on the public: This measure provides a more efficient pretrial process leading to a decrease in the amount of delays defendants experience due to the evaluation process. This procedure enables a more expedient administration of justice.

Impact on the department and other agencies: This measure should assist in shortening the lengths of stay for defendants in the State's Hawaii State Hospital, and to some extent in the community correctional facilities, resulting in a significant savings of public funds. Requiring only one evaluation for the re-examination of fitness to proceed after a finding of unfitness and services to address fitness restoration will save the Judiciary from paying for two additional evaluations (currently the cost is \$1000 per evaluation) from independent examiners in felony cases. Furthermore, any additional costs for having to conduct separate evaluations for penal responsibility will be saved by requiring only one re-evaluation for fitness.

GENERAL FUND: Unspecified potential savings or expenses  
due to workflow and scheduling changes.

OTHER FUNDS: None.

PPBS PROGRAM  
DESIGNATION: HTH 495.

OTHER AFFECTED  
AGENCIES: Judiciary.

EFFECTIVE DATE: Upon approval.