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No. _____

TESTIMONY ON HOUSE BILL 555
RELATING TO EXAMINATIONS OF FITNESS TO PROCEED

by

Nolan P. Espinda, Director
Department of Public Safety

House Committee on Judiciary
Representative Scott Y. Nishimoto, Chair
Representative Joy A. San Buenaventura, Vice Chair

Friday, February 24, 2017; 2:00 p.m.
State Capitol, Conference Room 325

Chair Nishimoto, Vice Chair San Buenaventura, and Members of the Committee:

The Department of Public Safety (PSD), upon consideration of this bill in its current form, respectfully submits testimony in **opposition** to House Bill (HB) 555. This non-administration bill proposes to amend Section 704-404, Hawaii Revised Statutes, to clarify the provisions relating to examinations of defendants' fitness to proceed in the prosecution. As drafted, HB 555 would also restrict the courts' ability to direct defendants with severe mental health issues to the custody of the Department of Health's (DOH) Hawaii State Hospital (HSH). The courts' authority to decide placement pending evaluation and the defending attorneys' ability to advocate for desired placement should not be prohibited through statute.

PSD acknowledges that, notwithstanding any collaborative or cooperative agreements between PSD and DOH, delaying treatment for patients requiring mental health hospitalization could potentially pose danger to the patient, other patients, and staff. The recent Department of Justice (DOJ), Oahu Community Correctional Center (OCCC), Settlement Agreement clearly prescribed the more

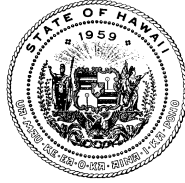
timely transfer of patients requiring hospital mental health treatment not available at OCCC.

PSD respectfully notes that the management of the HSH census directed in HB 555 will result in conversely increasing the number of admissions of mental health patients as inmates to PSD's Community Correctional Centers (CCC) throughout the State. Last year (2016), of approximately 250 total admissions, 200 were assigned to our CCCs and 50 to the State Hospital. The statutory amendment proposed in HB 555 would assign 50 more patients to PSD facilities, representing an annual increase in admissions of 20%.

This indicates a significant impact to the presently over-crowded CCC system if the population of special needs inmates, whose presence will clearly increase demands on the already overtaxed mental health housing and treatment resources, is increased by one-fifth. This proposed legislation will serve to expose the inmate population, staff, the facility and the State to greater risk. HB 555 purports to address the HSH census but unfortunately, does not consider its severe ramifications upon the CCC system.

In addition, this measure might adversely impact any DOJ follow-up on the recent American Civil Liberties Union (ACLU) letter of complaint as it pertains to overcrowding and PSD's ability to provide appropriate mental health care to its inmate population.

Thank you for the opportunity to present this testimony.



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**Testimony in SUPPORT of HB555
RELATING TO EXAMINATIONS OF FITNESS TO PROCEED**

REPRESENTATIVE SCOTT Y. NISHIMOTO, CHAIR
HOUSE COMMITTEE ON JUDICIARY

Hearing Date: Friday, February 24, 2017

Room Number: 325

1 **Fiscal Implications:** Undetermined at this time.

2 **Department Testimony:** The Department of Health (DOH) supports this measure and
3 offers comments and amendments.

4 The purpose of this bill is twofold:

5 With respect to Section 1, the purpose of this bill is to ensure that transfers to
6 Hawaii State Hospital (HSH) for evaluation are due to the need for acute hospital level
7 psychiatric treatment for mental illness. The Department of Health (DOH) strongly
8 supports this concept, offers comments and alternative language.

9 With respect to Section 2, the purpose of this bill is to make permanent, the time-
10 limited statutory changes enacted by the legislature last session stemming from the
11 2016 Penal Code Task Force review, intended to provide flexibility for the DOH to
12 assign work to forensic examiners during a period of temporary staffing deficit. The
13 DOH does not support this section.

14 The DOH anticipates that demand for forensic mental health services, including
15 the need for secure settings to deliver them, will continue and that our state must
16 pursue a variety of initiatives focused on the safe, effective and efficient delivery of
17 mental health supports and forensic evaluations. We acknowledge the importance of
18 providing some individuals, with a fitness assessment in a hospital setting as opposed

1 to detention setting. This measure, HB555, as amended, will ensure that pretrial
2 commitment orders to the custody of the director of health for evaluation are the result
3 of a clinical determination and assessment of need for hospital level of care.

4 In current practice, the court has discretion to order that a defendant be
5 transferred to a hospital “when necessary” for a pretrial forensic evaluation pursuant to
6 HRS 704-404. There currently are no clearly defined criteria for determining
7 “necessary” level of care, which can result in a defendant being ordered to the HSH who
8 does not need a hospital level of care; nor is there available, at that juncture in the court
9 proceedings, a mental health professional to assess the level of care a defendant might
10 need.

11 A legislative approach to address this gap in statute is to revise HRS 704-404 to
12 indicate that such transfers to the custody of DOH for evaluation of fitness are due to
13 the need for acute hospital level psychiatric treatment for mental illness. HB555
14 provides that defendants awaiting forensic examinations may only be transferred from
15 jail to the HSH pursuant to HRS Section 334-74, a statute pertaining to the transfer of
16 “residents” of correctional facilities who are in need of acute psychiatric treatment for
17 mental illness to a facility operated by the DOH. However, we believe that this provision
18 needs to be amended. In this context, “resident” applies to inmates located in prison
19 facilities and does not apply to detainees located in jail settings.

20 Pursuant to already established law (HRS 334-74), as well as a formalized in a
21 Memorandum of Agreement (MOA) between the DOH and the PSD, a person in the
22 custody of the Director of Public Safety, in need of acute psychiatric treatment for
23 mental illness, may be transferred to a facility operated by the DOH. The procedures
24 outlined in the MOA include psychiatric assessment of need for hospital level of care
25 and coordination between the PSD and the DOH.

26 Please note that bail proceedings are suspended for persons ordered to the HSH
27 for evaluation. Bail proceedings are not suspended for persons awaiting evaluation

1 while in the custody of the PSD, so that they may be released on bail pending the
2 evaluation.

3 The DOH supports the policy of ensuring that transfers to DOH custody for
4 evaluation of fitness are due to the need for acute hospital level psychiatric treatment for
5 mental illness, and we recommend consideration of alternative language.

6 With respect to section 2 of this measure, in late 2015 and early 2016, parallel to
7 rebuilding the DOH Courts Branch staffing (which is now complete), the Penal Code
8 Review Taskforce developed an omnibus bill that contained a provision intended to
9 provide flexibility for the DOH to assign work to independent, non-state employed
10 forensic examiners during that specific period of temporary staffing deficit. This
11 provision, as passed in HB2561/Act 231, is scheduled to sunset on July 1, 2018.
12 Section 2 of SB145 repeals the sunset provision, making this flexible assignment
13 permanent.

14 The DOH thanks the Legislature for its support of the DOH and opposes the concept
15 of making permanent the time-limited statutory changes enacted by the legislature last
16 session. However, this change is not needed. Therefore, DOH does not support the
17 provisions in Section 2 of this bill which makes changes to Act 231, Session Laws of
18 Hawaii 2016.

19 Thank you for the opportunity to testify. We offer the following amendments.

20 **Offered Amendments:**

21 We propose to strike all of Section 2 from this bill.

22 We propose an effective date of July 1, 2017, or when enacted.

23 For your consideration, our amendment is as follows:

24 ["SECTION 5. Section 704-404, Hawaii Revised Statutes, is amended by amending
25 subsection (2) to read as follows:

1 “(2) Upon suspension of further proceedings in the prosecution, the court shall appoint
2 three qualified examiners in felony cases, and one qualified examiner in nonfelony
3 cases, to examine and report upon the physical and mental condition of the defendant.
4 In felony cases, the court shall appoint at least one psychiatrist and at least one
5 licensed psychologist. The third member may be a psychiatrist, licensed psychologist,
6 or qualified physician. One of the three shall be a psychiatrist or licensed psychologist
7 designated by the director of health from within the department of health. In nonfelony
8 cases, the court may appoint either a psychiatrist or a licensed psychologist. All
9 examiners shall be appointed from a list of certified examiners as determined by the
10 department of health. The court, in appropriate circumstances, may appoint an
11 additional examiner or examiners. The examination may be conducted while the
12 defendant is in custody or on release or, ~~[in the court's discretion,]~~ when necessary ~~[the~~
13 ~~court may order]~~ the defendant ~~[to]~~ may be [committed] transferred to a hospital or other
14 suitable facility, pursuant to section 334-74 regarding transfer of residents of
15 correctional facilities, or pursuant to any agreements entered into between the
16 department of health and the department of public safety regarding transfer of detainees
17 of community correctional centers, for the purpose of the examination ~~[for a period not~~
18 ~~exceeding thirty days, or a longer period as the court determines to be necessary for the~~
19 ~~purpose.]~~ The court may direct that one or more qualified physicians or psychologists
20 retained by the defendant be permitted to witness the examination. As used in this
21 section, the term “licensed psychologist” includes psychologists exempted from
22 licensure by section 465 3(a) (3).”]

From: mailinglist@capitol.hawaii.gov
Sent: Wednesday, February 22, 2017 6:57 PM
To: JUDtestimony
Cc: louis@hawaiidisabilityrights.org
Subject: Submitted testimony for HB555 on Feb 24, 2017 14:00PM

HB555

Submitted on: 2/22/2017

Testimony for JUD on Feb 24, 2017 14:00PM in Conference Room 325

Submitted By	Organization	Testifier Position	Present at Hearing
Louis Erteschik	Hawaii Disability Rights Center	Comments Only	Yes

Comments: We are sympathetic to the fact that the Hawaii State Hospital is overcrowded and that having many residents there who are merely being evaluated for fitness may be taxing their resources. However, we are equally concerned that this bill may make it more difficult to transfer inmates to the State Hospital who are genuinely in need of mental health treatment. The treatment they receive at the prison is not as comprehensive and they may languish for several months waiting for their evaluation and that obviously does not serve them well. We also believe that retaining the Judge's flexibility is generally a good policy. If the concern is that Judges are too frequently committing prisoners to the State Hospital when it is not necessary, then the better approach may be to work with the Judiciary to provide appropriate guidelines and parameters for those actions. But the ability of the Judge to Order a defendant to the State Hospital should not be repealed as this bill does.

Please note that testimony submitted less than 24 hours prior to the hearing, improperly identified, or directed to the incorrect office, may not be posted online or distributed to the committee prior to the convening of the public hearing.

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