

---

---

# A BILL FOR AN ACT

RELATING TO THE ADMINISTRATION OF JUSTICE.

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

PART I

SECTION 1. Chapter 704, Hawaii Revised Statutes, is amended by adding a new section to be appropriately designated and to read as follows:

"§704-\_\_\_\_\_ Effect of finding of unfitness to proceed for defendants charged with petty misdemeanors not involving violence or attempted violence; criminal justice diversion program. (1) In cases where the defendant is charged with a petty misdemeanor not involving violence or attempted violence, if, at the hearing held pursuant to section 704-404(2)(a) or at a further hearing held after the appointment of an examiner pursuant to section 704-404(2)(b), the court determines that the defendant lacks fitness to proceed, the court may:

(a) Suspend the proceedings and order the defendant to be transferred to the custody of the director of health and placed in a hospital or other suitable facility



1           for further examination and assessment for up to seven  
2           days; or

3           (b) Dismiss the charges with or without prejudice.

4           (2) If the defendant's clinical team determines that the  
5 defendant meets the criteria for involuntary hospitalization set  
6 forth in section 334-60.2, the director of health shall file a  
7 petition for involuntary hospitalization pursuant to section  
8 334-60.3 in family court. If the petition is granted, the  
9 defendant shall remain hospitalized for a time period as  
10 provided by section 334-60.6.

11           (3) If the defendant's clinical team determines that the  
12 defendant does not meet the criteria for involuntary  
13 hospitalization, or the family court denies the petition for  
14 involuntary hospitalization, or in the anticipation of discharge  
15 after involuntary hospitalization pursuant to section 334-60.3,  
16 the clinical team shall determine whether an assisted community  
17 treatment plan is appropriate pursuant to chapter 334, part  
18 VIII. If the clinical team determines that an assisted  
19 community treatment plan is appropriate, the psychiatrist or  
20 advanced practice registered nurse from the clinical team shall  
21 prepare the certificate for assisted community treatment



1 specified by section 334-123. The clinical team shall identify  
2 a community mental health outpatient program that agrees to  
3 provide mental health services to the defendant as the  
4 designated mental health program under the assisted community  
5 treatment order. The defendant may be held at the hospital or  
6 other suitable facility pending the family court hearing on the  
7 petition for assisted community treatment. If the petition is  
8 granted, the defendant shall be released for treatment with the  
9 designated mental health program once the assisted community  
10 treatment order is issued and the initial treatment consistent  
11 with the assisted community treatment plan is administered to  
12 the defendant.

13 (4) If the petition for assisted community treatment is  
14 not granted or the clinical team determines that an assisted  
15 community treatment order is not appropriate, the defendant  
16 shall be:

17 (a) Referred to an appropriate outpatient mental health  
18 program for continued support, care, and treatment;

19 and

20 (b) Discharged from the hospital or other suitable  
21 facility."



1 SECTION 2. Section 704-404, Hawaii Revised Statutes, is  
2 amended as follows:

3 1. By amending subsections (1) and (2) to read:

4 "(1) Whenever there is reason to doubt the defendant's  
5 fitness to proceed, the court may immediately suspend all  
6 further proceedings in the prosecution; provided that for any  
7 defendant not subject to an order of commitment to a hospital  
8 for the purpose of the examination, neither the right to bail  
9 nor proceedings pursuant to chapter 804 shall be suspended. If  
10 a trial jury has been [~~empanelled,~~] empaneled, it shall be  
11 discharged or retained at the discretion of the court. The  
12 discharge of the trial jury shall not be a bar to further  
13 prosecution.

14 (2) Upon suspension of further proceedings in the  
15 prosecution[~~r~~]:

16 (a) In nonfelony cases, if a court-based certified  
17 examiner is available, the court shall appoint the  
18 court-based certified examiner to examine and provide  
19 an expedited report solely upon the issue of the  
20 defendant's fitness to proceed. The court-based  
21 certified examiner shall file the examiner's report



1 with the court within two days of the appointment of  
2 the examiner. A fitness determination hearing shall  
3 be held within two days of the filing of the report,  
4 or as soon thereafter as is practicable;

5 (b) In nonfelony cases where a court-based certified  
6 examiner is not available, the court shall appoint  
7 [three qualified examiners in felony cases, and] one  
8 qualified examiner [in nonfelony cases,] to examine  
9 and report upon the defendant's fitness to proceed.

10 The court may appoint as the examiner either a  
11 psychiatrist or a licensed psychologist; and

12 (c) In felony cases, the court shall appoint three  
13 qualified examiners to examine and report upon the  
14 defendant's fitness to proceed. The court shall  
15 appoint as examiners [at least one psychiatrist and at  
16 least one licensed psychologist. The third examiner  
17 may be a psychiatrist, licensed psychologist, or  
18 qualified physician. One] psychiatrists, licensed  
19 psychologists, or qualified physicians; provided that  
20 one of the three examiners shall be a psychiatrist or



1 licensed psychologist designated by the director of  
2 health from within the department of health.  
3 ~~[In nonfelony cases, the court may appoint as examiners either a~~  
4 ~~psychiatrist or a licensed psychologist.]~~ All examiners shall  
5 be appointed from a list of certified examiners as determined by  
6 the department of health. The court, in appropriate  
7 circumstances, may appoint an additional examiner or examiners.  
8 The examination may be conducted while the defendant is in  
9 custody or on release or, in the court's discretion, when  
10 necessary the court may order the defendant to be committed to a  
11 hospital or other suitable facility for the purpose of the  
12 examination for a period not exceeding thirty days, or a longer  
13 period as the court determines to be necessary for the purpose.  
14 The court may direct that one or more qualified physicians or  
15 psychologists retained by the defendant be permitted to witness  
16 the examination. As used in this section, the term "licensed  
17 psychologist" includes psychologists exempted from licensure by  
18 section 465-3(a)(3) and "qualified physician" means a physician  
19 qualified by the court for the specific evaluation ordered."  
20 2. By amending subsection (5) to read:



1           "(5) [~~The~~] Except in the case of an examination pursuant  
2 to subsection (2)(a), the report of the examination for fitness  
3 to proceed shall include the following:

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

5           **(b)** A diagnosis of the physical or mental condition of the  
6 defendant;

7           ~~[(b)]~~ (c) An opinion as to the defendant's capacity to  
8 understand the proceedings against the defendant and  
9 to assist in the defendant's own defense;

10          ~~[(e)]~~ (d) An assessment of the risk of danger to the  
11 defendant or to the person or property of others for  
12 consideration and determination of the defendant's  
13 release on conditions; and

14          ~~[(d)]~~ (e) Where more than one examiner is appointed, a  
15 statement that the opinion rendered was arrived at  
16 independently of any other examiner, unless there is a  
17 showing to the court of a clear need for communication  
18 between or among the examiners for clarification. A  
19 description of the communication shall be included in  
20 the report. After all reports are submitted to the  
21 court, examiners may confer without restriction."



1           3. By amending subsection (7) to read:

2           "(7) [~~Three copies~~] A copy of the report of the  
3 examination, including any supporting documents, shall be filed  
4 with the clerk of the court [~~, who shall cause copies to be~~  
5 ~~delivered to the prosecuting attorney and to counsel for the~~  
6 ~~defendant]~~."

7           SECTION 3. Section 704-406, Hawaii Revised Statutes, is  
8 amended by amending subsection (1) to read as follows:

9           "(1) If the court determines that the defendant lacks  
10 fitness to proceed, the proceeding against the defendant shall  
11 be suspended, except as provided in [~~section~~] sections  
12 704-407 [~~7~~] and 704-\_\_\_, and the court shall commit the defendant  
13 to the custody of the director of health to be placed in an  
14 appropriate institution for detention, assessment, care, and  
15 treatment; provided that [~~the commitment shall be limited in~~  
16 ~~certain cases as follows~~].

17           ~~(a) When~~ when the defendant is charged with a petty  
18 misdemeanor not involving violence or attempted  
19 violence, the [~~commitment shall be limited to no~~  
20 ~~longer than sixty days from the date the court~~  
21 ~~determines the defendant lacks fitness to proceed; and~~





1       ~~(b) When the defendant is charged with a misdemeanor not~~  
2           ~~involving violence or attempted violence, the~~  
3           ~~commitment shall be limited to no longer than one~~  
4           ~~hundred twenty days from the date the court determines~~  
5           ~~the defendant lacks fitness to proceed.] defendant~~  
6           ~~shall be diverted from the criminal justice system~~  
7           ~~pursuant to section 704- .~~

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



1 the defendant is committed to the custody of the director of  
2 health for detention, assessment, care, and treatment, the  
3 county police departments shall provide to the director of  
4 health and the defendant copies of all police reports from cases  
5 filed against the defendant that have been adjudicated by the  
6 acceptance of a plea of guilty or nolo contendere, a finding of  
7 guilt, acquittal, acquittal pursuant to section 704-400, or by  
8 the entry of a plea of guilty or nolo contendere made pursuant  
9 to chapter 853; provided that the disclosure to the director of  
10 health and the defendant does not frustrate a legitimate  
11 function of the county police departments; provided further that  
12 expunged records, records of or pertaining to any adjudication  
13 or disposition rendered in the case of a juvenile, or records  
14 containing data from the United States National Crime  
15 Information Center shall not be provided. The county police  
16 departments shall segregate or sanitize from the police reports  
17 information that would result in the likely or actual  
18 identification of individuals who furnished information in  
19 connection with the investigation or who were of investigatory  
20 interest. No further disclosure of records shall be made except  
21 as provided by law."



1 SECTION 4. Section 704-411, Hawaii Revised Statutes, is  
2 amended by amending subsection (3) to read as follows:

3 "(3) When ordering a hearing pursuant to subsection (2):

4 (a) In nonfelony cases, the court shall appoint a  
5 qualified examiner to examine and report upon the  
6 physical and mental condition of the defendant. The  
7 court may appoint either a psychiatrist or a licensed  
8 psychologist. The examiner may be designated by the  
9 director of health from within the department of  
10 health. The examiner shall be appointed from a list  
11 of certified examiners as determined by the department  
12 of health. The court, in appropriate circumstances,  
13 may appoint an additional examiner or examiners; and  
14 (b) In felony cases, the court shall appoint three  
15 qualified examiners to examine and report upon the  
16 physical and mental condition of the defendant. In  
17 each case, the court shall appoint [~~at least one~~  
18 ~~psychiatrist and at least one licensed psychologist.~~  
19 ~~The third member may be a psychiatrist, a licensed~~  
20 ~~psychologist, or a qualified physician. One] as  
21 examiners psychiatrists, licensed psychologists, or~~



1           qualified physicians; provided the one of the three  
2           shall be a psychiatrist or licensed psychologist  
3           designated by the director of health from within the  
4           department of health. The three examiners shall be  
5           appointed from a list of certified examiners as  
6           determined by the department of health.

7 To facilitate the examination and the proceedings thereon, the  
8 court may cause the defendant, if not then confined, to be  
9 committed to a hospital or other suitable facility for the  
10 purpose of examination for a period not exceeding thirty days or  
11 a longer period as the court determines to be necessary for the  
12 purpose upon written findings for good cause shown. The court  
13 may direct that qualified physicians or psychologists retained  
14 by the defendant be permitted to witness the examination. The  
15 examination and report and the compensation of persons making or  
16 assisting in the examination shall be in accordance with section  
17 704-404(3), (5)(a) [~~and~~], (b), (d), and (e), (7), (8), (9),  
18 (10), and (11). As used in this section, the term "licensed  
19 psychologist" includes psychologists exempted from licensure by  
20 section 465-3(a)(3) and "qualified physician" means a physician  
21 qualified by the court for the specific evaluation ordered."



1 SECTION 5. Section 704-414, Hawaii Revised Statutes, is  
2 amended by amending subsection (1) to read as follows:

3 "(1) Upon filing of an application pursuant to section  
4 704-412 for discharge or conditional release, or upon the filing  
5 of an application pursuant to section 704-413 for discharge, the  
6 court shall appoint three qualified examiners in felony cases,  
7 and one qualified examiner in nonfelony cases, to examine and  
8 report upon the physical and mental condition of the defendant.  
9 In felony cases, the court shall appoint [~~at least one~~  
10 ~~psychiatrist and at least one licensed psychologist. The third~~  
11 ~~member may be a psychiatrist, a licensed psychologist, or a~~  
12 ~~qualified physician. One]~~ as examiners psychiatrists, licensed  
13 psychologists, or qualified physicians; provided that one of the  
14 three shall be a psychiatrist or licensed psychologist  
15 designated by the director of health from within the department  
16 of health. The examiners shall be appointed from a list of  
17 certified examiners as determined by the department of health.  
18 To facilitate the examination and the proceedings thereon, the  
19 court may cause the defendant, if not then confined, to be  
20 committed to a hospital or other suitable facility for the  
21 purpose of the examination and may direct that qualified



1 physicians or psychologists retained by the defendant be  
2 permitted to witness the examination. The examination and  
3 report and the compensation of persons making or assisting in  
4 the examination shall be in accordance with section 704-404(3),  
5 (5) (a) [~~and~~], (b), (d), and (e), (7), (8), (9), (10), and (11).  
6 As used in this section, the term "licensed psychologist"  
7 includes psychologists exempted from licensure by section 465-  
8 3(a)(3) and "qualified physician" means a physician qualified by  
9 the court for the specific evaluation ordered."

10 PART II

11 SECTION 6. The legislature finds that the recommendations  
12 of the Hawaii Summit on Improving the Governmental Response to  
13 Community Mental Illness hosted by the State Justice Institute,  
14 National Center for State Courts, Conference of Chief Justices,  
15 and the Conference of State Court Administrators on November 6,  
16 2019, as well as studies such as the 2016-2017 Policy Paper by  
17 the Conference of State Court Administrators' "Decriminalization  
18 of Mental Illness: Fixing a Broken System", demonstrate that  
19 jails nationwide have become the default mental health method of  
20 treatment for numerous low-level defendants whose needs could be  
21 far more effectively addressed by diversion into behavioral



1 health treatment. Moreover, once the issue of mental health  
2 surfaces during a judicial proceeding, the defendant more often  
3 than not actually spends far more time being incarcerated  
4 without being treated and being denied due process while  
5 awaiting mental health evaluations. With the cost of  
6 incarceration in Hawaii averaging over \$150 per day and the high  
7 rate of recidivism shown by these studies because of the lack of  
8 treatment, the legislature finds that allowing the parties to  
9 opt out of judicial proceedings by entering into agreements at  
10 any stage of the process is more cost-effective with respect to  
11 time, money, and community results.

12 The purpose of this part is to:

- 13 (1) Authorize the courts to enter into agreements with the  
14 parties where there is reason to believe that the  
15 defendant has a physical or mental disease, disorder,  
16 or defect that will or has become an issue in the  
17 criminal case;
- 18 (2) Amend the requirements for appointing qualified  
19 examiners to perform examinations for penal  
20 responsibility; and



1 (3) Require an examination for penal responsibility to be  
2 conducted within fifteen days after a finding of  
3 fitness to proceed.

4 SECTION 7. Section 704-407.5, Hawaii Revised Statutes, is  
5 amended as follows:

6 1. By amending subsections (1) and (2) to read:

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

15 Whenever there is reason to believe that the physical or  
16 mental disease, disorder, or defect of the defendant will or has  
17 become an issue in the case, the court may enter into an  
18 agreement with the parties at any stage of the proceeding to  
19 divert the case into an evaluation of the defendant, treatment  
20 of the defendant, including residential or rehabilitation  
21 treatment; or any other course or procedure, including diversion





1 into specialized courts. Such agreements may include in-court  
2 clinical evaluations.

3 (2) ~~[The]~~ For those cases not diverted by an agreement  
4 pursuant to subsection (1), the court shall appoint three  
5 qualified examiners [in felony cases] for class A and class B  
6 felonies, as well as for class C felonies involving violence or  
7 attempted violence, and one qualified examiner in nonfelony  
8 cases and class C felonies not involving violence or attempted  
9 violence, to examine and report upon the physical or mental  
10 disease, disorder, or defect of the defendant at the time of the  
11 conduct. In [felony] cases [7] requiring three examiners, the  
12 court shall appoint at least one psychiatrist [and] or at least  
13 one licensed psychologist. [The] When applicable, the third  
14 examiner may be a psychiatrist, licensed psychologist, or  
15 qualified physician. One of the three examiners shall be a  
16 psychiatrist or licensed psychologist designated by the director  
17 of health from within the department of health. In nonfelony  
18 cases [7] and class C felonies not involving violence or  
19 attempted violence, the court may appoint as examiners either a  
20 psychiatrist or a licensed psychologist. All examiners shall be  
21 appointed from a list of certified examiners as determined by



1 the department of health. The court, in appropriate  
2 circumstances, may appoint an additional examiner or examiners.  
3 The court may direct that one or more qualified physicians or  
4 psychologists retained by the defendant be permitted to witness  
5 the examination. As used in this section, the term "licensed  
6 psychologist" includes psychologists exempted from licensure by  
7 section 465-3(a)(3) and "qualified physician" means a physician  
8 qualified by the court for the specific evaluation ordered."

9 2. By amending subsection (4) to read:

10 "(4) For defendants charged with felonies, the  
11 examinations for fitness to proceed under section 704-404 and  
12 penal responsibility under this section shall be conducted  
13 separately unless a combined examination has been ordered by the  
14 court upon a request by the defendant or upon a showing of good  
15 cause to combine the examinations. When the examinations are  
16 separate, the examination for penal responsibility under this  
17 section shall not be ordered more than [~~thirty~~] fifteen days  
18 after a finding of fitness to proceed. The report of the  
19 examination for fitness to proceed shall be separate from the  
20 report of the examination for penal responsibility unless a  
21 combined examination has been ordered. For defendants charged



1 with offenses other than felonies, a combined examination is  
2 permissible when ordered by the court."

3 PART III

4 SECTION 8. This Act does not affect rights and duties that  
5 matured, penalties that were incurred, and proceedings that were  
6 begun before its effective date.

7 SECTION 9. Statutory material to be repealed is bracketed  
8 and stricken. New statutory material is underscored.

9 SECTION 10. This Act shall take effect on July 1, 2050.



**Report Title:**

Fitness to Proceed; Petty Misdemeanors; DOH; Penal  
Responsibility; Mental Health Treatment; Agreements

**Description:**

Amends the effect of finding a defendant charged with a petty misdemeanor not involving violence or attempted violence unfit to proceed. Amends the requirements for fitness determination hearings, court-appointed examiners, and examination reports. Authorizes the courts to enter into agreements to divert into residential, rehabilitative, and other treatment those defendants whose physical or mental disease, disorder, or defect is believed to have become or will become an issue in a judicial case. Amends the requirements for appointing qualified examiners to perform examinations for penal responsibility. Requires an examination for penal responsibility to be conducted within fifteen days after a finding of fitness to proceed. Effective 7/1/2050. (HD2)

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

