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# A BILL FOR AN ACT

RELATING TO THE ADMINISTRATION OF JUSTICE.

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

1 PART I

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

5 "§704- Proceedings for defendants charged with petty  
6 misdemeanors not involving violence or attempted violence;  
7 criminal justice diversion program. (1) In cases where the  
8 defendant is charged with a petty misdemeanor not involving  
9 violence or attempted violence, if, at the hearing held pursuant  
10 to section 704-404(2)(a) or at a further hearing held after the  
11 appointment of an examiner pursuant to section 704-404(2)(b),  
12 the court determines that the defendant is fit to proceed, then  
13 the proceedings against the defendant shall resume. In all  
14 other cases where fitness remains an outstanding issue, the  
15 court shall continue the suspension of the proceedings and  
16 commit the defendant to the custody of the director of health to



1 be placed in a hospital or other suitable facility for further  
2 examination and assessment.

3 (2) Within seven days from the commitment of the defendant  
4 to the custody of the director of health, or as soon thereafter  
5 as is practicable, the director of health shall report to the  
6 court on the defendant's current capacity to understand the  
7 proceedings against defendant and defendant's current ability to  
8 assist in defendant's own defense. If, following the report,  
9 the court finds defendant fit to proceed, the proceedings  
10 against defendant shall resume. In all other cases, the court  
11 shall dismiss the charge with or without prejudice in the  
12 interest of justice. The director of health may at any time  
13 proceed under the provisions of section 334-60.2 or 334-121."

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

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

17 "(1) Whenever there is reason to doubt the defendant's  
18 fitness to proceed, the court may immediately suspend all  
19 further proceedings in the prosecution; provided that for any  
20 defendant not subject to an order of commitment to [~~a hospital~~]  
21 the director of health for the purpose of the examination,



1 neither the right to bail nor proceedings pursuant to chapter  
2 804 shall be suspended. If a trial jury has been [~~empanelled,~~]  
3 empaneled, it shall be discharged or retained at the discretion  
4 of the court. The discharge of the trial jury shall not be a  
5 bar to further prosecution.

6 (2) Upon suspension of further proceedings in the  
7 prosecution[~~7~~]:

8 (a) In cases where the defendant is charged with a petty  
9 misdemeanor not involving violence or attempted  
10 violence, if a court-based certified examiner is  
11 available, the court shall appoint the court-based  
12 certified examiner to examine and provide an expedited  
13 report solely upon the issue of the defendant's  
14 capacity to understand the proceedings against the  
15 defendant and defendant's ability to assist in the  
16 defendant's own defense. The court-based certified  
17 examiner shall file the examiner's report with the  
18 court within two days of the appointment of the  
19 examiner, or as soon thereafter is practicable. A  
20 hearing shall be held to determine if the defendant is



1 fit to proceed within two days of the filing of the  
2 report, or as soon thereafter as is practicable;

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

9 The court may appoint as the examiner either a  
10 psychiatrist or a licensed psychologist designated by  
11 the director of health from within the department of  
12 health; and

13 (c) In felony cases, the court shall appoint three  
14 qualified examiners to examine and report upon the  
15 defendant's fitness to proceed. The court shall  
16 appoint as examiners ~~[at least one psychiatrist and at~~  
17 ~~least one licensed psychologist. The third examiner~~  
18 ~~may be a psychiatrist, licensed psychologist, or~~  
19 ~~qualified physician. One]~~ psychiatrists, licensed  
20 psychologists, or qualified physicians; provided that  
21 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          ~~[(c)]~~ (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 the defendant is charged with a petty misdemeanor  
18 not involving violence or attempted violence, the  
19 [~~commitment shall be limited to no longer than sixty~~  
20 ~~days from the date the court determines the defendant~~  
21 ~~lacks fitness to proceed,~~] defendant shall be diverted



1           from the criminal justice system pursuant to section  
2           704-     ; 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 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  
17 charged with a misdemeanor not involving violence or attempted  
18 violence shall continue for no longer than one hundred twenty  
19 days. A copy of all reports filed pursuant to section 704-404  
20 shall be attached to the order of commitment or order of release  
21 on conditions that is provided to the department of health.~~





1 When the defendant is committed to the custody of the director  
2 of 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 that 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) Remove the time requirement for the ordering of the  
2 penal responsibility evaluation.

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

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

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

14 Whenever there is reason to believe that the physical or  
15 mental disease, disorder, or defect of the defendant will or has  
16 become an issue in the case, the court may enter into an  
17 agreement with the parties at any stage of the proceeding to  
18 divert the case into an evaluation of the defendant, treatment  
19 of the defendant, including residential or rehabilitation  
20 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 to examine and report upon the physical or mental disease,  
9 disorder, or defect of the defendant at the time of the conduct.  
10 For class C felonies not involving violence or attempted  
11 violence, the court may appoint one or three qualified examiners  
12 to examine and report upon the physical or mental disease,  
13 disorder, or defect of the defendant at the time of the conduct.  
14 In ~~[felony]~~ cases~~[,]~~ where the court appoints three examiners,  
15 the court shall appoint ~~[at least one psychiatrist and at least~~  
16 ~~one licensed psychologist. The third examiner may be a~~  
17 ~~psychiatrist, licensed psychologist, or qualified physician.~~  
18 ~~One]~~ as examiners psychiatrists, licensed psychologists, or  
19 qualified physicians; provided that one of the three examiners  
20 shall be a psychiatrist or licensed psychologist designated by  
21 the director of health from within the department of health. In





1 nonfelony cases [7] and class C felonies not involving violence  
2 or attempted violence where one examiner is appointed, the court  
3 may appoint as examiners either a psychiatrist or a licensed  
4 psychologist. The examiner may be designated by the director of  
5 health from within the department of health. All examiners  
6 shall be appointed from a list of certified examiners as  
7 determined by the department of health. The court, in  
8 appropriate circumstances, may appoint an additional examiner or  
9 examiners. The court may direct that one or more qualified  
10 physicians or psychologists retained by the defendant be  
11 permitted to witness the examination. As used in this section,  
12 the term "licensed psychologist" includes psychologists exempted  
13 from licensure by section 465-3(a)(3) and "qualified physician"  
14 means a physician qualified by the court for the specific  
15 evaluation ordered."

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

17 "(4) For defendants charged with felonies, the  
18 examinations for fitness to proceed under section 704-404 and  
19 penal responsibility under this section shall be conducted  
20 separately unless a combined examination has been ordered by the  
21 court upon a request by the defendant or upon a showing of good



1 cause to combine the examinations. [~~When the examinations are~~  
2 ~~separate, the examination for penal responsibility under this~~  
3 ~~section shall not be ordered more than thirty days after a~~  
4 ~~finding of fitness to proceed.] The report of the examination  
5 for fitness to proceed shall be separate from the report of the  
6 examination for penal responsibility unless a combined  
7 examination has been ordered. For defendants charged with  
8 offenses other than felonies, a combined examination is  
9 permissible when ordered by the court."~~

10 PART III

11 SECTION 8. The judiciary, in consultation with the  
12 prosecuting attorney of each county, shall submit a report of  
13 its findings and recommendations, including any proposed  
14 legislation, on the effectiveness of this Act to the legislature  
15 no later than forty days prior to the convening of the regular  
16 sessions of 2021, 2022, and 2023.

17 SECTION 9. This Act does not affect rights and duties that  
18 matured, penalties that were incurred, and proceedings that were  
19 begun before its effective date.

20 SECTION 10. Statutory material to be repealed is bracketed  
21 and stricken. New statutory material is underscored.



**1** SECTION 11. This Act shall take effect upon its approval.



**Report Title:**

Fitness to Proceed; Petty Misdemeanors; Department of Health;  
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. Removes the time requirement for the ordering of the penal responsibility evaluation. Requires the judiciary, in consultation with county prosecutors, to report to the Legislature on the effectiveness of the Act in 2021, 2022, and 2023. (SD2)

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

