



*The Judiciary, State of Hawai'i*

**Thirtieth State Legislature, 2020 Session**

**Testimony to the House Committee on Judiciary**  
Representative Chris Lee, Chair  
Representative Joy A. San Buenaventura, Vice-Chair

Tuesday, February 25, 2020, 2:00 p.m.  
State Capitol, Conference Room 325

By  
Shirley M. Kawamura  
Deputy Chief Judge, Criminal Administrative Judge, Circuit Court of the First Circuit

**WRITTEN TESTIMONY ONLY**

---

**Bill No. and Title:** House Bill No. 1619, H.D. 1, Relating to Penal Responsibility.

**Purpose:** 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. Requires either one psychiatrist or one psychologist to be appointed in felony cases requiring three examiners. Requires an examination for penal responsibility to be conducted within fifteen days after a finding of fitness to proceed. Effective 7/1/2050.

**Judiciary's Position:**

The Judiciary provides the following comments. The Judiciary supports the intent of this bill, however the bill in its current form remains unclear in certain key areas, rendering implementation a concern. Further, as described below, the Judiciary respectfully opposes portions of the bill.

First, the bill does not specify the offenses for which the bill is applicable. Second, the bill does not set forth the applicable disposition of the criminal case following evaluation and treatment of the defendant. Third, there is no instruction as to who would be conducting the



evaluation and treatment of the defendant, who would manage the care, or who would incur the costs associated therewith.

Moreover, the Judiciary opposes the mandatory reduction from three to one evaluators for the evaluations on penal responsibility for “C” felonies not involving violence or attempted violence. The determination of penal responsibility is a trial issue, to be determined by the trier of fact whether that be a judge or a jury. This provision mandates that only one examiner should evaluate and present evidence on a defendant’s mental disease, disorder, or defect where the defendant is charged with a “C” felony, a serious crime subject to five years imprisonment. This would appear to invade the purview of the trier of fact.

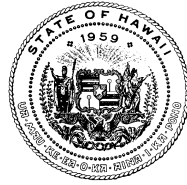
The proposed mandatory reduction from three to one evaluators is also unlikely to lead to expedited proceedings because it would likely lead to one or both parties seeking a motion allowing them to have their own evaluations of the defendant completed, pursuant to sections 704-409 and 704-410, and thus further postpone the trial. If a reduction in the number of examiners is sought, the judiciary respectfully proposes that the reduction be discretionary upon agreement of the parties and not mandatory.

Alternatively, the proposed elimination of specific specialty requirements, as proposed in section 2 of H.B. 1842, may accomplish the intent of the reduction from three to one evaluators. Specifically, the pertinent portion of the statute may read: “In cases requiring three examiners, the court shall appoint psychiatrists, licensed psychologists, or qualified physicians.”

Indeed, the Judiciary respectfully seeks these amendments in HRS sections 704-404, 704-406, 704-411, and 704-414—allowing for the three professionals to be psychiatrists, licensed psychologists, or qualified physicians.

The Judiciary strenuously opposes the time requirement for the ordering of the penal responsibility evaluation on page 5, lines 1 – 4, as any such requirement would violate a defendant’s constitutional right to present a defense. *See Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (“Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense.”).

Thank you for the opportunity to testify on this measure.



STATE OF HAWAII  
DEPARTMENT OF HEALTH  
P. O. Box 3378  
Honolulu, HI 96801-3378  
doh.testimony@doh.hawaii.gov

**LATE**

**Testimony COMMENTING on H.B. 1619 H.D. 1  
RELATING TO PENAL RESPONSIBILITY**

REPRESENTATIVE CHRIS LEE, CHAIR  
HOUSE COMMITTEE ON JUDICIARY

Hearing Date and Time: Tuesday, February 25, 2020 at 2:00 p.m.

Room: 325

1 **Department Position:** The Department of Health (“Department”) supports the intent of this  
2 measure and offers the following comments.

3 **Department Testimony:** The subject matter of this measure intersects with the scope of the  
4 Department’s Behavioral Health Administration (“BHA”) whose statutory mandate is to assure a  
5 comprehensive statewide behavioral health care system by leveraging and coordinating public,  
6 private and community resources. Through the BHA, the Department is committed to carrying  
7 out this mandate by reducing silos, ensuring behavioral health care is readily accessible, and  
8 person centered. The BHA’s Adult Mental Health Division (“AMHD”) provides the following  
9 testimony on behalf of the Department.

10 The Department supports the development of opportunities for pre- and post-arrest  
11 diversion into appropriate pathways, and out of involvement with the criminal justice system  
12 when appropriate for individuals who are living with behavioral health issues. The Department  
13 appreciates the intent of this bill to allow for agreements that expand and expedite access to  
14 evaluation and treatment when the defendant’s behavioral health is a factor in a case.

15 Respectfully, the Department defers to the Judiciary (JUD) on items in the bill that  
16 impact judicial proceedings such as mandatory reductions of examinations from three to one;  
17 and the changes in time requirements for penal responsibility evaluations outlined on page 5,

1 lines 1-4. We have been collaborating closely with the JUD regarding the expansion of  
2 treatment pathways and greater coordination for defendants with behavioral health issues and  
3 would echo and support the following specific amendments to the measure the Judiciary has  
4 proposed.

5 **Offered Amendments:** The Department echoes the proposed amendment from the JUD  
6 regarding relevant sections of sections 704-404, 704-406, 704-411, and 704-414, Hawaii  
7 Revised Statutes. We respectfully request this measure be amended to eliminate specific  
8 specialty requirements to read, "In cases requiring three examiners, the court shall appoint  
9 psychiatrists, licensed psychologists, or qualified physicians."

10

11 Thank you for the opportunity to testify.

12 **Fiscal Implications:** Undetermined.

**LATE**

STATE OF HAWAI‘I  
**OFFICE OF THE PUBLIC DEFENDER**

**Testimony of the Office of the Public Defender,  
State of Hawai‘i to the House Committee on Judiciary**

February 25, 2020

H.B. No. 1619 HD1: RELATING TO PENAL RESPONSIBILITY

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

The Office of the Public Defender respectfully opposes H.B. No. 1619 HD1.

Although we support the provision relating to diversion by a collaborative agreement with the parties at any stage of the proceedings, we strongly oppose any reduction in the number of qualified examiners from three examiners to only one examiner for class C felonies not involving violence or attempted violence.

A panel of three qualified examiners is necessary and essential to protecting a person’s due process rights for all felony cases. Indeed, there is no difference between a class C felony not involving violence or attempted violence and a class C felony involving violence or attempted violence; both types of class C felonies subject defendants to the maximum prison sentence of five years. Therefore, a mentally impaired person allegedly committing a non-violent felony should not be treated differently than from a mentally impaired person allegedly committing a violent felony.

In many cases, the desire to push a person through the system quickly, under the guise of protecting the speedy processing of a case or in the name of judicial economy, is counter-productive. Our office has seen many cases where the three panel of examiners disagree on whether a defendant had the capacity to appreciate the wrongfulness of his/her conduct (cognitive capacity) or to conform his/her conduct to the requirements of the law (volitional capacity) at the time of the alleged conduct. Indeed, according to the written testimony by the Hawai‘i Psychological Association submitted to the Committee on Health, “It has been demonstrated that a second examiner provides a differing opinion in these cases at least 30% of the time. In fact, the examiner inter-rater reliability for penal responsibility evaluations averages around 60%.”

Requiring three examiners for all felony cases ensures that the defendant’s guilt or innocence (by insanity) is not dependent on the luck of the draw -- i.e., the selection of one particular examiner. Given the high stakes involved in felony prosecutions (i.e. extended periods of hospitalization, prison terms of five years for class C felonies), the current standard of three examiners should remain. When there is disagreement on the panel, only a full litigation of the issue leads to justice being served. The appointment of a single examiner would not assure a correct resolution on this issue.

Moreover, the views of all three examiners are considered valuable and are taken into account by the trial judge in deciding whether a person who did not have the cognitive

capacity or volitional capacity at the time of the alleged conduct should be sent to the Hawai'i State Hospital or to be released into the community for care and treatment.

Thank you for the opportunity to comment on H.B. No. 1619 HD1.

DEPARTMENT OF THE PROSECUTING ATTORNEY  
**CITY AND COUNTY OF HONOLULU**

ALII PLACE  
1060 RICHARDS STREET • HONOLULU, HAWAII 96813  
PHONE: (808) 768-7400 • FAX: (808) 768-7515

DWIGHT K. NADAMOTO  
ACTING PROSECUTING ATTORNEY



LYNN B.K. COSTALES  
ACTING FIRST DEPUTY  
PROSECUTING ATTORNEY

**LATE**

**THE HONORABLE CHRIS LEE, CHAIR  
HOUSE COMMITTEE ON JUDICIARY  
Thirtieth State Legislature  
Regular Session of 2020  
State of Hawai`i**

**February 25, 2020**

**RE: H.B. 1619, H.D. 1; RELATING TO PENAL RESPONSIBILITY.**

Chair Lee, Vice Chair San Buenaventura, and members of the House Committee on Judiciary, the Department of the Prosecuting Attorney of the City and County of Honolulu submits the following testimony in strong opposition of H.B. 1619, H.D. 1.

The purpose of H.B. 1619, H.D. 1 is to cut costs and time as it relates to the important issues of mental health by allowing a court to enter into an agreement with the parties involved when there is reason to believe that, physical or mental disease, disorder or defect becomes an issue in a criminal case.

The Department appreciates some of the amendments made by the last committee to address some of the stakeholders concerns, however, the Department is concerned that it is still unclear as to whether all parties must agree on the specific treatment plan, or that just an agreement is met to divert the case. In addition, in a few "specialized courts", an entry of a no-contest or guilty plea is required before admission; therefore, a number of diversion alternatives envisioned by H.B. 1619, H.D. 1 may become unavailable.

Further, H.B. 1619, H.D. 1 fails to take into consideration that an assessment of one's mental condition is not a black-and-white science, and is often subject to differing opinions, it is crucial that the court and all stakeholders have the benefit of receiving multiple opinions in every felony case, to most accurately assess that defendant's mental condition. Please keep in mind that, while our criminal code categorizes offenses into class A, B and C felonies, it does not always clearly indicate which cases involve violence or attempted violence nor does it alone distinguish the "dangerousness" of an individual. For example, it is unclear whether the following Class C felony offenses would be among those relegated to a panel of one examiner:

- Negligent Homicide in the 2<sup>nd</sup> Degree (HRS §707-703)
- Negligent Injury in the 1<sup>st</sup> Degree (HRS §707-705)
- Reckless Endangering in the 1<sup>st</sup> Degree (HRS §707-713)
- Terroristic Threatening (HRS §707-716)
- Sexual assault in the 3<sup>rd</sup> Degree (HRS §707-732)
- Aggravated Harassment by Stalking (HRS §711-1106.4)
- Arson in the 3<sup>rd</sup> Degree (HRS §708-8253)
- Violation of Privacy in the 1<sup>st</sup> Degree (HRS §711-1110.9)
- Habitual OVUII (§291E-61.5, H.R.S.)
- Promoting Pornography for Minors (§712-1215, H.R.S.)
- Solicitation of a Minor for Prostitution (§712-1209.1, H.R.S.)
- Electronic Enticement of a Child in the 2<sup>nd</sup> Degree (HRS §707-757)

It is our understanding that psychiatrists and psychologists have different areas of expertise, and thus provide slightly different perspectives on each defendant. Therefore, decreasing the number of examiners from 3 down to 1 for all Class C felony offenses “not involving violence or attempted violence” would also eliminate the additional precaution of having at least one psychiatrist and at least one psychologist in a number of offenses which are not as clear as it relates to violence.

Finally, the Department opposes the proposal to change the current requirement in felony cases—where three examiners are appointed to determine a defendant’s physical or mental disease, disorder, or defect—to have at least one psychiatrist and at least one licensed psychologist among those examining the defendant. As stated earlier, it is our understanding that these are two distinct but equally important fields that specialize in addressing different aspects of a person’s mental state. If one of these views is lost, it inherently increases the likelihood of missing some important aspect of the analysis, and decreases the reliability of the outcome.

For these reasons, the Department of the Prosecuting Attorney strongly opposes the passage of H.B. 1619, H.D. 1. Thank you for this opportunity to testify.



**HB-1619-HD-1**

Submitted on: 2/21/2020 7:24:22 PM

Testimony for JUD on 2/25/2020 2:00:00 PM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Louis Erteschik	Hawaii Disability Rights Center	Comments	Yes

Comments:

We definitely support the idea of the agreement to divert the case into an evaluation/treatment of the defendant, especially involving a specialized court. We believe this is a very enlightened approach. We are not sure, however, that the reduction in the number of examiners for non-violent Class C felonies is a good idea. We would like to hear further discussion as to the merits of that provision.



# Hawai'i Psychological Association

## *For a Healthy Hawai'i*

---

P.O. Box 833  
Honolulu, HI 96808

[www.hawaiipsychology.org](http://www.hawaiipsychology.org)

Email: [hpaexec@gmail.com](mailto:hpaexec@gmail.com)  
Phone: (808) 521-8995

### COMMITTEE ON JUDICIARY

REPRESENTATIVE CHRIS LEE, CHAIR

REPRESENTATIVE JOY A. SAN BUENAVENTURA, VICE CHAIR

Tuesday February 25, 2020, 2:00 PM  
Conference Room 325

### **Testimony in OPPOSITION of HB 1619 HD1**

HB 1619 HD1 would allow for court ordered penal responsibility evaluations, for non-violent Felony C cases, to be based on the opinion of just one examiner instead of the current requirement for three examiners. This bill reduces a judge's ability to make an informed decision when relying on the opinion of only one examiner when another examiner would provide a different opinion at least 30% of the time. The examiner inter-rater reliability for penal responsibility evaluations averages around 60%, the implication of which means that, in many cases, reliance on a single evaluator's opinion will result in the judge inappropriately sending an insane individual to prison for a maximum sentence of five years.

When an examiner is unable to reach an opinion or when a one-panel examination contains insufficient information – situations that are not uncommon - more examinations will be ordered, needlessly adding to the length of time to reach a decision on penal responsibility.

This bill will also increase the likelihood that the defense or the prosecution will hire additional evaluators, resulting in further delays. These 'hired guns' have also been found to exhibit bias. Research conducted at the University of Virginia has conclusively demonstrated a systematic bias in defense/prosecutor retained evaluations. In contrast, the current three-panel system hires independent evaluators who serve as 'friends of the court'; the likelihood of systematic bias is significantly less.

The existing law was drafted by a task force of stakeholders who designed the three-panel system in order to remediate common flaws found in other states. National experts who have reviewed our system have recommended it as a model for other states. We believe that the courts in Hawai'i do a better job of achieving justice than most states in the continental U.S., where it is relatively common to find severely mentally ill persons inappropriately placed in prisons, and people without severe mental illness committed to state psychiatric hospitals.

The Hawai'i Psychological Association respectfully urges you to not pass this bill as currently written.

Thank you for your consideration.

Julie Takishima-Lacasa, PhD., President  
Chair, Legislative Action Committee  
Hawai'i Psychological Association



**LATE**

## **HB1916 HD1 Court Diversion and Mental Health Treatment**

### **COMMITTEE ON JUDICIARY:**

- Rep Chris Lee, Chair; Rep. Joy San Buenaventura, Vice Chair
- Tuesday, Feb. 25<sup>th</sup>, 2020: 2:00 pm:
- Conference Room 325

### **Hawaii Substance Abuse Coalition Supports HB1916 HD1:**

*GOOD MORNING CHAIR, VICE CHAIR AND DISTINGUISHED COMMITTEE MEMBERS. My name is Alan Johnson. I am the current chair of the Hawaii Substance Abuse Coalition (HSAC), a statewide organization of over 30 non-profit alcohol and drug treatment and prevention agencies.*

**HSAC supports Courts Diverting patients into Mental Health Treatment through Interventions.** Courts would work out an agreement with providers to divert, involving qualified examiners to perform appropriate evaluations. Services referred to can include residential or rehabilitative treatments.

**HSAC notes that SAMHSA regards the Sequential Intercept Models as best practices:** which is that crisis response professionals and law enforcement act together in a “guardian” role to move people with mental and substance use disorders from arrest into treatment/services in order to avoid criminal justice involvement.<sup>1</sup>

**SAMHSA recommends that states develop partnerships with police, hospitals and community service agencies to increase the capacity of agencies** to provide services as well as enable sharing of information and ideas. Incorporating technology into mental health and substance use treatment services may require programs to shift to less traditional staffing models (e.g., remote employees that are not based in one central location such as through telehealth), bolstering their electronic infrastructure, and make other changes to support a shift towards virtual service delivery.

**The state must ensure that there are shifts in the intended process changes by increasing their financial investment** in those resources that results in:

- Higher usage rates,
- Increased on-scene resolution of crises,
- Less demand for services on emergency response systems,
- Reduced use of costly transportation, and
- Quicker delivery of critical services to individuals in crisis or presenting with mental and substance use disorders.

---

<sup>1</sup> SAMHSA Pre-arrest Diversion Expert Panel, convened in January 2018. <https://store.samhsa.gov/system/files/pep19-crisis-rural.pdf>

**It is often more beneficial to expand existing programs**, rather than developing entirely new programs as a means to improve opportunities for crisis response or pre-arrest diversion. This approach may include supplying new tools and resources to current agencies/staff and providing specialized training for responders to address a broad range of crises effectively.

We appreciate the opportunity to provide testimony and are available for questions.

**LATE**

**HB-1619-HD-1**

Submitted on: 2/25/2020 12:53:33 PM  
Testimony for JUD on 2/25/2020 2:00:00 PM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Erika Vargas	Individual	Support	No

Comments: