



The Judiciary, State of Hawai‘i

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. 1620, H.D. 1, Relating to the Administration of Justice

Purpose: Amends the effect of finding a defendant charged with a misdemeanor or petty misdemeanor not involving violence or attempted violence unfit to proceed. Amends the requirements for fitness determination hearings, court-appointed examiners, and examination reports. Effective 7/1/2050. (HD1)

Judiciary’s Position:

The Judiciary strongly supports this bill and the opportunity to work with the Department of Health and the Department of the Attorney General to propose refined language of this measure to address concerns. After consultation with the Department of Health, the Department of the Attorney General, the Department of the Prosecuting Attorney of the City and County of Honolulu, and the Office of the Public Defender, the Judiciary proposes the following amendments to H.B. 1620, H.D. 1. At this time the Department of Health and the Judiciary support the amendments below. In addition, the below proposed amendments have been shared with the Department of the Attorney General, Department of the Prosecuting Attorney of the City and County of Honolulu and the Office of the Public Defender; at this time we do not know their position on these amendments.



SECTION 1, addition of the new section 704-____

The Judiciary respectfully proposes that the criminal justice diversion program be made available at this time only for those petty misdemeanors not involving violence or attempted violence. This will allow the Department of Health to implement the provisions with existing resources and allow them to determine the resources necessary to expand the program in the future. In addition, the proposal is to amend the provisions of the section to make clear that those defendants deemed fit to proceed will have their criminal cases resumed and only those who cannot be determined to be fit to proceed will be diverted into the mental health system. The seven days will be available for those defendants to be evaluated and assessed as to the level of care they may require (in-patient, out-patient, or merely crisis intervention). Those individuals who may require or benefit from treatment will be diverted and their case will be dismissed. As is always within their discretion, the Department of Health may proceed under Chapter 334 if the situation so requires. The Judiciary believes that this will address the concerns raised by the prosecutors as well as the Office of the Public Defender. The Judiciary proposes the following language for section 704-____ in place of Page 1, Line 4 through Page 3, Line 21 of H.B. 1620, H.D.1:

“704-____ Proceedings 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 is fit to proceed, then the proceedings against defendant shall resume. In all other cases where fitness remains an outstanding issue, the court shall continue the suspension of the proceedings and commit the defendant to the custody of the director of health to be placed in a hospital or other suitable facility for further examination and assessment.

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



SECTION 2, amendment of section 704-404:

In light of the revision proposed above to section 704-___, further revisions are required for consistency and cohesiveness to section 704-404. In addition, the Judiciary suggests amendments to the proposed provisions of the expedited hearings and evaluations for the petty non-violent misdemeanors that will address potential straining of the resources of the Department of Health due to the expedited nature of the evaluations. Specifically, the Judiciary proposes that Page 4, line 3 through Page 5, line 11 of H.B. 1620, H.D.1 would be amended to state as follows:

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

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

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

(a) In cases where the defendant is charged with a petty misdemeanor not involving violence or attempted violence, if a court-based certified examiner is available, the court shall appoint the court-based certified examiner to examine and provide an expedited report solely upon the issue of the defendant's capacity to understand the proceedings against defendant and defendant's ability to assist in defendant's own defense. The court-based certified examiner shall file the examiner's report with the court within two days of the appointment of the examiner, or as soon thereafter as is practicable. A hearing shall be held to determine if defendant is fit to proceed within two days of the filing of the report, or as soon thereafter as is practicable;

(b) In all other nonfelony cases, and where a court-based certified examiner is not available in cases under section (2)(a) above, the court shall appoint ~~[three qualified examiners in felony cases, and]~~ one qualified examiner ~~[in nonfelony cases,]~~ to examine and report upon the defendant's fitness to proceed. The court may appoint as the examiner either a psychiatrist or a licensed psychologist; and



SECTION 3, amendment of section 704-406:

In light of the revision proposed in section 704-___, we propose that Page 8, line 9 through Page 9, line 18 of H.B. 1620, H.D.1 be amended to state as follows:

“(1) If the court determines that the defendant lacks fitness to proceed, the proceeding against the defendant shall be suspended, except as provided in ~~[section]~~ sections 704-407[;] and 704-___, and the court shall commit the defendant to the custody of the director of health to be placed in an appropriate institution for detention, assessment, care, and treatment; provided that ~~[the commitment shall be limited in certain cases as follows:~~

- (a) When the defendant is charged with a petty misdemeanor not involving violence or attempted violence, the ~~[commitment shall be limited to no longer than sixty days from the date the court determines the defendant lacks fitness to proceed; and defendant shall be diverted from the criminal justice system pursuant to section 704-___~~.
- (b) When the defendant is charged with a misdemeanor not involving violence or attempted violence, the commitment shall be limited to no longer than one hundred twenty days from the date the court determines the defendant lacks fitness to proceed.

If the court is satisfied that the defendant may be released on conditions without danger to the defendant or to another or risk of substantial danger to property of others, the court shall order the defendant's release, which shall continue at the discretion of the court, on conditions the court determines necessary; provided that ~~[the release on conditions of a defendant charged with a petty misdemeanor not involving violence or attempted violence shall continue for no longer than sixty days, and]~~ the release on conditions of a defendant charged with a misdemeanor not involving violence or attempted violence shall continue for no longer than one hundred twenty days.

SECTION 4, amendment of section 704-411:

It appears that the current version of H.B. 1620, H.D.1 may have a typographical error on Page 12, Line 1, and should read “qualified physicians; provided that one of the three”; it currently reads “the” instead of “that.”

Thank you for the opportunity to testify on this measure.

STATE OF HAWAI‘I
OFFICE OF THE PUBLIC DEFENDER

LATE

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

February 25, 2020

H.B. No. 1620 HD1: RELATING TO THE ADMINISTRATION OF JUSTICE

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

Although the Office of the Public Defender supports the intent of H.B. No. 1620 HD1, we respectfully oppose the measure.

An unintended consequence of this measure is that it will actually substantially increase the pre-trial (pre-hearing) incarceration time for criminal defendants charged with petty misdemeanors and misdemeanors. Although the length of time for a determination of fitness will only be seven (7) days, the length of time for a determination of a petition for assisted community treatment will be substantial. Therefore, if this bill is enacted, the pre-trial/pre-hearing incarceration time for a defendant charged with a petty misdemeanor offense will far exceed the maximum jail sentence.

Litigating a petition for assisted community treatment is a very lengthy process due to the litigation involved and the lack of courtroom availability despite the passage of S.B. No. 1124 SD2 HD1 CD1 last session. Currently, there are at least five petitions pending in the family court. All were filed on or before November 27, 2019. They are all still pending. The hearing (trial) dates for the five cases are to be held in March or April 2020.

Based on the current track record, a defendant who is found unfit and is recommended for assisted community treatment can expect lengthy delays before his/her petition will be resolved. While waiting for the outcome of his/her petition for assisted community treatment, the unfit defendant will likely be placed in a correctional facility such as the Oahu Community Correctional Center (O.C.C.C.) despite the bill’s language stating that they “may be held at the hospital or *other suitable facility* pending the family court hearing on the petition for assisted community treatment.” Currently, many, if not all, the defendants pending a determination of fitness are held at O.C.C.C. -- which is allegedly considered a “suitable facility.” Therefore, an unfit defendant charged with a petty misdemeanor or misdemeanor will spend several months in custody before his/her petition for assisted community treatment is resolved.

A petition for assisted community treatment for an unfit criminal defendant will be even be more time consuming, as *an unfit criminal defendant cannot assist the attorney in his/her petition for assisted community treatment*. Consequently, the attorney cannot obtain consent from the unfit criminal defendant to stipulate to the admission of any evidence or even agree to the petition. Indeed, the family court will not even be able to accept any stipulations from the unfit criminal defendant, as the family court will not be able to conduct a meaningful colloquy with the unfit

criminal defendant in waiving any procedural matters. Therefore, each petition for an unfit criminal defendant will have to be fully litigated.

Another consequence of referring criminal defendants who are found unfit to proceed to assisted community treatment is that the pending petitions for those subjects who are not in the care of custody of the director of health (i.e., the homeless) will be delayed. Petitions for defendants detained (i.e., incarcerated) will certainly take (or at least, should take) precedent over petitions for subjects who are in the community.

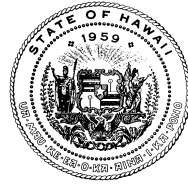
This measure would be acceptable if SECTION 1(b)(2), (b)(3) and (b)(4) (i.e., the section relating to the assisted community treatment) is deleted. Instead, the proposed language be inserted:

(1) In cases where the defendant is charged with a misdemeanor or 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 is fit to proceed, then the proceedings against defendant shall resume. In all other cases where fitness remains an outstanding issue, the court shall continue the suspension of the proceedings and commit the defendant to the custody of the director of health to be placed in a hospital or other suitable facility for further examination and assessment.

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

With the exception of the term "misdemeanor," we anticipate that the foregoing language will be proposed/suggested by the Judiciary, Department of Health, and Department of the Attorney General (and which the Office of the Public Defender will support) in their testimony for HB. No. 1620 HD1. If the foregoing is not submitted, we would then propose the foregoing language be substituted in lieu of SECTION 1(b)(2), (b)(3) and (b)(4).

Thank you for the opportunity to comment on H.B. No. 1620 HD1.



STATE OF HAWAII
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LATE

**Testimony in SUPPORT of H.B. 1620 H.D. 1
RELATING TO ADMINISTRATION OF JUSTICE**

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”) strongly supports this
2 measure offering comments and proposed amendments.

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 strongly supports the development of opportunities for diversion of
11 individuals who are living with behavioral health issues into treatment. Providing alternative
12 pathways for individuals with lower level charges when found unfit though an expedited fitness
13 evaluation process is a goal we share in common with the Judiciary (JUD). The Department has
14 worked with the JUD to address concerns expressed by the Department of the Attorney
15 General (ATG) regarding fitness and concerns expressed by the Department of the Prosecuting
16 Attorney of the City and County of Honolulu and the Office of the public Defender regarding
17 petty non-violent misdemeanors.

1 The attached proposed H.D. 2 includes amendments we believe will get us closer to the
2 goal of having all parties agree on statutory changes in order to effectuate the intent of this
3 measure. These amendments are supported by the JUD and ATG and have been shared with
4 the Department of the Prosecuting Attorney of the City and County of Honolulu and the Office
5 of the Public Defender.

6 In summary, the proposed H.D. 2 includes the following suggested amendments.

7 SECTION 1 – Amending new section of Chapter 704, Hawaii Revised Statutes (HRS)

8 The Department respectfully proposes that page 1, line 4 through page 3, line 21 of this
9 measure be amended to allow for the criminal justice diversion program to be made available
10 at this time only for petty misdemeanors not involving violence or attempted violence. The
11 Department believes that this amendment clarifies that defendants deemed fit to proceed will
12 have their criminal cases resumed and only defendants who cannot be determined as fit to
13 proceed will be diverted into the behavioral health system.

14 Additionally, the seven days will be available to evaluate and assess defendants for their
15 current level of care. Defendants whose evaluation and assessment identify a recommendation
16 for treatment will be diverted and their case will be dismissed. When appropriate, the
17 Department will, on a case-by-case basis, utilize options provided in Chapter 334, HRS.

18 By changing this section, we believe the concerns expressed by the Department of the
19 Prosecuting Attorney of the City and County of Honolulu and the Office of the Public Defender
20 have been addressed. The Department believes the criminal justice diversion program, with
21 our suggested amendments, can be implemented with existing resources. Further, should the
22 criminal justice diversion program be expanded in the future, the Department will be able to
23 identify additional resources including requests for appropriations from the legislature.

1 SECTION 2 – Amending Section 704-404, HRS

2 For consistency with the proposed amendments for SECTION 1, revisions to SECTION 2,
3 page 4, line 2 through page 8, line 6 are necessary. Additionally, to address our concerns
4 regarding available resources, including staffing, the Department proposes language in this
5 section be revised to address provisions for expedited hearings and evaluations.

6 SECTION 3 – Amending Section 704-406, HRS

7 For consistency with the proposed amendments for SECTION 1 and SECTION 2, revisions
8 to SECTION 3, page 8, line 7 through page 10, line 21 are necessary.

9

10 The Department thanks the Legislature for its support of developing more appropriate
11 and effective pathways for this population.

12 **Offered Amendments:** The Department respectfully offers the attached proposed H.D. 2.

13 Thank you for the opportunity to testify.

14 **Fiscal Implications:** Undetermined.

A BILL FOR AN ACT

RELATING TO THE ADMINISTRATION OF JUSTICE.

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

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

4 "704- Proceedings for defendants charged with petty
5 misdemeanors not involving violence or attempted violence,
6 criminal justice diversion program. (1) In cases where the
7 defendant is charged with a petty misdemeanor not involving
8 violence or attempted violence, if, at the hearing held pursuant
9 to section 704-404(2)(a) or at a further hearing held after the
10 appointment of an examiner pursuant to section 704-404(2)(b),
11 the court determines that the defendant is fit to proceed, then
12 the proceedings against defendant shall resume. In all other
13 cases where fitness remains an outstanding issue, the court
14 shall continue the suspension of the proceedings and commit the
15 defendant to the custody of the director of health to be placed
16 in a hospital or other suitable facility for further examination
17 and assessment.

H.B. NO. 1620, Proposed H.D. 2

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 the director of health for the purpose of the examination,
9 neither the right to bail nor proceedings pursuant to chapter
10 804 shall be suspended. If a trial by jury has [~~empanelled,~~]
11 empaneled, it shall be discharged or retained at the discretion
12 of the court. The discharge of the trial jury shall not be a
13 bar to further prosecution.

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

16 (a) In cases where the defendant is charged with a petty
17 misdemeanor not involving violence or attempted
18 violence, if a court-based certified examiner is
19 available, the court shall appoint the court-based
20 certified examiner to examine and provide an expedited
21 report solely upon the issue of the defendant's
22 capacity to understand the proceedings against

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1 defendant and defendant's ability to assist in
2 defendant's own defense. The court-based certified
3 examiner shall file the examiner's report with the
4 court within two days of the appointment of the
5 examiner, or as soon thereafter as is practicable. A
6 hearing shall be held to determine if defendant is fit
7 to proceed within two days of the filing of the report,
8 or as soon thereafter as is practicable;

9 (b) In all other nonfelony cases and where a court-based
10 examiner is not available in cases under section (2)(a)
11 above, the court shall appoint [~~three qualified~~
12 examiners in felony cases, and] one qualified examiner
13 [~~in nonfelony cases,~~] to examine and report upon the
14 defendant's fitness to proceed.

15 The court may appoint as the examiner either a
16 psychiatrist or a licensed psychologist; and

17 (c) In felony cases, the court shall appoint three
18 qualified examiners to examine and report upon the
19 defendant's fitness to proceed. The court shall
20 appoint as examiners [~~at least one psychiatrist and at~~
21 least one licensed psychologist. ~~The third examiner~~
22 may be a psychiatrist, licensed psychologist, or

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1 ~~qualified physician. One]~~ psychiatrist, licensed
2 psychologists, or qualified physicians; provided that
3 one of the three examiners shall be a psychiatrist or
4 licensed psychologist designed by the director of
5 health from within the department of health.

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

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1 2. By amending subsection (5) to read:

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

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

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

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

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

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

H.B. NO. 1620, Proposed H.D. 2

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, excepted 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; and~~ defendant shall be

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1 diverted from the criminal justice system pursuant to
2 section 704-_____.

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

H.B. NO. 1620, Proposed H.D. 2

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."

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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~~

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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."

H.B. NO. 1620, Proposed H.D. 2

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.

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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
8 section 465-3(a)(3) and "qualified physician" means a physician
9 qualified by the court for a specific evaluation ordered."

10 SECTION 6. Statutory material to be repealed is bracketed
11 and stricken. New statutory material is underscored.

12 SECTION 7. This Act shall take effect on July 1, 2050.

H.B. NO. 1620, Proposed H.D. 2

Report Title:

Fitness to Proceed; Misdemeanors; Petty Misdemeanors; DOH

Description:

Amends the effect of finding a defendant charged with a misdemeanor or petty misdemeanor not involving violence or attempted violence unfit to proceed. Amends the requirements for fitness determination hearings, court-appointed examiners, and examination reports. Effective 7/1/2050. (SD1)



**TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
THIRTIETH LEGISLATURE, 2020**

LATE

ON THE FOLLOWING MEASURE:

H.B. NO. 1620, H.D. 1, RELATING TO THE ADMINISTRATION OF JUSTICE.

BEFORE THE:

HOUSE COMMITTEE ON JUDICIARY

DATE: Tuesday, February 25, 2020 **TIME:** 2:00 p.m.

LOCATION: State Capitol, Room 325

TESTIFIER(S): Clare E. Connors, Attorney General, or
Debbie L. Tanakaya, Deputy Attorney General

Chair Lee and Members of the Committee:

The Department of the Attorney General offers the following comments.

This bill adds a section to chapter 704, Hawaii Revised Statutes, which addresses the diversion of a non-violent petty misdemeanor or non-violent misdemeanor defendant determined to lack fitness to proceed. This bill creates different possible outcomes for these defendants, allowing a court to (1) suspend criminal proceedings and order defendants to be transferred to the custody of the Director of Health to be placed in a hospital or other suitable facility for further examination and assessment for up to seven days or (2) dismiss the charges with or without prejudice. If these defendants are transferred to the custody of the Director of Health, depending on the results of the further examination and assessment, the defendant could be involuntarily hospitalized, ordered into an assisted community treatment plan, referred to an appropriate mental health outpatient program, or discharged from the custody of the Director of Health. The bill also amends the requirements for fitness determination hearings, court-appointed examiners, and examination reports.

The ordering of defendants charged with misdemeanors and petty misdemeanors not involving violence or attempted violence to the custody of the Director of Health (upon a court determination of unfitness to proceed), found in section 1, page 1, line 14, through page 2, line 2, of the bill, raises constitutional due process

concerns. This is because the amendment to the fitness to proceed examination in section 704-404(5), Hawaii Revised Statutes, on page 7, lines 1-2, leaves the fitness to proceed determination for the diversion of defendants charged with misdemeanors and petty misdemeanors not involving violence or attempted violence without any criteria. The due process concerns could be resolved by providing standards for the determination of fitness to proceed for purposes of these defendants.

Additionally, the word "transferred" at page 1, line 15, of the bill, does not apply to defendants who are not already in custody. We believe the word should be changed to "committed."

It might be advisable to delay the dismissal of charge(s), provided for at page 2, line 3, until after the proceedings outlined on page 2, line 4, through page 3, line 21, take place. Otherwise, an additional concern is the provision at page 3, lines 5-7, which would allow a defendant who has been determined to not meet the criteria for involuntary hospitalization or for whom the family court has denied a petition for involuntary hospitalization to be held at the hospital or other suitable facility pending a family court hearing on a petition for assisted community treatment. Continued holding of a defendant, especially with no time limitation, in that circumstance may violate the defendant's constitutional due process rights.

Our Department is available to work further with the Committee, the Department of Health, the Judiciary, prosecuting attorneys, the Public Defender, and other stakeholders to address the intent of this measure.

Thank you for this opportunity to testify.

DEPARTMENT OF THE PROSECUTING ATTORNEY
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**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. 1620, H.D. 1; RELATING TO THE ADMINISTRATION OF JUSTICE.

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 (Department) submits the following testimony in strong opposition to H.B. 1620, H.D. 1.

The purpose of this bill is to create a mechanism in which a defendant is diverted to a hospital or other suitable facility for up to seven days or to alternatively dismiss the criminal case with or without prejudice upon a finding that the defendant lacks (mental) fitness to proceed. As proposed, if the case is not dismissed, this bill envisions that during the seven days or hospitalization, a determination will be made whether to pursue involuntary hospitalization, assisted community treatment, or simply discharge and refer to an outpatient mental health program.

First, because H.B. 1620, H.D. 1 encompasses misdemeanor and petty misdemeanor offenses, it is unclear to the Department which offenses the new section would be applicable to; what does "not involving violence or attempted violence" encompass? For example, it is unclear whether the following offenses would be among those dismissed, anytime a defendant is unfit:

- Violation of temporary restraining order (HRS §586-4 or §604-10.5)
- Reckless endangering in the 2nd degree (HRS §707-714)
- Terroristic threatening in the 2nd degree (HRS §707-717)
- Unlawful imprisonment in the 2nd degree (HRS §707-722)
- Custodial interference in the 2nd degree (HRS §707-727)
- Sexual assault in the 4th degree (HRS §707-733)

- Criminal property damage (3rd degree HRS §708-822; 4th degree HRS §708-823)
- Endangering the welfare of a minor in the 2nd degree (HRS §709-904)
- Endangering the welfare of an incompetent person (HRS §709-905)
- Harassment by stalking (HRS §711-1100)

The Department is deeply concerned that these types of cases—and perhaps others not yet contemplated—could be summarily dismissed, simply because a defendant is found unfit to proceed. Being unfit for purposes of court proceedings is completely separate and apart from one’s mental state and penal responsibility at the time the offense took place, and many defendants who are found unfit during the course of a case will “regain fitness” when they receive appropriate treatment. The Department is concerned that H.B. 1620, H.D. 1 proposes less safeguards and protection for the public than its prior version. The current draft allows courts not only to avoid determining penal responsibility before dismissing the criminal case, but also allows the court to dismiss the case without the defendant receiving any form of treatment.

Finally, the Department strongly opposes the proposal to change the current requirement in felony cases—where three examiners are appointed to determine a defendant’s fitness to proceed—to have at least one psychiatrist and at least one licensed psychologist among those examining the defendant. 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.

While the Department can appreciate efforts to streamline mental health assessments that are done for court purposes, H.B. 1620, H.D. 1 would do so at the expense of public safety and welfare—which is the Department’s primary concern—and as such, the Department cannot support this measure.

For all of the foregoing reasons, the Department of the Prosecuting Attorney of the City and County of Honolulu strongly opposes the passage of H.B. 1620, H.D. 1. Thank you for the opportunity to testify on this matter.

HB-1620-HD-1

Submitted on: 2/21/2020 7:03:28 PM

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

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

Comments:

We think the intent of this bill has merit and deserves further discussion. It appears to seek to screen defendants found not fit to proceed for either civil commitment or assisted community treatment. That makes sense and might be a way to bring people into the system and provide treatment that would not be available currently. We don't know how many people who are found unfit to proceed will actually meet these criteria so it remains to be seen if this will be successful. But it is worth exploring. We do like the idea of dismissing the charges in the minor non violent cases as it would help avoid clogging up the courts and jails with people who really do not need to be there. It also would avoid some of the stigma that comes from the "criminalization of the mentally ill". Some of the timelines that are specified might need to be looked at more closely. For instance, we are not sure if a two day timeline for a fitness evaluation is realistic. We suspect it may not be. We would certainly be interested in working with the Committee and relevant stakeholders to further develop and refine this proposal if the measure is advanced.



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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 1620 HD1

HB 1620 HD1 fails to achieve the laudable goal of reducing the criminalization of mental illness in Hawai'i because it departs from the Massachusetts best-practice model of a two-day screening for defendants with court-ordered fitness to proceed evaluations. Instead, HB 1620 HD1 mandates a final opinion, not a screening, on fitness to proceed within two days, which does not allow an examiner to review previous treatment or jail records. The examiner would be "flying blind" with an unacceptably high error rate, thus increasing the likelihood that a truly unfit to proceed individual would be prosecuted, at least in a small number of cases. The national average completion time for fitness exams is 31 days. When Washington State mandated a 15-day deadline, State Hospital admissions skyrocketed, the State paid \$85 million in fines for late reports, had to double the number of fitness examiners, and raise their salaries.

This bill is a gross departure from acceptable assessment practice such that in many, if not most cases, an ethical examiner would not be able to arrive at an opinion. Massachusetts has a two-step process: a screening within two days and then a full evaluation of fitness to proceed after the necessary information is gathered. HB 1620 HD1 does not allow any money for the hiring of additional examiners who could perform screenings and recommends cases to be evaluated in the hospital, civilly committed instead of prosecuted, or diverted into community treatment. At the same time, the bill does not allocate money to increase hospital civil commitment beds, which is needed to reduce criminal charges for mentally ill persons who could otherwise be civilly committed to a psychiatric hospital.

Under HB 1620 HD1 persons who are found unfit to proceed within two days of referral would be committed to Hawai'i State Hospital for seven days and then have their charges dropped if they cannot be civilly committed. However, this bill is only applicable when a court-based clinician is available. On the neighbor islands especially, a court-based evaluator would likely not be available, thus defendants would have different procedures based on geography and

staffing. If this bill becomes law, some persons found unfit to proceed would have their charges dropped after seven days, while others would wait at least four weeks in jail for the fitness exams.

Other consequences of the seven-day State Hospital commitment are as follows. First, persons who are found unfit to proceed within two days secondary to the effects of crystal methamphetamine, would no longer be found fit to proceed within four to six weeks after their psychotic symptoms clear. Second, the State Hospital census would increase because many patients in jail respond adequately to psychiatric medication within four to six weeks; therefore, they are found fit to proceed, which is what occurred in Washington State. Lastly, State Hospital intakes and discharges are time consuming; the influx of new seven-day State Hospital commitments would divert resources from the care of patients with longer hospitalizations.

HPA respectfully urges you not to pass this bill.

Thank you for your consideration.

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



LATE

HB1920 HD1 Court Diversion and Mental Health Treatment

COMMITTEE ON JUDICIARY:

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

Hawaii Substance Abuse Coalition Recommends and Supports HB1920 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 Recommends changing Mental Health Outpatient to Mental Health or Co-occurring Disorder program because many patients have both mental health or substance use disorders and several programs now treat both.

1. (3) If the defendant's clinical team determines that the defendant does not meet the criteria for involuntary hospitalization, or the family court denies the petition for involuntary hospitalization, or in the anticipation of discharge after involuntary hospitalization pursuant to section 334-60.3, the clinical team shall determine whether an assisted community treatment plan is appropriate pursuant to chapter 334, part VIII. If the clinical team determines that an assisted community treatment plan is appropriate, the psychiatrist or advanced practice registered nurse from the clinical team shall prepare the certificate for assisted community treatment specified by section 334-123. The clinical team shall identify a community mental health **or co-**

occurring disorder ~~outpatient~~ treatment program that agrees to provide mental health services to the defendant as the designated mental health program under the assisted community treatment order. The defendant may be held at the hospital or other suitable facility pending the family court hearing on the petition for assisted community treatment. If the petition is granted, the defendant shall be released for treatment with the designated mental health program once the assisted community treatment order is issued and the initial treatment consistent with the assisted community treatment plan is administered to the defendant.

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

(1) Referred to an appropriate ~~outpatient~~ mental health or co-occurring disorder program for continued support, care, and treatment; and

HSAC supports amending the Fitness to Proceed for Defendants with Non-Violent Misdemeanors as part of a Criminal Justice Diversion program. Transferring custody to the Dept. of Health to file an involuntary hospitalization to begin hospital services and eventually referred to community-based outpatient programs is in the best interest of the persons involved.

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.¹

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.

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.

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

HB-1620-HD-1

Submitted on: 2/25/2020 12:54:06 PM

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

LATE

Submitted By	Organization	Testifier Position	Present at Hearing
Erika Vargas	Individual	Support	No

Comments: