



**TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
KA 'OIHANA O KA LOIO KUHINA
THIRTY-SECOND LEGISLATURE, 2024**

ON THE FOLLOWING MEASURE:

H.B. NO. 2159, H.D. 1, RELATING TO MENTAL HEALTH.

BEFORE THE:

HOUSE COMMITTEE ON JUDICIARY AND HAWAIIAN AFFAIRS

DATE: Tuesday, February 13, 2024 **TIME:** 2:00 p.m.

LOCATION: State Capitol, Room 325 and Videoconference

TESTIFIER(S): Anne E. Lopez, Attorney General, or
Ian T. Tsuda, Deputy Attorney General

Chair Tarnas and Members of the Committee:

The Department of the Attorney General (Department) provides the following comments:

The purposes of this bill are to (1) require the Department to assist in the preparation, filing, and presentation of petitions for Assisted Community Treatment (ACT) when requested, (2) repeal section 802-1(a)(3), Hawaii Revised Statutes (HRS), regarding legal representation by the Public Defender for the subjects of ACT proceedings, (3) amend section 704-404(2), HRS, to make it inapplicable to proceedings under the jurisdiction of the family court, (4) create a mechanism for individuals charged with nonviolent petty misdemeanors, whose fitness remains an outstanding issue, to be automatically screened for involuntary hospitalization or ACT, (5) decrease the offense of escape in the second degree under section 710-1021, HRS, from a class C felony to a petty misdemeanor if the defendant escaped while under the custody of the Director of Health due to a nonviolent petty misdemeanor charge, and (6) authorize courts to require a probation violator to participate in a mental health evaluation and treatment program when there is reason to believe the violation was associated with a mental disease, disorder, or defect of the defendant.

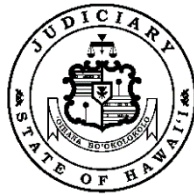
The amendments to sections 704-404(2) and 710-1021, HRS, in this bill might be considered to be outside the scope of the original bill, necessitating additional readings to comply with constitutional requirements. In *League of Women Voters of Honolulu v.*

State, 150 Hawai'i 182, 205, 499 P.3d 382, 405 (2021), the Hawaii Supreme Court held that a bill's three readings in each house must "begin anew" if a "non-germane amendment changes the object or subject of a bill so that it is no longer related to the original bill as introduced." The object of this bill, in its original draft, was to require the Department to assist petitioners with the preparation, filing, and presentation of petitions for ACT proceedings, which involve individuals suffering from mental illness or substance abuse who have a history of treatment noncompliance and require treatment to prevent relapse or deterioration that would predictably result in them becoming imminently dangerous to self or others. Section 334-121, HRS. While the majority of amendments in H.D. 1 of this bill share a common tie to that objective, the jurisdictional amendment to section 704-404(2), HRS, made by section 9 of this bill, on page 9, line 20, to page 10, line 2, as well as the criminal penalty reduction in some circumstances of escape under section 710-1021, HRS, made by section 11 of this bill, on page 16, lines 13-19, however, could be viewed as dissimilar and discordant, leaving the bill susceptible to the requirement of additional readings.

To reduce the risk that additional readings of this bill be required, the Department recommends that sections 9 and 11 of this bill be removed. In the alternative, the bill could be scheduled for additional readings before it crosses over to the Senate.

The Department respectfully requests that the Committee consider these recommendations.

Thank you for the opportunity to testify.



The Judiciary, State of Hawai'i

Testimony to the Thirty-Second State Legislature, 2024 Regular Session

House Committee on Judiciary and Hawaiian Affairs

Representative David A. Tarnas, Chair
Representative Gregg Takayama, Vice-Chair

Tuesday, February 13, 2024 at 2:00 p.m.
Conference Room 325 and Via Videoconference

by
Rodney A. Maile
Administrative Director of the Courts

Bill No. and Title: House Bill No. 2159, H.D. 1, Relating to Mental Health.

Purpose: Part I: requires the Department of the Attorney General to assist with the preparation and filing of petitions for assisted community treatment and with the presentation of the case, unless declined by the petitioner. Part II: repeals language entitling the subject of a petition for assisted community treatment to legal representation by a public defender. Part III: provides a mechanism for the automatic screening of certain nonviolent defendants for involuntary hospitalization or assisted community treatment. Part IV: authorizes courts to require certain probation violators to undergo a mental health evaluation and treatment program as a condition of continued probation. Part V: beginning 7/1/2024, and occurring every ten years thereafter, requires the Department of Health to convene an Advisory Committee on Mental Health Code Review. Effective 7/1/3000. (HD1)

Judiciary's Position:

The Judiciary strongly supports the overall intent of this legislation, and specifically supports Sections 8 – 10 and Part IV, as each of these parts, and all of them together, will improve the government response to individuals suffering from mental health challenges, particularly for those who may become, or already are, involved in the criminal justice system. While the Judiciary offers no comments on Parts I and II and Section 11 of the measure, we offer the following comments on the remainder of the legislation.

As noted, the Judiciary strongly supports the provisions outlined in Sections 8 – 10 of the measure as these amendments were supported by the Judiciary last session when they were a part of the larger House Bill (HB) 1442, HD2, SD1, which went to conference committee and was carried over to this session. These provisions are critical to ensuring that the defendants who are diverted from the criminal justice system are properly evaluated and assessed to determine what types of services they may require, and what can be offered to them, whether inpatient, outpatient, or community based, upon the dismissal of the criminal case.

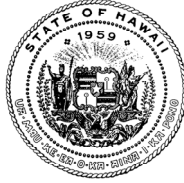
In addition, the Judiciary strongly supports the provisions of Part IV that were also contained in HB1442, HD2, SD1, which will permit the court to divert a probation violator to mental health evaluation and treatment as a condition of continued probation rather than simply revoking that probation. This will provide the court with valuable tool to both determine and address whether an individual may be having difficulty with the terms and conditions of their probation due to a mental disease, disorder, or defect instead of requiring a revocation of that individual's probation. If, after being assessed and treated, it is determined that the defendant's conduct on probation is not the result of a mental disease, disorder, or defect, or the defendant fails to comply, then the court may continue with the motion for revocation.

While the Judiciary supports these provisions as part of the overall blueprint to improve the government response to individuals suffering from mental health challenges, particularly for those who may become, or already are, involved in the criminal justice system, the present bill does not include the appropriations for these provisions that were included in HB1442, HD2, SD1. Respectfully, the Judiciary requests that the measure be amended to include the appropriation of funds to provide the job position necessary to support implementation of this bill and the broader jail diversion program. Specifically, the Judiciary requests the appropriation set forth Part I, Section 6 of HB1442, HD2, SD1, for the law clerk position tasked with cases under Chapter 704 and the Circuit Court of the First Circuit Jail Diversion Program. For fiscal year 2025 this amount is estimated to be a salary of \$71,016, plus benefits.

Finally, the Judiciary respectfully requests that any appropriations added to this bill not supplant the Judiciary's existing funding and current budget requests.

Thank you for the opportunity to testify on this measure.

JOSH GREEN, M.D.
GOVERNOR OF HAWAII
KE KIA'ĀINA O KA MOKU'ĀINA 'O HAWAII'



KENNETH S. FINK, M.D., M.G.A, M.P.H
DIRECTOR OF HEALTH
KA LUNA HO'ŌKELE

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**Testimony in SUPPORT of H.B. 2159
RELATING TO MENTAL HEALTH**

REPRESENTATIVE DAVID A. TARNAS, CHAIR
HOUSE COMMITTEE ON JUDICIARY & HAWAIIAN AFFAIRS

Tuesday, February 13, 2024, 2:00 p.m. in Room 325 and Via Videoconference

1 **Fiscal Implications:** Undetermined.

2 **Department Position:** The Department supports this measure and offers comments.

3 **Department Testimony:** The Adult Mental Health Division (AMHD) provides the following
4 testimony on behalf of the Department.

5 The Department supports this measure and concurs that assisted community treatment
6 (ACT) orders provide a potentially highly effective means to improve treatment adherence and
7 achieve significantly better health outcomes for individuals suffering from serious mental
8 illnesses. Furthermore, the Department supports the requirement of the Department of the
9 Attorney General to assist with the preparing and filing of any petition brought pursuant to the
10 Hawaii Revised Statutes, and with the presentation of the case at any related court
11 proceedings.

12 In the community, the Department benefits from Attorney General assistance in
13 preparing and filing ACT petitions. However, some community providers have used their own
14 attorneys to complete these petitions. Currently, the majority of petitions have been done by
15 the community.

1 The Department supports ACT orders as being a potentially valuable component for
2 individuals being treated successfully in the community; however, any opinions on legal
3 processes contained in this bill are deferred to the Department of the Attorney General or
4 other appropriate legal experts.

5 The Department's recommendations reflect the operations of the Hawaii State Hospital
6 and the AMHD. We defer to the Department of the Attorney General where their input is
7 required.

8 **Offered Amendments:** None.

9 Thank you for the opportunity to testify on this measure.

JON N. IKENAGA
STATE PUBLIC DEFENDER

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February 9, 2024

Committee on Judiciary & Hawaiian Affairs
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Rep. Gregg Takayama, Vice Chair
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State Capital
Honolulu, HI 96813
[via email: JDCtestimony@capitol.hawaii.gov](mailto:JDCtestimony@capitol.hawaii.gov)

Re: Testimony in Support of H.B. 2159
Hearing: February 13, 2024, 2:00 PM

Dear Chair Tarnas, Vice Chair Takayama and Committee Members:

This letter is mainly in support of H.B. 2159 which would (1) amend the law to effectively maintain consistency and uniformity with the mandates of the Office of the Public; (2) provide the court with additional treatment and placement options for those undergoing fitness examinations; (3) creates a petty misdemeanor offense of escape under certain circumstances; and (4) allows the court to order a defendant to undergo a mental health evaluation and treatment when there is reason to believe that a probation violation is associated with a mental disease, disorder or defect.

H.B. 2159 amends the law for consistency and uniformity by omitting the Office of the Public Defender in cases involving petitions for assisted community treatment under Hawaii Revised Statutes Chapter 334. This omission is consistent with the mandates of the Office of the Public Defender in providing legal representation for those whose liberty interests are at risk because assisted community treatment does not fall under those parameters.

H.B. 2159 also provides mental health treatment options including involuntary hospitalization, assisted community treatment and release with conditions while a defendant is undergoing a fitness examination. Similarly, where there is a reason to believe that a mental health issue is associated with a probation violation, the probation violation is appropriately addressed through a mental health evaluation and possible treatment. Although this assessment could be beneficial to the defendant, it may be detrimental for the defendant to be saddled with the financial cost of the assessment and treatment. In addition, should the defendant not comply with mental health treatment, additional treatment options should be explored and employed, including the aforementioned treatment options, prior to revoking the defendant's probation.

Finally, the creation of a petty misdemeanor offense of escape for nonviolent petty misdemeanor offenders under the custody of the director of health would be beneficial to those individuals where fitness is not an issue. A petty misdemeanor escape charge is more appropriate than a class C felony charge. Although fitness is likely an issue for everyone who is in the custody of the director of health, those who are not fit should not be penally responsible. The focus of individuals in the custody of the director of health continues to be mental health treatment, fitness restoration and long term stability. To the extent that H.B. 2159 furthers those goals, the Office of the Public Defender is in support of those measures.

Thank you for taking these comments into consideration.

Sincerely,
/s/ Taryn Tomasa
Deputy Public Defender

HB-2159-HD-1

Submitted on: 2/10/2024 2:23:13 PM

Testimony for JHA on 2/13/2024 2:00:00 PM

Submitted By	Organization	Testifier Position	Testify
Louis Erteschik	Hawaii Disability Rights Center	Oppose	Remotely Via Zoom

Comments:

We have great concerns about this bill, and believe it may cause serious due process constitutional violations of the rights of individuals with a mental illness.

Last year the Legislature authorized the Attorney General to assist in the filing and preparation of ACT Petitions. This Bill greatly expands their role to make them a full participant in what is supposed to be a legal proceeding. We understand that Petitions are often filed by people who are unfamiliar with the legal system and so we can understand how the Attorney General would be helpful to them.

However, a few years ago the Legislature made the decision to strip Respondents in these proceedings of their right to be represented by the Public Defender. It substituted a Guardian Ad Litem who I think all lawyers will agree is not the same thing. A Guardian Ad Litem may advocate for the so called "best interests" of the Respondent while a Public Defender may be more likely to advocate for the articulated wishes of that individual. At the time that decision was made, most of the Petitioners were unrepresented as well so there arguably may have been less of an imbalance. However, if this measure passes the scales will be substantially tilted against the Respondents in these cases and that may well create serious due process considerations that need to be examined. Certainly if the Legislature is going to consider having the Attorney General be a full party to the case, it should equally consider restoring the right to free counsel for the individuals who are the subject of the proceedings. In fact we would argue that it must restore the right to counsel in that case. That would hardly be extraordinary. Essentially, it would provide that the ACT proceedings be conducted in the same traditional manner as virtually all other hearings which occur in the Judicial system.

There are some provisions in the Bill that we think are positive. For example, screening for civil commitment or more likely assisted community treatment does seem to be reasonable. We do though have some concerns about the timeline in which a person committed to the Health Director would have to wait in custody, since the ACT process can take a while. Additionally, requiring mental health treatment as a condition of probation is helpful to everyone. However, the bill says if they cannot then benefit from the treatment their probation can be revoked. That may be unfair if the treatment turns out to be inappropriate for some reason and they otherwise were compliant. There ought to be some provision to address that scenario.

We do support the idea of having the flexibility in the case of non violent petty misdemeanors to not commit Defendants to the custody of the Health Director as well as the ability to dismiss the charges if fitness cannot be restored.



Committee: Judiciary & Hawaiian Affairs
Hearing Date/Time: Wednesday, February 13, 2024, at 2:00pm
Place: Conference Room 325 & Via Videoconference
Re: **Testimony of the ACLU of Hawai'i in OPPOSITION to H.B. 2159 Relating to Mental Health**

Dear Chair Tarnas, Vice Chair Takayama, and Members of the Committee:

The ACLU of Hawai'i **opposes H.B. 2159 which** proposes the following: 1) requires the Department of the Attorney General to assist with the preparation and filing of petitions for assisted community treatment and with the presentation of the case, unless declined by the petitioner; 2) repeals language entitling the subject of a petition for assisted community treatment to legal representation by a public defender; 3) provides a mechanism for the automatic screening of certain nonviolent defendants for involuntary hospitalization or assisted community treatment; 4) authorizes courts to require certain probation violators to undergo a mental health evaluation and treatment program as a condition of continued probation and 5) beginning 7/1/2024, and occurring every ten years thereafter, requires the Department of Health to convene an Advisory Committee on Mental Health Code Review.

The ACLU of Hawai'i strongly opposes the stripping away of a person's due process Constitutional rights under **H.B. 2159**.

Below, we offer historical context to ground our Constitutional objections.

In 2021, the State Legislature introduced a measure to eliminate the right to counsel for persons subject to Assistant Community Treatment petitions. Written testimony from the **Department of Attorney General, dated February 11, 2021**, on HB 345 Relating to Assisted Community Treatment, to amend H.R.S. 334, reflected their constitutional concerns:

“The appointment of counsel is one of the significant provisions of the ACT to afford subjects due process under the Fourteenth Amendment of the U.S. Constitution and article I, section 5, of the Constitution of the State of Hawai'i. This bill's proposed removal of the right to counsel would remove a significant protection afforded by the procedures of the ACT statutes. *For these reasons, the Department recommends the provisions regarding the removal of the right to counsel be deleted from the bill.*”

During discussion of HB 345, the **Department of Health** also expressed their reservations:

“We continue to strive for a balance with individuals suffering from acute mental illness where they can be treated during a time where they are, for all intents and purposes ‘unconscious,’ **but still assure that their right to self-determination and representation during proceedings will be honored,**” the department wrote in testimony. **“As written, we do not believe that this measure strikes that balance.”**

We also understand that the Office of the Public Defenders weighed in on this matter. “The Office of the Public Defender offered the following comments on H.B. No. 345 HD1:

Article I, section 14 of the Hawai‘i Constitution provides, “The State shall provide counsel for an indigent defendant charged with an offense punishable by imprisonment.” (Emphasis added). Accordingly, OPD did not object to the original bill “as long as a guardian ad litem (GAL) was appointed to represent the interest of the individual because the individuals subject to the ACT petitions are not threatened by confinement or imprisonment.”

While we respect the Public Defender’s interpretation of the Hawai‘i Constitution, **we agree with the Department of Attorney General’s prior written testimony that persons subject to an ACT petition must be afforded counsel under the Fourteenth Amendment of the U.S. Constitution and article I, section 5, of the Hawai‘i Constitution.**

The appointment of a GAL alone is insufficient to protect the Constitutional rights of all people, including those living with disabilities and mental health conditions, to make informed decisions relating to their own bodies.

*The right of each person to determine his or her medical treatment is one of the most valued liberties in a democratic society. **Only in the most exigent of circumstances—where the patient is an imminent danger to themselves or others, where the treatment is in the patient’s best interest, and where no less restrictive means exist—may the State intervene and force an individual to take psychotropic drugs or otherwise undergo medical psychiatric treatment over the patient’s objection.** See *State v. Kotis*, 984 P.2d 78, 91 Hawai‘i 319 (1999). <https://law.justia.com/cases/hawaii/supreme-court/1999/18823-2.html>*

In short, removing legal counsel, whether a Public Defender or Court appointed Counsel from the ACT process, a legal proceeding, would violate a person’s due process rights under our federal and state Constitutions.

Please defer this measure. Otherwise, the State Legislature will be sanctioning an imbalanced legal proceeding where the State, via the Attorney General’s office, **is mandated to file** petitions to the Family Court for an order of continued Assisted Community Treatment (including coercive or forced treatment) against a pro se individual for up to two years – without procedural safeguards in place simply because that person has a mental health condition and/or co-occurring condition.

Alternatively, if the State Legislature requires the Attorney General to file or assist with ACT petitions, we respectfully request the following amendments:

1. Eliminate Part I unless indigent persons subject to petitions for assistant community treatment are entitled to legal representation or
2. Add language in Part II that entitles the indigent person subject to a petition for assisted community treatment to legal representation in addition to a guardian ad litem.

Thank you for the opportunity to testify in opposition to **H.B. 2159**.

Sincerely,

Carrie Ann Shirota
Carrie Ann Shirota
Policy Director
ACLU of Hawai'i
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The mission of the ACLU of Hawai'i is to protect the fundamental freedoms enshrined in the U.S. and State Constitutions. The ACLU of Hawai'i fulfills this through legislative, litigation, and public education programs statewide. The ACLU of Hawai'i is a non-partisan and private non-profit organization that provides its services at no cost to the public and does not accept government funds. The ACLU of Hawai'i has been serving Hawai'i for over 50 years.

HB-2159-HD-1

Submitted on: 2/12/2024 12:56:57 PM

Testimony for JHA on 2/13/2024 2:00:00 PM

Submitted By	Organization	Testifier Position	Testify
Raelyn Reyno Yeomans	Individual	Oppose	Remotely Via Zoom

Comments:

Re: HB2159 HD1

I am submitting testimony in strong OPPOSITION to this bill.

The State has already used their power to unilaterally strip the Right To Legal Counsel from those targeted by ACT (Assisted Community Treatment) Petitions. Now the State would like to use that same power through this bill to mandate that the Attorney General's Office step in as counsel for the Petitioner. This is a violation of an individual's most basic right and speaks volumes when other states are able to provide treatment orders while still providing free legal counsel to those affected.

The State is not allowed to draft legislation which violates an individuals rights because it makes it easier to achieve the State's goal. The right to legal counsel for the targeted individual must be restored in all ACT Petition proceedings.

The second part of this bill also targets mentally ill individuals charged with petty misdemeanors. Just last week, this Legislature held a hearing where the administrator of the State Hospital informed you that it is overcrowded and there are many individuals being held there when it was not medically necessary but because there is a backlog in psychiatric evaluations.

<https://www.hawaiinewsnow.com/2024/02/06/state-psychiatric-hospital-overcrowded-with-patients-who-dont-have-medical-needs/>

Now the State Legislature would like to propose this legislation which targets individuals charged with petty misdemeanors and funnels more individuals towards this ACT Petition Process where the right to legal counsel has already been stripped. This on top of the fact that this Legislature has already passed legislation that individuals charged with petty misdemeanors can be held for 30 days or more to determine fitness through a process that this Legislature has also previously changed by lowering the bar for determining fitness to proceed for individuals charged with any non-felony case (ie-petty misdemeanors); by specifically lowering the requirement to only one examiner.

The Legislature needs to start over. For all of these reasons, I OPPOSE this bill.

DATE: February 13, 2024

TO: Honorable Legislators

FROM: Christopher D. Thomas, Attorney at Law

RE: Public Comment and Testimony Regarding HB 2159

My name is Christopher Thomas; I am an attorney in Honolulu, and I obtain Assisted Community Treatment (ACT) Orders for the Institute of Human Services (IHS). Via IHS, a team of Psychiatrists, Outreach Workers, and Attorneys represent the highest utilizers of our ACT Statute within Hawai'i. We have treated, and continue to treat, a large percentage of O'ahu's seriously mentally ill and substance addicted homeless population. Our ACT statute, housed in HRS Chapter 334 is one of the most useful laws we use to ensure the most vulnerable of our citizens receives the treatment they have the right to obtain.

I support HB 2159 as a practical and commonsense Amendment to our laws to match the intent of prior legislation which Amended ACT process and procedure.

Regarding Attorney General Representation of ACT Petitioners

As it currently stands, private entities such as the Institute for Human Services, are performing the bulk of ACT Petitions, litigation, and treatment. In effect, IHS is taking the burden of ACT treatment on their own shoulders, when the State has the inherent responsibility (and more robust financial resources) to our citizens to treat serious mental illness in our community. Requiring Attorney General involvement in petitioning for ACT Orders and Treatment of individuals upon release from involuntary hospitalization is a natural "hand-off" of hospitalized patients to the benefits of ACT "street medicine." HB 2159 merely makes this hand-off mandatory, versus discretionary. The amendment would require greater use of our existing ACT statute and benefit our citizens accordingly.

Regarding Public Defender Representation to ACT Respondents

As you are likely aware, in 2021, Chapter 334 was amended to relieve the State of Hawai'i Public Defender's (PD's) attorneys from the burden of being appointed as mandatory counsel to ACT Respondents/Patients. Chapter 334 was further amended to make the appointment of a Guardian Ad Litem (GAL) to ACT Respondents mandatory, versus discretionary. Prior to the PD's being removed from mandatory appointment, ACT Petitions were unreasonably delayed due to a myriad of logistical and procedural entanglements. Prior to 2021, my experience is that mandatory PD appointment actually served to thwart the purpose of ACT Orders: to get patients efficiently treated. Appointment of a GAL in lieu of PDs has streamlined ACT Orders and produced more efficient treatment.

Unfortunately, while Chapter 334 was Amended to remove PD representation, a corresponding edit to Chapter 802 Section 1(a)(3) was neglected. As a result, HRS 802-1(a)(3) remains in conflict with Chapter 334-121 through 136. An Amendment is necessary to remove PD appointment remaining in Chapter 802. HB 2159 represents that necessary Amendment.

From a practitioner's standpoint gleaned from the last five years of litigating ACT cases, the mandatory appointment of GALs to ACT cases adequately balances the need for an ACT Respondent to have an advocate to guide them through the ACT process with the need of the community to immediately and swiftly treat illness/substance abuse. An ACT Respondent is provided adequate due process in a civil matter through protection via the statute, a trial judge, a psychiatrist, and a GAL. Public Defender mandatory representation is, therefore, not necessary. The neglected corresponding Amendment to HRS 802-1(a)(3) is overdue.

I respectfully request that HB 2159 be given your full support through the legislative process.

Respectfully submitted,
Christopher D. Thomas, (808) 261-7710, cthomas@hawaiianfamilylaw.com