

The Judiciary, State of Hawai'i

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

Senate Committee on Judiciary
Senator Karl Rhoads, Chair
Senator Mike Gabbard, Vice-Chair

Tuesday, April 2, 2024, 10:05 A.M.
Conference Room 016 & Videoconference

by
Rodney A. Maile
Administrative Director of the Courts

WRITTEN TESTIMONY ONLY

Bill No. and Title: House Bill No. 2159, H.D. 2, S.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.

Judiciary's Position:

The Judiciary strongly supports the overall intent of this legislation, and specifically supports Sections 8 – 9 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 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 – 9 of the measure as these amendments were supported by the Judiciary last session when they were a part of the larger House Bill No. (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.

The Judiciary also 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 a 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.

In addition, the Judiciary respectfully requests the effective date be changed to take effect upon approval, as set forth in the original version of the bill.

Thank you for the opportunity to testify on this measure.



**WRITTEN 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. 2, S.D. 1, RELATING TO MENTAL HEALTH.

BEFORE THE:

SENATE COMMITTEE ON JUDICIARY

DATE: Tuesday, April 2, 2024

TIME: 10:05 a.m.

LOCATION: State Capitol, Room 016 and Videoconference

TESTIFIER(S): **WRITTEN TESTIMONY ONLY.**

(For more information, contact Ian T. Tsuda,
Deputy Attorney General, at (808) 693-7081)

Chair Rhoads 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) 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, and (4) 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.

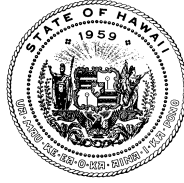
The amendment to section 704-421(3)(b), HRS, in section 9 of the bill at page 12, line 4, through page 13, line 10, providing that a defendant committed to the custody of the Director of Health “shall remain in custody until the family court issues a decision on the [ACT] petition” (page 13, lines 9-10) has the potential to conflict with a defendant’s criminal proceedings in a manner that implicates a defendant’s right to 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. Currently, there are no time limitations on the family court's ability to issue a decision on an ACT petition. This allows ACT cases to remain pending for unknown and potentially significant periods of time, during which a determination could be made in a concurrent criminal proceeding that a defendant has regained the defendant's fitness to proceed, making commitment no longer appropriate. Further, the question of fitness to proceed involves issues not contemplated by orders for ACT. As written, this provision has the potential to be interpreted in a manner that requires the continued commitment of a defendant who has regained fitness solely because the defendant is the subject of a separate, pending ACT proceeding.

To address this issue, and to minimize the potential for legal challenge, the Department recommends that page 13, lines 6-10, be amended to delete "When a petition for assisted community treatment has been filed for a defendant, the defendant committed to the custody of the director of health shall remain in custody until the family court issues a decision on the petition." Our recommendation will not impede the Director of Health's ability to pursue an ACT order, when appropriate, as the primary benefit relating to committed defendants is the ability to serve them with a petition and notice of hearing, which can occur soon after the initiation of a case.

The Department respectfully requests that the Committee consider this recommendation.

Thank you for the opportunity to testify.



STATE OF HAWAII
DEPARTMENT OF HEALTH
KA 'OIHANA OLAKINO
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WRITTEN
TESTIMONY ONLY

**Testimony in SUPPORT of H.B. 2159 HD2 SD1
RELATING TO MENTAL HEALTH**

SENATOR KARL RHOADS, CHAIR
SENATE COMMITTEE ON JUDICIARY

Tuesday, April 2, 2024, 10:05 a.m. in Room 016 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 (SMI). Additionally, timely mental health evaluations and treatment may prevent
9 individuals with SMI from cycling in and out of the criminal justice system and the Hawaii State
10 Hospital. Furthermore, the Department supports the requirement of the Department of the
11 Attorney General to assist with the preparing and filing of any petition brought pursuant to the
12 Hawaii Revised Statutes, and with the presentation of the case at any related court
13 proceedings.

14 All inpatient and outpatient clinical treatment teams should consider ACT for individuals
15 with or without ongoing criminal proceedings. It is less than likely that an individual who is
16 denied an involuntary hospitalization would meet the criteria of an ACT petition. In the

1 community, the Department benefits from Attorney General assistance in preparing and filing
2 ACT petitions. However, some community providers have used their own attorneys to complete
3 these petitions. Currently, the vast majority of ACT petitions have been with outpatients in the
4 community.

5 The Department supports ACT orders as being a potentially valuable component for
6 individuals being treated successfully in the community.

7 **Offered Amendments:** The Department respectfully suggests the following amendments with
8 the associated comments below. These recommendations align with those we submitted
9 regarding HB2451 HD3 and have received concurrence from the Attorney General's office.

10 Recommend deleting from Section 3, (3), (b): ~~"If the defendant's clinical team~~
11 ~~determines that the defendant does not meet the criteria for involuntary hospitalization, or the~~
12 ~~court denies the petition for involuntary hospitalization,"~~ The Assisted Community Treatment
13 statute should be considered by all clinical treatment teams, both inpatient and outpatient and
14 for individuals with or without ongoing criminal proceedings. It is less than likely that an
15 individual who is denied an involuntary hospitalization would meet the criteria of an ACT
16 petition.

17 Also delete in Section 3, (3), (b), p. 6 lines 14-18: ~~"The clinical team shall identify a~~
18 ~~community mental health outpatient program that agrees to provide mental health services to~~
19 ~~the defendant as the designated mental health program under the assisted community~~
20 ~~treatment order."~~ Insert, "The patient will be linked with the appropriate community-based
21 mental health case management team based on clinical needs and Medicaid-eligibility, which
22 will serve as the designated mental health program under the assisted community treatment
23 order." The state agencies that oversee community mental health case management continue
24 to work with these case management teams on clinical issues and willingness to work with
25 patients who have active ACT Orders.

1 Also delete Section 3, (3), (b), p. 7: ~~“When a petition for assisted community treatment~~
2 ~~has been filed for a defendant, the defendant committed to the custody of the director of~~
3 ~~health shall remain in custody until the family court issues a decision on the petition.”~~ Once the
4 petition is filed, the defendant does NOT need to remain committed. This would be a
5 tremendous waste of resources and contribute to the continued overuse of Hawai’i State
6 Hospital, which will eventually reach a crisis point. There would be no clinical justification for
7 having someone like this locked up for additional weeks or months to await the ACT hearings to
8 take place. The vast majority of ACT petitions filed so far have been with outpatients in the
9 community. Forcing these individuals to remain in an inpatient setting may also violate
10 *Olmstead v. L.C.*

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

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April 1, 2024

Committee on Judiciary
Sen. Karl Rhoads, Chair
Sen. Mike Gabbard, Vice Chair
415 South Beretania Street, Conf. Rm. 016
State Capital
Honolulu, HI 96813

Re: Testimony in Support of H.B. 2159, HD 2, SD1
Hearing: April 2, 2024, 10:00 AM

Dear Chair Rhoads, Vice Chair Gabbard and Committee Members:

This letter is in support of H.B. 2159 to the extent that it (1) amends the law to effectively maintain consistency and uniformity with the mandates of the Office of the Public; (2) provides the court with additional treatment and placement options for those undergoing fitness examinations; (3) requires the department of the attorney general to assist with the preparation, filing and presentation of the petition for assisted community treatment (“ACT”); 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. The Office of the Public Defender (“OPD”) takes no position as to requiring the Department of the Attorney General to assist in the preparation, filing and presentation of ACT petitions.

H.B. 2159 amends the law for consistency and uniformity by omitting the OPD in ACT cases filed pursuant to Hawaii Revised Statutes Chapter 334. The 2021 amendments to the ACT law properly removed the OPD as counsel for subjects of an ACT petition.¹ While the provisions of the ACT statutes under Chapter 334 were amended to remove the appointment of the OPD as counsel for subjects of an ACT petition, HRS § 802-1

¹ The OPD generally represents only persons who are subject to incarceration. Pursuant to article I, section 14 of the Hawaii Constitution, “[t]he State shall provide counsel for an indigent defendant charged with an offense **punishable by imprisonment.**” (Emphasis added). Prior to the enactment of the ACT statutes, HRS § 802-1 limited the OPD’s duty to representing only indigent persons threatened by imprisonment or confinement. This limitation was inclusive to indigent persons charged with criminal offenses punishable by confinement or prison, juveniles subject to confinement under HRS Chapter 571, and persons threatened by confinement in psychiatric or other mental institutions, including accompanying requests for involuntary medical treatment.

was not amended to remove the “the subject of a petition for assisted community treatment under chapter 334.” This outstanding issue is resolved by properly removing the subject of an ACT petition from HRS § 802-1.² This amendment is consistent with the mandates of the OPD in providing legal representation for indigent individuals whose liberty interests are at risk because ACT does not fall under those parameters.

In prior hearings, the issue of whether the failure to appoint a court-appointed attorney to represent the subject of the ACT violated the subject’s due process rights was discussed.³ The OPD has no objection to the court appointing counsel, but not the OPD because the appointment of the OPD to represent the subject of an ACT petition is inconsistent with the OPD’s mandate to represent indigent persons threatened only by imprisonment or confinement.⁴

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.

Thank you for taking these comments into consideration.

Sincerely,
/s/ Taryn Tomasa
Deputy Public Defender

² It is important to reiterate that the OPD has already been removed as counsel for the subject of an ACT petition under Chapter 334. This bill only seeks to further clarify the removal of the OPD as counsel for the ACT subject by removing the unnecessary provision under HRS § 802-1(a)(3).

³ At a hearing before the House Committee on the Judiciary and Hawaiian Affairs, the OPD was asked whether the subject’s due process rights are protected without the default appointment of counsel. The OPD believes that the ACT hearing procedure is defined to provide due process rights to the subject of the ACT petition. Ultimately the determination of whether the ACT procedure provides constitutionally-adequate due process to the subject is a matter that would be determined by the courts, not the OPD.

⁴ Even if the ACT petition is granted, the subject of the ACT petition would not be subject to confinement in a hospital or mental institution. See HRS §§ 334-127, 334-129. The subject may only be transported to a designated mental health program or hospital emergency department with their consent or in accordance with the emergency hospitalization procedure set forth in HRS § 334-59, which requires a belief that the subject is mentally ill or suffering from substance abuse, imminently dangerous to self or others, and is need of care or treatment or both. See HRS § 334-59. continued confinement of the subject is sought, the subject could then be subjected to the involuntary civil commitment procedure set forth in Chapter 334 and the OPD would be appointed to represent the subject due to the threat of confinement. The ACT statutes only allow involuntary medication of the subject of an ACT order if the subject is within a hospital emergency room or admitted to a hospital. See HRS § 334-129(b).

HB-2159-SD-1

Submitted on: 3/27/2024 10:18:28 PM

Testimony for JDC on 4/2/2024 10:05:00 AM

Submitted By	Organization	Testifier Position	Testify
Louis Erteschik	Testifying for Hawaii Disability Rights Center	Comments	Written Testimony Only

Comments:

While the bill does contain some provisions that will facilitate treatment, we have concerns that it may raise 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. We also 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.

We know that this issue has been discussed at several hearings this session and the Senate Committee on Health and Human Services noted the due process concerns in its Committee Report. We also appreciate that this Committee in SB 2557 amended it to grant discretion to the

Court to appoint an attorney. While that is certainly an improvement over the current law we do reiterate our legal concerns over the lack of counsel. We also want to point out that there was a prior statement at the hearing on SB 2557 that may have led the Committee to believe that ACT orders are not literally enforceable unless a subsequent petition for involuntary hospitalization is filed. That is not our reading of the law and that is a crucial point of information for the Committee to consider. If the law did require a subsequent court hearing in order to enforce the ACT order one might argue that the right to counsel would be afforded at that time and so it would cure any potential defect in the initial proceeding. However, under HRS 334-129 an individual can be forcibly placed into a police car and transported to a hospital emergency room and then literally forcibly medicated. So the end result of an ACT order is not simply a Judge telling an individual they must take medication. It is involuntary, forced treatment. While people can debate whether that is beneficial or detrimental, nobody can deny that it is a serious infringement of a constitutionally protected liberty interest. For that to occur, they must at the very least be accorded their constitutional rights to due process, which includes legal representation.



HB2159 HD2 SD1 ACT and Involuntary Assessment and Treatment

COMMITTEE ON JUDICIARY

Senator Karl Rhoads, Chair

Senator Mike Gabbard, Vice Chair

Tuesday, Apr 2, 2024: 10:05 : Room 016

Hawaii Substance Abuse Coalition Supports HB2159 HD2 SD1:

ALOHA CHAIRS, VICE CHAIRS, AND DISTINGUISHED COMMITTEE MEMBERS. My name is Alan Johnson. I am the current chair of the Hawaii Substance Abuse Coalition (HSAC), a statewide organization for substance use disorder and co-occurring mental health disorder treatment and prevention agencies and recovery-oriented services.

HSAC supports that defendants charged with petty misdemeanors not involving violence can be subject to criminal justice diversion programs such that following appropriate assessments, the defendant can be committed to a hospital or outpatient facility for more assessments and treatment.

Such defendants can fare much better in treatment than in jail.

As for the rights of defendants to be supported by the Attorney General and not have legal support from public defenders after determining fitness to proceed, HSAC defers to legal experts.

We appreciate the opportunity to provide testimony.



Committee: Judiciary
Hearing Date/Time: Tuesday, April 2, 2024, at 10:05 am
Place: Conference Room 016 & Via Videoconference
Re: **Testimony of the ACLU of Hawai'i in OPPOSITION to Part II of HB 2159, HD2, SD1 Relating to Mental Health**

Dear Chair Rhoads, Vice Chair Gabbard, and Members of the Committee:

The ACLU of Hawai'i **opposes Part II of HB 2159 HD2, SD1** which proposes to repeal language entitling the subject of a petition for assisted community treatment to legal representation by a public defender.

What's at Stake

The ACLU of Hawai'i strongly opposes stripping away legal representation – and ultimately the due process rights of indigent persons subject to Assisted Community Treatment (ACT) petitions and orders.

Under an ACT order, the Family Court has the discretion to order forced medication (also known as involuntary medical treatment). This is acknowledged by the Department of the Attorney General in a formal opinion dated April 20, 2023:

“An individual can be forcibly medicated under an ACT order if the individual is within an emergency department or admitted to a hospital, it is determined there that the individual is “imminently dangerous to self or others,” and the administration of medication pursuant to the ACT order is indicated by good medical practice.”¹

The Department of the Attorney General Previously Recommended Against Removing Appointment of Legal Counsel for Individuals Subject to ACT Proceedings Under the Prior Administration.

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

¹ <https://ag.hawaii.gov/wp-content/uploads/2023/04/AG-Opinion-23-01.pdf>

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.”**

At that time, the Office of the Public Defender also weighed in on this matter, and 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 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.”

We respect the Public Defender’s legal interpretation of the Hawai‘i Constitution as it relates to their mandate to represent indigent defendants “threatened by confinement or imprisonment.” However, **we agree with the prior Department of Attorney General’s 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.**²

The Hawai‘i Supreme Court Has Set a High Legal Standard Before the State May Force Medication Over the Patient’s Objections.

The Hawai‘i Supreme Court has affirmed that 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>

² The Department of Attorney General issued an opinion last year relating to Assisted Community Treatment yet did not squarely address the issue whether indigent persons subject to ACT petitions are entitled to legal representation. However, the opinion acknowledges that ACT orders can include medical treatment. <https://ag.hawaii.gov/wp-content/uploads/2023/04/AG-Opinion-23-01.pdf>

The Appointment of a Guardian Ad Litem Does Not Equate to Legal Representation in ACT Proceedings.

Several proponents for removing Part II affording legal representation have argued that legal counsel is unnecessary because indigent individuals subject to ACT petitions are afforded Guardian Ad Litem (GALS) in the Family Court proceedings. However, GALs must abide by a different standard than attorneys.

GALS are expected to make recommendations based on the “best interest of the individual” whereas attorneys have a legal duty to provide zealous representation and protect the Constitutional rights of their client, including those living with or perceived disabilities, where decision-making relates to personal or bodily autonomy – including the right to determine medical treatment.

Other States Afford Individuals Subject to Assisted Outpatient Treatment Petitions Legal Representation.

Hawaii’s Assisted Community Treatment laws are modeled after Assisted Outpatient Treatment processes in other jurisdictions. Significantly, states such as New York³, California⁴, Washington, and Utah, to name a few, afford individuals the right to legal representation throughout the AOT legal proceedings.

- 1. New York’s Section 9.60 Assisted outpatient treatment Mental Hygiene (MHY) CHAPTER 27, TITLE B, ARTICLE 9 Law, also known as Kendra’s Law, affords the right to counsel.**

§ 9.60 Assisted outpatient treatment.

(g) Right to counsel. The subject of the petition shall have the right to be represented by the mental hygiene legal service, or privately financed counsel, at all stages of a proceeding commenced under this section.⁵

- 2. California’s AB-1976 Mental health services: assisted outpatient treatment.(2019-2020), Assembly Bill No. 1976, CHAPTER 140, also known as Laura’s Law, affords the right to counsel.**⁶

(4) The petition shall state all of the following:

(A) Each of the criteria for assisted outpatient treatment as set forth in subdivision (a).

(B) Facts that support the petitioner’s belief that the person who is the subject of the petition meets each criterion, provided that the hearing on the petition shall be limited to the stated facts in the verified petition, and the petition contains all the grounds on which

³https://my.omh.ny.gov/analytics/saw.dll?dashboard&PortalPath=%2Fshared%2FAOTLP%2F_portal%2FAssisted%20Outpatient%20Treatment%20Reports&nquser=BI_Guest&nqpassword=Public123

⁴ <https://namisantaclara.org/wp-content/uploads/2014/11/Lauras-Law-AB1421.pdf>

⁵ <https://www.nysenate.gov/legislation/laws/MHY/9.60>

⁶ https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB1976; see also

the petition is based, in order to ensure adequate notice to the person who is the subject of the petition and that person's counsel.

(C) That the person who is the subject of the petition is present, or is reasonably believed to be present, within the county where the petition is filed.

(D) That the person who is the subject of the petition has the right to be represented by counsel in all stages of the proceeding under the petition, in accordance with subdivision (c).⁷

The Attorney General's Involvement in the ACT Proceeding Makes the Repeal of Legal Counsel for an Indigent Person Even More Suspect Given the Imbalance of Power between the Parties.

Under the proposed measure, 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 unless the petitioner declines the assistance.⁸

The lack of due process procedural safeguards in place simply because a person has a mental health condition and/or co-occurring condition is discriminatory on its face, and constitutionally suspect.

Removing legal counsel, whether a Public Defender or court appointed counsel from the ACT process, a closed legal proceeding in Family Court, violates a person's due process rights under our federal and state Constitutions.

Proposed Amendments

We offer either of the following amendments to remedy this constitutional violation:

1. Amend Part II and add language that any indigent person subject to a petition for assistant community treatment shall be entitled to legal representation by court appointed counsel through all stages of the ACT proceeding **OR**
2. Amend Part II and add language that any indigent person subject to a petition for assistant community treatment shall be entitled to legal representation by a public defender through all stages of the ACT proceeding.

⁷ In California, Public Defenders represent defendants in criminal cases, as well as individuals subject to conservatorship and Assisted Outpatient Treatment proceedings in civil court.

<https://pubdef.lacounty.gov/mental-health-court-branch/>

⁸ Hawai'i Judiciary form to initiate a Petition for Assisted Community Treatment

<https://www.courts.state.hi.us/wp-content/uploads/2023/07/3CP553.pdf>

Other Concerns

- We agree with the comments raised by Hawai'i Disability Rights Center relating to the timeline in which a person committed to the Director of Health would have to wait in custody.
- According to a Pew Report in 2019, Hawai'i has the longest average length of probation within the United States, with an average length of six years. Revoking individuals on probation supervision for failing to comply with treatment alone contravenes best practices and evidence based harm-reduction strategies. We have limited treatment options in Hawai'i, and revoking a person for non-compliance when the treatment was inappropriate is punitive, not therapeutic.

Thank you for the opportunity to submit testimony and propose amendments to remedy the constitutional violations that **HB 2159, HD2 SD1** will effectuate if passed as currently drafted.

Sincerely,

Carrie Ann Shirota

Carrie Ann Shirota
Policy Director
ACLU of Hawai'i
cshirota@acluhawaii.org

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.

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April 2, 2024
10:05 a.m.

Conference Room 016 & Videoconference

To: The Honorable Chair Karl Rhoads
The Honorable Vice Chair Mike Gabbard
Senate Committee on Judiciary

From: 'Ohana Health Plan
Rachel Wilkinson, Manager, Government Relations, Marketing &
Communications

Re: HB2159 HD2 SD1, Relating to Mental Health; **In Support**

'Ohana Health Plan is a wholly owned subsidiary of Centene Corporation, a leading multi-national healthcare enterprise committed to helping people live healthier lives. Since 2008, 'Ohana Health Plan has provided government-sponsored managed care services to families—from keiki to kupuna—and individuals with complex medical needs primarily through QUEST Integration (Medicaid), Medicare Advantage and Medicare Prescription Drug Plans across the state.

'Ohana Health Plan offers our **support** of HB2159 HD2 SD1, which 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; repeals language entitling the subject of a petition for assisted community treatment to legal representation by a public defender; provides a mechanism for the automatic screening of certain nonviolent defendants for involuntary hospitalization or assisted community treatment; and authorizes courts to require certain probation violators to undergo a mental health evaluation and treatment program as a condition of continued probation.

Since 2013, 'Ohana Health Plan has also served adults diagnosed with a qualifying serious mental illness (SMI) and/or a serious and persistent mental illness (SPMI) through the state's Community Care Services (CCS) program.

Our 'Ohana CCS members are some of Hawaii's most vulnerable individuals who have been diagnosed with schizophrenia, Post Traumatic Stress Disorder, substance induced psychosis, bipolar disorder, and major depression. They have significant impairment in their social or functional behavior, unable to achieve optimal health outcomes without the support of persons to help navigate their care.

The CCS program has additional benefits and resources to help those in our community dealing with behavioral health and substance use disorders, including a specialized intensive case management program for our most severely mentally ill.

The assistance of the Department of the Attorney General would significantly enhance the ability of the treatment team to prepare an effective MH-10.

The benefit of maintaining a guardian ad litem rather than a public defender to assist our members is due to the inherent deficit in decision making capacity and insight a member must have to initiate an MH-10 petition. A public defender may not always act in the best interest of an incapacitated person and instead may unintentionally align with the member's inauthentic and unsafe refusal of treatment.

Thank you for the opportunity to submit testimony on this measure.



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COMMITTEE ON JUDICIARY

Senator Karl Rhoads, Chair

Senator Mike Gabbard, Vice Chair

April 2, 2024 10:05 A.M. Conf Rm 16 & via Video conference

Testimony in Support on HB2159 SD1 RELATING TO MENTAL HEALTH

The Hawai'i Psychological Association (HPA) supports HB2159 SD1; which ultimately facilitates assisted community treatment (ACT) and mental health treatment for defendants navigating the criminal justice system.

Mental Illness Should Not be Criminalized

There is a disproportionate number of individuals with severe mental health conditions who are incarcerated - Up to a 1/3 of those incarcerated have serious mental illness.

People with mental illness are 10x more likely to be incarcerated than they are to be hospitalized. The justice system is often the de facto entry point for individuals with mental health disorders, substance use disorders, or both.

Diversion programs reduce recidivism. People who participate in diversion programs are less likely to re-offend than those who are incarcerated. This is because diversion programs help people address the underlying causes of their criminal behavior, which reduces the risk of future offending.

Diversion programs promote public safety. By reducing recidivism, diversion programs help to make our communities safer. People who are receiving treatment are less likely to engage in criminal behavior, which benefits everyone.

Intervention should go beyond determinations of Imminent Danger to self or others. Behaviors induced by conditions like psychosis, paranoia, mania, dementia or substance intoxication need to be diverted and not just those with suicidal or homicidal ideation. Current crisis intervention approaches only allow diversion in cases where there is imminent danger to self or others occurs. There are many scenarios with people who are not imminently dangerous, but who are in severe crisis due to their condition, and need immediate crisis evaluation and treatment. Otherwise, they will not receive treatment and are released back into the community. These individuals' underlying conditions and behaviors will continue to go untreated, and they will likely reoffend (often for petty offenses). The cycle will continue.

Often the crisis is the doorway into services for individuals with severe conditions. Given the barriers and challenges existing to enter into the mental health system, we need to be able to identify and redirect them immediately rather than repeatedly going through the criminal justice system.

The crisis centers can provide much needed access to care

Diversion programs provide much-needed treatment. Incarceration does not address the underlying mental health or substance use issues that contribute to criminal behavior. Diversion programs offer a path to treatment and recovery, which can help people get their lives back on track.

Diversion programs are more cost-effective than incarceration.

In the long run, it is less expensive to invest in diversion programs than it is to incarcerate people with mental health or substance use disorders.

Comment on a Coordinated Legislative Approach to Criminal Justice and Mental Health

A coordinated, comprehensive and integrated behavioral health system is desperately needed to achieve the appropriate diversion of individuals with mental health disorders and substance use disorders to proper and effective care. Many bills this session target the intersection of mental illness and criminal justice, but focus on just one component. In order to have a comprehensive systemic approach, our legislation should also be comprehensive and systematic.

This bill (HB2159) gets help to people early when first interfacing and navigating the criminal justice system. Others (SB3139 and HB1831) create crisis and diversion program to address an initial crisis. Without a crisis center to divert individuals to and a program to oversee and monitor, it will not work. Without properly trained officers to get them there, it will not work. We also need specially trained and designated law enforcement officers to identify and divert those with mental illness to the crisis center (SB2345); the brick and mortar crisis center itself (HB1831); the Assisted Community Treatment (ACT) program that will manage and monitor the process and put the systems in place to identify those in the legal system that are in need of treatment (SB3141); and the handling of involuntary hospitalizations and authorization for screenings for ACT (HB2159).

Each of these measures needs adequate funding to make it all happen, which overall is a cost savings for the government and the public. There will be a marked reduction in recidivism, which also benefits overall public safety and quality of life for all.

As for individuals, these measures – with adequate and appropriately targeted funding – will provide services that actually help.

Thank you for the opportunity to provide input into this important bill.

Sincerely,



Raymond A Folen, Ph.D., ABPP.
Executive Director

REFERENCES

- Fader, T. & Kelly E. (2020). *Just and well: Rethinking how states approach competency to stand trial*. The Council of State Governments Justice Center. <https://csgjusticecenter.org/wp-content/uploads/2020/10/Just-and-Well27OCT2020.pdf>
- National Center for State Courts. (2022). *National Diversion Landscape: Continuum of Behavioral Health Diversions Survey Report*. National Judicial Task Force to Examine State Courts' Response to Mental Illness. https://www.ncsc.org/data/assets/pdf_file/0022/77143/National-Diversion-Landscape.pdf
- National Center for State Courts. (2023). *State Courts Leading Change: Report and Recommendations*. National Judicial Task Force to Examine State Courts' Response to Mental Illness. https://www.ncsc.org/data/assets/pdf_file/0031/84469/MHTF_State_Courts_Leading_Change.pdf

HB-2159-SD-1

Submitted on: 3/27/2024 8:54:21 PM

Testimony for JDC on 4/2/2024 10:05:00 AM

Submitted By	Organization	Testifier Position	Testify
Ellen Godbey Carson	Individual	Support	Written Testimony Only

Comments:

I strongly support this bill, which makes some essential changes to our Assisted Community Treatment laws (ACT).

While I write as an individual, I have served as president of IHS and the Hawai‘i State Bar Association, with a commitment toward helping change our laws to better address the needs of our neighbors who are chronically mentally ill and/or suffering from substance abuse.

ACT laws play a critical role in our continuum of care for our most vulnerable residents. ACT provides a legal hearing process that allows intervention for seriously mentally ill persons that can get them the treatment they need, before they become so ill that they die, cause injury or need involuntary civil commitment.

This bill makes essential changes to allow more mentally ill people to be evaluated for civil commitment and ACT, and assists in getting them treatment earlier, before they hurt themselves or someone else.

The bill also makes clear the Attorney General's office should provide the legal services for pursuing ACT petitions. This essential change mirrors the AG's role in civil commitment hearings, acting on behalf of the State, in seeking to provide appropriate treatment for these individuals. Private attorneys are still allowed to represent private petitioners if they wish.

And the bill removes the final vestiges of Public Defender being involved in ACT cases. The Public Defender is not appropriate in ACT cases because no involuntary custody is entailed in the ACT proceedings, and this fulfills the intent of earlier amendments in that regard.

Please support passage of this bill.

Thank you for consideration of my testimony.

Ellen Godbey Carson, Honolulu, Hawai‘i

HB-2159-SD-1

Submitted on: 4/1/2024 1:50:21 PM

Testimony for JDC on 4/2/2024 10:05:00 AM

Submitted By	Organization	Testifier Position	Testify
Raelyn Reyno Yeomans	Individual	Oppose	Written Testimony Only

Comments:

I am submitting testimony in strong OPPOSITION to this bill.

The State has previously used their power to unilaterally strip an individual's 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.

As the Attorney General of the State Of Hawai'i wrote/ warned in their 2/9/2021 testimony to the State Legislature on then bill SB199 (Relating To Assisted Community Treatment):

"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."

Please also note these two portions of the Judiciary's 02/03/2023 testimony to the State Legislature on then bill HB1155 (Relating to Assisted Community Treatment):

"First, given the constitutional liberty interests at issue in ACT cases,...."

"....it should be noted that the role of the GAL is to represent the best interests of the subject; they are not the subject's lawyer and cannot give the subject legal advice."

The right to legal counsel for the targeted individual must be restored in all ACT Petition (Outpatient Commitment) proceedings.

This bill also targets mentally ill individuals charged with misdemeanors. Just last month, 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 severe 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 proposes this bill which specifically targets disabled/mentally ill individuals who are charged with misdemeanors. This bill will funnel disabled/mentally ill individuals to an already severely backlogged and broken psychiatric evaluation system where they are at real risk of being detained/incarcerated/hospitalized much longer than other non-disabled individuals charged with the same exact misdemeanor. In addition, this bill will funnel these same disabled/mentally ill individuals to the Assisted Community Treatment/Outpatient Commitment hearing process where the State has already stripped the disabled/mentally ill individual's right to legal counsel.

The Legislature/State needs to start over and refrain from further violating the rights of disabled individuals.