

JON N. IKENAGA
STATE PUBLIC DEFENDER

DEFENDER COUNCIL
1130 NORTH NIMITZ HIGHWAY
SUITE A-254
HONOLULU, HAWAII 96817

HONOLULU OFFICE
1130 NORTH NIMITZ HIGHWAY
SUITE A-254
HONOLULU, HAWAII 96817

APPEALS SECTION
TEL. No. 586-2080

DISTRICT COURT SECTION
TEL. No. 586-2100

FAMILY COURT SECTION
TEL. No. 586-2300

FELONY SECTION
TEL. No. 586-2200

FAX (808) 586-2222



STATE OF HAWAII
OFFICE OF THE PUBLIC DEFENDER

HAYLEY CHENG
ASSISTANT PUBLIC
DEFENDER

HILO OFFICE
275 PONAHAHAWAI STREET
HILO, HAWAII 96720
TEL. No. 974-4571
FAX No. 974-4574

KONA OFFICE
82-6127 MAMALAHOA HIGHWAY
P.O. BOX 1219
CAPTAIN COOK, HAWAII 96704
TEL. No. 323-7562
FAX No. 323-7565

KAUAI OFFICE
3060 EIWA STREET
LIHUE, HAWAII 96766
TEL. No. 274-3418
FAX No. 274-3422

MAUI OFFICE
81 N. MARKET STREET
WAILUKU, HAWAII 96793
TEL. No. 984-5018
FAX No. 984-5022

March 18, 2024

Committee on Judiciary & Hawaiian Affairs
Rep. David A. Tarnas, Chair
Rep. Gregg Takayama, Vice Chair
415 South Beretania Street, Conf. Rm. 325
State Capital
Honolulu, HI 96813

Re: Testimony in Support of S.B. 2557, SD 1
Hearing: March 20, 2024, 2:00 PM

Dear Chair Tarnas, Vice Chair Takayama and Committee Members:

This letter is in support of S.B. 2557, SD 1 which (1) amends the law to effectively maintain consistency and uniformity with the mandates of the Office of the Public; and (2) allows for the court to appoint an attorney if the interests of justice require one be appointed.

S.B. 2557 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.

Thank you for taking these comments into consideration.

Sincerely,
/s/ Taryn Tomasa
Deputy Public Defender

SB-2557-SD-1

Submitted on: 3/18/2024 7:03:08 PM

Testimony for JHA on 3/20/2024 2:00:00 PM

Submitted By	Organization	Testifier Position	Testify
Louis Erteschik	Hawaii Disability Rights Center	Comments	In Person

Comments:

We realize this measure started off as merely a housekeeping bill. However, we believe it presents an opportunity to the Legislature to revisit what we respectfully believe was a decision made a few years ago that violated the rights of individuals who have a mental illness. When the ACT program was first implemented, the Respondents were afforded legal representation via the Public Defender. A few years ago the Legislature removed that right and substituted a Guardian Ad Litem to assist the individual in the proceeding. It is clearly not the equivalent and is not legal representation. 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. We believe it violates the due process rights of these people. Our research to date, while not a full list of all the states in the US, has indicated that it appears that all the states we have surveyed currently provide for a right to counsel in these cases. That confirms our position that Hawaii has been an outlier on this subject. This bill attempts to strike a compromise by providing for counsel in cases where the Judge feels it is appropriate. To that extent, we appreciate that the Senate Committee on Judiciary heard our concerns. While we continue to believe that counsel is required, the SD1 version is a step in the right direction. It does, though, raise some further questions such as what criteria would the Court use to decide whether to appoint counsel. Would the Court be required to make a specific finding as to why counsel was appointed or not appointed? These questions may need further exploration.

Moreover, this Committee as well as the full House of Representatives advanced HB 2159 which would have the Attorney General represent the Petitioners. If that were to pass it would substantially tilt the scales even further against these individuals. In light of the possibility that that measure were to pass it would create even more of an imbalance and raise even more serious constitutional issues. Certainly if the Legislature is going to consider having the Attorney General be a full party to the case, it is all the more reason to restore 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 . If the Legislature does not pass HB 2159, then while we do feel appointment of counsel is always appropriate, we do also believe that the discretionary provision in this bill would be an improvement over current law.



Committee: Judiciary & Hawaiian Affairs
Hearing Date/Time: Wednesday, March 20, 2024, at 2:00pm
Place: Conference Room 016 & Via Videoconference
Re: **Testimony of the ACLU of Hawai'i in OPPOSITION to S.B. 2557 SD1 Relating to Legal Representation**

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

The ACLU of Hawai'i **opposes S.B. 2557 SD1 which** proposes to repeal paragraph (3) of section 802-1(a), Hawaii Revised Statutes, which entitles the subject of a petition for assisted community treatment to legal representation by a public defender.

The ACLU of Hawai'i strongly opposes stripping away legal representation for indigent persons subject to Assisted Community Treatment petitions. The proposed measure, while an improvement to the original measure, makes the appointment of court appointed counsel discretionary. Given the liberty interests at stake under Assistant Community Treatment orders, the lack of legal counsel violates the due process rights afforded under our federal and Hawai'i Constitutions.

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.”***

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.**¹

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>

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.

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.²

¹ 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>

² 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>

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.

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 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.

³https://my.omh.ny.gov/analytics/saw.dll?dashboard&PortalPath=%2Fshared%2FAOTLP%2F_portal%2F_Assisted%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

(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).

Proposed Amendments

We offer the following amendments to remedy this constitutional violation:

1. 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 proceeding under the petition or
2. Add language that any indigent person subject to a petition for assistant community treatment shall be entitled to legal representation by a public defender.

Thank you for the opportunity to testify in opposition to **S.B. 2557**. Please defer this measure or pass this bill with the proposed amendments. Otherwise, the failure to provide legal counsel to indigent persons in ACT proceedings will violate the Fourteenth Amendment of the U.S. Constitution and article I, section 5, of the Hawai'i Constitution.⁷

Sincerely,

Carrie Ann Shiota

Carrie Ann Shiota
Policy Director
ACLU of Hawai'i
cshiota@acluhawaii.org

American Civil Liberties Union of Hawai'i
P.O. Box 3410 Honolulu,
Hawai'i 96801T:
808.522.5900
F: 808.522.5909
E: office@acluhawaii.org www.acluhawaii.org

⁷ The Department of Attorney General issued an opinion last year relating to Assisted Community Treatment. However, this Opinion 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>

SB-2557-SD-1

Submitted on: 3/20/2024 3:08:33 AM

Testimony for JHA on 3/20/2024 2:00:00 PM

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

Comments:

I am submitting testimony in opposition as an individual subject to involuntary commitment, whether inpatient or outpatient must have an attorney present during the commitment hearing. Commitment is Commitment, whether inpatient or outpatient, and basic liberties are at stake in both cases.

The State should never have stripped away the right to legal counsel during outpatient commitment hearings as there are now many individuals currently under Outpatient Commitment Orders issued without legal counsel present due to the actions of the Hawai'i State Legislature/ State Of Hawai'i.

The right to counsel is not discretionary and should not depend on whether the Court or the Guardian Ad Litem "decides" legal representation should be made available to an individual that is the target of an outpatient commitment hearing or Assisted Community Treatment hearing.

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."

The State must reverse course.