THE SENATE
TWENTY-FOURTH LEGISLATURE, 2008
STATE OF HAWAII

S.B. NO. 2160 S.D. 2 H.D. 1

A BILL FOR AN ACT

RELATING TO HEALTH.

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

PART I

SECTION 1. Senate Concurrent Resolution No. 117, S.D. 1, H.D. 1, adopted by the twenty-third Hawaii state legislature in 2006 called for the governor to convene a task force to "evaluate and recommend possible procedural, statutory, and public policy changes to minimize the census at Hawaii State Hospital and promote community based health services for forensic patients." The purpose of this part is to enact the recommendations made by that task force.

SECTION 2. Chapter 334, Hawaii Revised Statutes, is amended by adding one new section to be appropriately designated and to read as follows:

"**§334- Annual report; forensic patient data.** The department of health shall submit an annual report to the legislature no later than twenty days prior to the convening of each regular legislative session which, at a minimum, shall summarize yearly data on forensic patients, including:

(1) Gross numbers for admissions to and discharges from the Hawaii state hospital;

(2) The number of admissions to, discharges from, and lengths of stays in the Hawaii state hospital, broken down by the following commitment categories:

(A) Original order under section 704-411(1)(a);

(B) Pending examination under section 704-413(3);

(C) Maximum seventy-two-hour recommitment pending examination under section 704-413(1);

(D) Original order under section 704-404; and

(E) Original order under section 704-406;

(3) Number of persons committed to the Hawaii state hospital by each court and county;

(4) Gross lengths of stay in the Hawaii state hospital for:

(A) Patients discharged during the fiscal year; and

(B) Individuals remaining as inpatients at the end of the fiscal year;

(5) Number of patients in the Hawaii state hospital on forensic status, broken down by categories of underlying crimes, such as by crimes against the

1 person, sex offenses, and property crimes, and by
2 grade of offense."
3 SECTION 3. Section 704-411, Hawaii Revised Statutes, is
4 amended to read as follows:
5 "**§704-411 Legal effect of acquittal on the ground of**
6 **physical or mental disease, disorder, or defect excluding**
7 **responsibility; commitment; conditional release; discharge;**
8 **procedure for separate post-acquittal hearing.** (1) When a
9 defendant is acquitted on the ground of physical or mental
10 disease, disorder, or defect excluding responsibility, the
11 court, on the basis of the report made pursuant to section
12 704-404, if uncontested, or the medical or psychological
13 evidence given at the trial or at a separate hearing, shall make
14 an order as follows:
15 (a) The court shall order the defendant to be committed to
16 the custody of the director of health to be placed in
17 an appropriate institution for custody, care, and
18 treatment if the court finds that the defendant:
19 (i) Is affected by a physical or mental disease,
20 disorder, or defect;
21 (ii) Presents a risk of danger to self or others; and
22 (iii) Is not a proper subject for conditional release;

provided that the director of health shall place defendants charged with misdemeanors or felonies not involving violence or attempted violence in the least restrictive environment appropriate in light of the defendant's treatment needs and the need to prevent harm to the person confined and others;

(b) The court shall order the defendant to be [~~released on such conditions~~] granted conditional release with conditions as the court deems necessary if the court finds that the defendant is affected by physical or mental disease, disorder, or defect and that the defendant presents a danger to self or others, but that the defendant can be controlled adequately and given proper care, supervision, and treatment if the defendant is released on condition; or

(c) The court shall order the defendant discharged if the court finds that the defendant is no longer affected by physical or mental disease, disorder, or defect or, if so affected, that the defendant no longer presents a danger to self or others and is not in need of care, supervision, or treatment.

(2) The court, upon its own motion or on the motion of the prosecuting attorney or the defendant, shall order a separate post-acquittal hearing for the purpose of taking evidence on the issue of physical or mental disease, disorder, or defect and the risk of danger that the defendant presents to self or others.

(3) When ordering a hearing pursuant to subsection (2):

(a) In nonfelony cases, the court shall appoint a qualified examiner to examine and report upon the physical and mental condition of the defendant. The court may appoint either a psychiatrist or a licensed psychologist. The examiner may be designated by the director of health from within the department of health. The examiner shall be appointed from a list of certified examiners as determined by the department of health. The court, in appropriate circumstances, may appoint an additional examiner or examiners; and

(b) In felony cases, the court shall appoint three qualified examiners to examine and report upon the physical and mental condition of the defendant. In each case, the court shall appoint at least one psychiatrist and at least one licensed psychologist. The third member may be a psychiatrist, a licensed

1 psychologist, or a qualified physician. One of the
2 three shall be a psychiatrist or licensed psychologist
3 designated by the director of health from within the
4 department of health. The three examiners shall be
5 appointed from a list of certified examiners as
6 determined by the department of health.
7 To facilitate the examination and the proceedings thereon, the
8 court may cause the defendant, if not then confined, to be
9 committed to a hospital or other suitable facility for the
10 purpose of examination for a period not exceeding thirty days or
11 such longer period as the court determines to be necessary for
12 the purpose upon written findings for good cause shown. The
13 court may direct that qualified physicians or psychologists
14 retained by the defendant be permitted to witness the
15 examination. The examination and report and the compensation of
16 persons making or assisting in the examination shall be in
17 accord with section 704-404(3), (4)(a) and (b), (6), (7), (8),
18 and (9). As used in this section, the term "licensed
19 psychologist" includes psychologists exempted from licensure by
20 section 465-3(a)(3).
21 (4) Whether the court's order under subsection (1) is made
22 on the basis of the medical or psychological evidence given at

the trial, or on the basis of the report made pursuant to section 704-404, or the medical or psychological evidence given at a separate hearing, the burden shall be upon the State to prove, by a preponderance of the evidence, that the defendant is affected by a physical or mental disease, disorder, or defect and may not safely be discharged and that the defendant should be either committed or conditionally released as provided in subsection (1).

(5) For each individual who is acquitted of a felony on the ground of physical or mental disease, disorder, or defect excluding responsibility, and is the subject of inpatient hospitalization, the court shall conduct hearings to assess any need for further inpatient hospitalization beginning one calendar year after the date of commitment. If the person remains subject to inpatient hospitalization, a status hearing shall be held once per year for the next four years, and then in biennial intervals thereafter.

[~~(5)~~] (6) In any proceeding governed by this section, the defendant's fitness shall not be an issue."

SECTION 4. Section 704-412, Hawaii Revised Statutes, is amended to read as follows:

1 "**§704-412 Committed person; application for conditional**
2 **release or discharge; by the director of health; by the person.**
3 (1) After the expiration of at least ninety days following
4 [~~the~~] an original order of commitment pursuant to [~~section~~
5 [~~704-411,~~] section 704-411(1)(a), or after the expiration of at
6 least thirty days following the revocation of conditional
7 release pursuant to section 704-413(3), if the director of
8 health is of the opinion that the person committed [~~to the~~
9 ~~director's custody~~] is still affected by a physical or mental
10 disease, disorder, or defect and may be [~~released on condition~~]
11 granted conditional release or discharged without danger to self
12 or to the person or property of others or that the person is no
13 longer affected by a physical or mental disease, disorder, or
14 defect, the director shall make application for [~~the discharge~~
15 ~~or conditional release of the person in~~] either the conditional
16 release or discharge of the person, as appropriate. In such a
17 case, the director shall submit a report to the court [~~from~~] by
18 which the person was ordered committed and shall transmit [~~a~~
19 ~~copy~~] copies of the application and report to the prosecuting
20 attorney of the county from which the person was committed[~~.~~
21 ~~The~~] and to the person [~~shall be given notice of such~~
22 ~~application.~~] committed.

(2) After the expiration of ninety days from the date of the order of commitment pursuant to section 704-411, or after the expiration of thirty days following the revocation of conditional release pursuant to section 704-413(3), the person committed may apply to the court from which the person was committed for an order of discharge upon the ground that the person is no longer affected by a physical or mental disease, disorder, or defect. The person committed may apply for [~~discharge or conditional release~~] conditional release or discharge upon the ground that, though still affected by a physical or mental disease, disorder, or defect, the person may be released without danger to self or to the person or property of others. A copy of the application shall be transmitted to the prosecuting attorney of the county from which the [~~defendant~~] person was committed. If the [~~determination of the court is adverse to the application,~~] court denies the application, the person shall not be permitted to file [~~a further~~] another application for either conditional release or discharge until one year [~~has elapsed from~~] after the date of [~~any preceding hearing on an application for the person's discharge or conditional release.~~] the hearing held on the immediate prior application."

SECTION 5. Section 704-413, Hawaii Revised Statutes, is amended to read as follows:

"**§704-413 Conditional release; application for modification or discharge; termination of conditional release and commitment.** (1) Any person [~~released~~] granted conditional release pursuant to [~~section 704-411~~] chapter 704 shall continue to receive mental health or other treatment and care deemed appropriate by the director of health until discharged from conditional release. The person shall follow all prescribed treatments and take all prescribed medications according to the instructions of the person's treating mental health professional. If [~~any~~] a mental health professional who is treating [~~any~~] a [~~conditionally released~~] person granted conditional release believes that either the person is not complying with the requirements of this section or there is other evidence that hospitalization is appropriate, the mental health professional shall report the matter to the probation officer of the [~~conditionally released person.~~] person granted conditional release. The probation officer may order the [~~conditionally released~~] person granted conditional release to be hospitalized for a period not to exceed seventy-two hours if the probation officer has probable cause to believe the person

has violated the requirements of this subsection. No person shall be hospitalized beyond the [~~seventy-two hour~~] seventy-two-hour period, as computed pursuant to section 1-29, unless a hearing has been held pursuant to subsection [~~(3).~~] (4); provided that on or before the expiration of the seventy-two-hour period, a court may conduct a hearing to determine whether the person would benefit from further hospitalization, which may render a revocation unnecessary. If satisfied, the court may order further temporary hospitalization for a period not to exceed ninety days, subject to extension as appropriate, but in no event for a period longer than one year. At any time within that period, the court may determine that a hearing pursuant to subsection (4) should be conducted.

(2) The director of health may apply to the court ordering any person released pursuant to chapter 704, for the person's discharge from, or modification of, the order granting conditional release; provided that the person receives community-based mental health services from or contracted by the department of health, and the director is of the opinion that the person on conditional release is no longer affected by a physical or mental disease, disorder, or defect and may be discharged, or the order may be modified, without danger to the

person or to others. The director shall make application for the discharge from, or modification of, the order of conditional release in a report to the court. The director shall transmit a copy of the application and report to the prosecuting attorney of the county from which the conditional release order was made, to the person's treating mental health professionals, and to the probation officer supervising the conditional release. The person on conditional release shall be given notice of the application.

[~~(2)~~] (3) Any person [~~released~~] granted conditional release pursuant to [~~section 704-411~~] chapter 704 may apply to the court ordering the conditional release for discharge from, or modification of, the order granting conditional release on the ground that the person is no longer affected by a physical or mental disease, disorder, or defect and may be discharged, or the order may be modified, without danger to the person or to others. The application shall be accompanied by a letter from or supporting affidavit of a qualified physician or licensed psychologist. A copy of the application and letter or affidavit shall be transmitted to the prosecuting attorney of the circuit from which the order issued and to any persons supervising the release, and the hearing on the application shall be held

following notice to such persons. If the [~~determination of the~~] court [~~is adverse to~~] denies the application, the person shall not be permitted to file [~~further~~] another application for either discharge or modification of conditional release until one year [~~has elapsed from~~] after the date of [~~any preceding hearing on an application for modification of conditions of release or for discharge.~~] the denial.

[~~(3)~~] (4) If, at any time after the order pursuant to [~~section 704-411~~] chapter 704 granting conditional release, the court determines, after hearing evidence, that:

(a) The person is still affected by a physical or mental disease, disorder, or defect, and the conditions of release have not been fulfilled; or

(b) For the safety of the person or others, the person's conditional release should be revoked,

the court may forthwith modify the conditions of release or order the person to be committed to the custody of the director of health, subject to discharge or release [~~only~~] in accordance with the procedure prescribed in section 704-412.

(5) For each individual who is granted conditional release under chapter 704, the court shall conduct hearings to assess any need to continue or modify the conditions beginning one

1 calendar year after the date of the original court order for
2 conditional release. If the person remains subject to
3 conditional release, a status hearing shall be held once per
4 year for the next four years, and then in biennial intervals
5 thereafter."

6 PART II

7 SECTION 6. Chapter 671, Hawaii Revised Statutes, is
8 amended by adding a new part to be appropriately designated and
9 to read as follows:

10 "**PART . MEDICAL LIABILITY IN CERTAIN COUNTIES**

11 **§671-A Application of part.** This part shall apply to each
12 county with a population of less than five hundred thousand.

13 **§671-B Definitions.** As used in this part:

14 "Catastrophic damages" means irreversible, life-altering
15 injuries to an individual such as anoxic brain injury, permanent
16 paralysis, or other conditions as determined by the department
17 of health.

18 "Health care provider" means:

19 (1) A physician or surgeon licensed under chapter 453;

20 (2) A physician and surgeon licensed under chapter 460;

21 (3) A podiatrist licensed under chapter 463E;

(4) A health care facility as defined in section 323D-2; and

(5) The employees and legal representatives of any of them.

Health care provider shall not mean any nursing institution or nursing service conducted by and for those who rely upon treatment by spiritual means through prayer alone, or employees of such institution or service.

"Medical tort" means a negligent act or omission to act by a health care provider in rendering professional services, or the provision of professional service by a health care provider without informed consent, which act or omission or provision of service without informed consent is the proximate cause of a personal injury or wrongful death; provided that the services are within the scope of services for which the provider is licensed and which are not within any restriction imposed by the licensing agency or licensed hospital.

§671-C Limitation on noneconomic damages. (a) Notwithstanding section 663-8.7, noneconomic damages as defined in section 663-8.5 shall be limited in medical tort actions to a maximum award of:

(1) $ for high-risk medical specialties as designated by the department of health; and

(2) $ for any medical specialty other than a high-risk medical specialty;

provided that a plaintiff may petition the court for consideration of catastrophic damages. If catastrophic damages are granted then noneconomic damages shall be limited to a maximum award of $.

§671-D Assessing percentage of negligence. Upon request of any nonsettling health care provider against whom a plaintiff alleges a medical tort that has caused injury, the trier of fact shall consider, in assessing any percentage of negligence or other fault, the negligence or other fault of all parties, including the negligence or other fault of any person or entity who has entered into a settlement with the plaintiff for the claimed damages, even when the settlement has been determined to have been made in good faith, pursuant to section 663-15.5.

§671-E Economic damages. (a) A trier of fact may render a verdict for the plaintiff in a medical tort action that includes economic damages.

(b) For the purposes of this section, "economic damages" include:

1 (1) Past and future medical expenses;

2 (2) Loss of past and future earnings;

3 (3) Loss of use of property;

4 (4) Cost of repair or replacement;

5 (5) Cost of obtaining domestic services;

6 (6) Loss of employment; and

7 (7) Loss of business and employment opportunities.

8 **§671-F Proportionate allocation of economic damages.** The
9 amount of economic damages allocated to a health care provider
10 in a medical tort action shall be based upon the health care
11 provider's proportionate percentage of negligence or other
12 fault.

13 **§671-G Noneconomic damages.** (a) If the trier of fact
14 renders a verdict for the plaintiff in a medical tort action,
15 the court shall enter judgment of liability against each
16 defendant health care provider in accordance with the percentage
17 of negligence or other fault for compensatory damages that is
18 attributed to the health care provider by the trier of fact.

19 (b) Judgment shall not be entered against any health care
20 provider who has not been named a party or has been released,
21 dismissed, or otherwise discharged as a party pursuant to
22 section 663-15.5."

SECTION 7. Section 663-11, Hawaii Revised Statutes, is amended to read as follows:

"**§663-11 Joint tortfeasors defined.** For the purpose of this part, the term "joint tortfeasors" means two or more persons jointly or severally liable in tort for the same injury to person or property, whether or not judgment has been recovered against all or some of them[~~.~~], except as provided for health care providers in part of chapter 671."

SECTION 8. Section 671-1, Hawaii Revised Statutes, is amended to read as follows:

"**§671-1 Definitions.** As used in this chapter[~~:~~], except as otherwise provided in part :

[~~(1)~~] "Health care provider" means [~~a~~] :

(1) A physician or surgeon licensed under chapter 453[~~, a~~];

(2) A physician and surgeon licensed under chapter 460[~~, a~~];

(3) A podiatrist licensed under chapter 463E[~~, a~~];

(4) A health care facility as defined in section 323D-2[~~,~~]; and [~~the~~]

(5) The employees of any of them.

1 Health care provider shall not mean any nursing institution or
2 nursing service conducted by and for those who rely upon
3 treatment by spiritual means through prayer alone, or employees
4 of such institution or service.
5 [~~(2)~~] "Medical tort" means professional negligence, the
6 rendering of professional service without informed consent, or
7 an error or omission in professional practice, by a health care
8 provider, which proximately causes death, injury, or other
9 damage to a patient."
10 SECTION 9. By December 31, 2009, the department of health
11 shall adopt rules in accordance with chapter 91 designating the
12 medical specialties that are high-risk for purposes of section
13 671-C in section 6 of this Act. In adopting these rules, the
14 department shall:
15 (1) Consult with medical malpractice insurance companies
16 and representatives of medical specialty societies in
17 the state; and
18 (2) Determine high-risk medical specialties based on
19 statewide data for each specialty, including data
20 regarding medical tort claims, judgments, awards,
21 settlements, and medical malpractice insurance
22 premiums.

PART III

SECTION 10. The purpose of this part is to further the public's interest in maintaining a financially sound health care system by requiring insurers, mutual benefit societies, and health maintenance organizations to pay health care providers directly, regardless of the health care provider's participatory status with the insurer, mutual benefit society, or health maintenance organization.

SECTION 11. Chapter 431, Hawaii Revised Statutes, is amended by adding a new section to article 10A to be appropriately designated and to read as follows:

"**§431:10A- Direct payment for health care services.** (a) An insurer, after receiving a claim for payment of benefits, shall make the payment directly to the health care provider that provided the services, regardless of the health care provider's participatory status with the insurer's plan; provided that this subsection shall not require payment for services that are not covered under the plan.

(b) If the insurer makes payment to the insured, the insurer shall remain liable for payment to the health care provider. This subsection shall not prohibit the insurer from recovering any amount mistakenly paid to the insured.

1 (c) The provisions of this section shall not apply to any
2 entity or situation when their application to the entity or
3 situation would be preempted under the Employee Retirement
4 Income Security Act of 1974, 29 United States Code Sections
5 1001, et seq.
6 (d) As used in this section, health care provider" means a
7 provider of services as defined in 42 United States Code Section
8 1395x(u), a provider of "medical and other health services," as
9 defined in 42 United States Code Section 1395x(s), and any other
10 person or organization who furnishes, bills, or is paid for
11 health care in the normal course of business."
12 SECTION 12. Chapter 432, Hawaii Revised Statutes, is
13 amended by adding a new section to article 1 to be appropriately
14 designated and to read as follows:
15 "**§432:1- Direct payment for health care services.** (a)
16 A mutual benefit society, after receiving a claim for benefits
17 under this chapter, shall make payment directly to the health
18 care provider that provided the services, regardless of the
19 health care provider's participatory status with the society's
20 health care plan; provided that this subsection shall not
21 require payment for services that are not covered under the
22 plan.

(b) If the society makes payment to the member, the society shall remain liable for payment to the health care provider. This subsection shall not prohibit the society from recovering any amount mistakenly paid to the member.

(c) The provisions of this section shall not apply to any entity or situation when their application to the entity or situation would be preempted under the Employee Retirement Income Security Act of 1974, 29 United States Code Sections 1001, et seq.

(d) As used in this section, "health care provider" means a provider of services, as defined in 42 United States Code Section 1395x(u), a provider of "medical and other health services", as defined in 42 United States Code Section 1395x(s), and any other person or organization who furnishes, bills, or is paid for healthcare in the normal course of business."

SECTION 13. Chapter 432D, Hawaii Revised Statutes, is amended by adding a new section to be appropriately designated and to read as follows:

"**§432D- Direct payment for health care services.** (a) A health maintenance organization, after receiving a claim for benefits under this chapter, shall make payment directly to the health care provider that provided the services, regardless of

1 the health care provider's participatory status with the health
2 maintenance organization health care plan; provided that this
3 subsection shall not require payment for services that are not
4 covered under the plan.
5 (b) If the health maintenance organization makes payment
6 to the enrollee, the health maintenance organization shall
7 remain liable for payment to the health care provider. This
8 subsection shall not prohibit the health maintenance
9 organization from recovering any amount mistakenly paid to the
10 enrollee.
11 (c) The provisions of this section shall not apply to any
12 entity or situation when their application to the entity or
13 situation would be preempted under The Employee Retirement
14 Income Security Act of 1974, 29 United States Code Sections
15 1001, et seq.
16 (d) As used in this section, "health care provider" means
17 a provider of services, as defined in 42 United States Code
18 Section 1395x(u), a provider of "medical and other health
19 services", as defined in 42 United States Code Section 1395x(s),
20 and any other person or organization who furnishes, bills, or is
21 paid for health care in the normal course of business."

PART IV

SECTION 14. There is appropriated out of the general revenues of the State of Hawaii the sum of $ or so much thereof as may be necessary for fiscal year 2008-2009 to support the operations and expansion of the mental health court.

The sum appropriated shall be expended by the judiciary for the purposes of part I of this Act.

SECTION 15. This Act does not affect rights and duties that matured, penalties that were incurred, and proceedings that were begun, before its effective date.

SECTION 16. In codifying the new sections added by section 6 of this Act, the revisor of statutes shall substitute appropriate section numbers for the letters used in designating the new sections in this Act.

PART V

SECTION 17. Statutory material to be repealed is bracketed and stricken. New statutory material is underscored.

SECTION 18. This Act shall take effect on July 1, 2050; provided that part II of this Act shall be repealed on December 31, 2014, and part III of this Act shall be repealed on May 1, 2013; provided further that:

(1) Section 9 shall take effect upon the approval of this Act; and

(2) Sections 6, 7, and 8 shall apply to injuries and deaths occurring after the effective date of this Act.

S.B. NO. 2160
S.D. 2
H.D. 1

Report Title:
Hawaii State Hospital; Forensic Patients; Medical Liability; Direct Provider Reimbursement

Description:
Requires the department of health to submit an annual report on forensic patients; requires yearly court status hearings for individuals ordered to be conditionally released or hospitalized as an inpatient by the mental health court; reduces the minimum length of hospitalization from ninety to thirty days for individuals who are recommitted after conditional release; makes appropriation for mental health court operations. Addresses medical malpractice insurance costs by capping non-economic damages at an unspecified amount for high-risk medical specialties and an unspecified amount for all other specialties, establishing a limit for noneconomic damages determined by the court to be catastrophic damages, and requiring that economic damages be allocated based upon proportionate percentage of negligence. Allows medical services providers to receive payment directly from health insurers, health maintenance organizations, and mutual benefit societies, rather than attempting to collect from the patient when the provider does not have a contract with the insurer (SB2160 HD1)