



STATE OF HAWAII
DEPARTMENT OF HEALTH
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**Testimony in SUPPORT of S.B. 2033 S.D. 1
RELATING TO ADMINISTRATION OF JUSTICE**

SENATOR KARL RHOADS, CHAIR
SENATE COMMITTEE ON JUDICIARY

Hearing Date and Time: Friday, February 21, 2020 at 10:45 a.m.

Room: 016

1 **Department Position:** The Department of Health (“Department”) strongly supports this
2 measure offering comments and proposed amendments.

3 **Department Testimony:** The subject matter of this measure intersects with the scope of the
4 Department’s Behavioral Health Administration (BHA) whose statutory mandate is to assure a
5 comprehensive statewide behavioral health care system by leveraging and coordinating public,
6 private and community resources. Through the BHA, the Department is committed to carrying
7 out this mandate by reducing silos, ensuring behavioral health care is readily accessible, and
8 person-centered. The BHA’s Adult Mental Health Division (AMHD) provides the following
9 testimony on behalf of the Department.

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

1 The attached proposed S.D. 2 includes amendments supported by the JUD and ATG and
2 shared with the Department of the Prosecuting Attorney of the City and County of Honolulu
3 and the Office of the Public Defender. In summary, the proposed S.D. 2 includes the following
4 suggested amendments.

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

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

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

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

22 SECTION 2 – Amending Section 704-404, HRS

23 For consistency with the proposed amendments for SECTION 1, revisions to SECTION 2,
24 page 4, line 2 through page 8, line 6 are necessary. Additionally, to address our concerns

1 regarding available resources, including staffing, the Department proposes language in this
2 section be revised to address provisions for expedited hearings and evaluations.

3 SECTION 3 – Amending Section 704-406, HRS

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

6

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

9 **Offered Amendments:** The Department respectfully offers the attached proposed S.D. 2.

10 Thank you for the opportunity to testify.

11 **Fiscal Implications:** Undetermined.

A BILL FOR AN ACT

RELATING TO THE ADMINISTRATION OF JUSTICE.

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

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

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

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1 SECTION 2. Section 704-404, Hawaii Revised Statutes, is
2 amended as follows:

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

4 "(1) Whenever there is reason to doubt the defendant's
5 fitness to proceed, the court may immediately suspend all
6 further proceedings in the prosecution; provided that for any
7 defendant not subject to an order of commitment to [~~a hospital~~]
8 the director of health for the purpose of the examination,
9 neither the right to bail nor proceedings pursuant to chapter
10 804 shall be suspended. If a trial by jury has [~~empanelled,~~
11 empaneled, it shall be discharged or retained at the discretion
12 of the court. The discharge of the trial jury shall not be a
13 bar to further prosecution.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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1 3. By amending subsection (7) to read:

2 “(7) [~~Three copies~~] A copy of the report of the
3 examination, including any supporting documents, shall be filed
4 with the clerk of the court[, ~~who shall cause copies to be~~
5 ~~delivered to the prosecuting attorney and to counsel for the~~
6 ~~defendant~~].”

7 SECTION 3. Section 704-406, Hawaii Revised Statutes, is
8 amended by amending subsection (1) to read as follows:

9 “(1) If the court determines that the defendant lacks
10 fitness to proceed, the proceeding against the defendant shall
11 be suspended, excepted as provided in [~~section~~] sections
12 704-407[~~7~~] and 704- , and the court shall commit the defendant
13 to the custody of the director of health to be placed in an
14 appropriate institution for detention, assessment, care and
15 treatment; provided that [~~the commitment shall be limited in~~
16 ~~certain cases as follows~~]:

17 (a) When the defendant is charged with a petty misdemeanor
18 not involving violence or attempted violence, the
19 [~~commitment shall be limited to no longer than sixty~~
20 ~~days from the date the court determines the defendant~~
21 ~~lacks fitness to proceed; and~~ defendant shall be

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

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

8 If the court is satisfied that the defendant may be released on
9 conditions without danger to the defendant or to another or risk
10 of substantial danger to property of others, the court shall
11 order the defendant's release, which shall continue at the
12 discretion of the court, on conditions the court determines
13 necessary; provided that [~~the release on conditions of a~~
14 ~~defendant charged with a petty misdemeanor not involving~~
15 ~~violence or attempted violence shall continue for no longer than~~
16 ~~sixty days]~~ the release on conditions of a defendant charged
17 with a misdemeanor not involving violence or attempted violence
18 shall continue for no longer than one hundred twenty days. A
19 copy of all reports filed pursuant to section 704-404 shall be
20 attached to the order of commitment or order of release on
21 conditions that is provided to the department of health. When

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1 the defendant is committed to the custody of the director of
2 health for detention, assessment, care, and treatment, the
3 county police departments shall provide to the director of
4 health and the defendant copies of all police reports from cases
5 filed against the defendant that have been adjudicated by the
6 acceptance of a plea of guilty or nolo contendere, a finding of
7 guilt, acquittal, acquittal pursuant to section 704-400, or by
8 the entry of a plea of guilty or nolo contendere, made pursuant
9 to chapter 853; provided that the disclosure to the director of
10 health and the defendant does not frustrate a legitimate
11 function of the county police departments; provided further that
12 expunged records, records of or pertaining to any adjudication
13 or disposition rendered in the case of a juvenile, or records
14 containing data from the United States National Crime
15 Information Center shall not be provided. The county police
16 departments shall segregate or sanitize from the police reports
17 information that would result in the likely or actual
18 identification of individuals who furnished information in
19 connection with the investigation or who were of investigatory
20 interest. No further disclosure of records shall be made except
21 as provided by law."

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1 SECTION 4. Section 704-411, Hawaii Revised Statutes, is
2 amended by amending subsection (3) to read as follows:

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

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

14 (b) In felony cases, the court shall appoint three
15 qualified examiners to examine and report upon the
16 physical and mental condition of the defendant. In
17 each case, the court shall appoint [~~at least one~~
18 ~~psychiatrist and at least one licensed psychologist.~~
19 ~~The third member may be a psychiatrist, a licensed~~
20 ~~psychologist, or a qualified physician.—One] as
21 examiners psychiatrists, licensed psychologists, or~~

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1 qualified physicians; provided that one of the three
2 shall be a psychiatrist or licensed psychologist
3 designated by the director of health from within the
4 department of health. The three examiners shall be
5 appointed from a list of certified examiners as
6 determined by the department of health.

7 To facilitate the examination and the proceedings thereon, the
8 court may cause the defendant, if not then confined, to be
9 committed to a hospital or other suitable facility for the
10 purpose of examination for a period not exceeding thirty days or
11 a longer period as the court determines to be necessary for the
12 purpose upon written findings for good cause shown. The court
13 may direct that qualified physicians or psychologists retained
14 by the defendant be permitted to witness the examination. The
15 examination and report and the compensation of persons making or
16 assisting in the examination shall be in accordance with section
17 704-404(3), (5)(a), [~~and~~], (b), (d) and (e), (7), (8), (9),
18 (10), and (11). As used in this section, the term "licensed
19 psychologist" includes psychologists exempted from licensure by
20 section 465-3(a)(3) and "qualified physician" means a physician
21 qualified by the court for the specific evaluation ordered."

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1 SECTION 5. Section 704-414, Hawaii Revised Statutes, is
2 amended by amending subsection (1) to read as follows:

3 "(1) Upon filing of an application pursuant to section
4 704-412 for discharge or conditional release, or upon the filing
5 of an application pursuant to section 704-413 for discharge, the
6 court shall appoint three qualified examiners in felony cases,
7 and one qualified examiner in nonfelony cases, to examine and
8 report upon the physical and mental condition of the defendant.
9 In felony cases, the court shall appoint [~~at least one~~
10 ~~psychiatrist and at least one licensed psychologist. The third~~
11 ~~member may be a psychiatrist, a licensed psychologist, or a~~
12 ~~qualified physician. One]~~ as examiners psychiatrists, licensed
13 psychologists, or qualified physicians; provided that one of the
14 three shall be a psychiatrist or licensed psychologist
15 designated by the director of health from within the department
16 of health. The examiners shall be appointed from a list of
17 certified examiners as determined by the department of health.
18 To facilitate the examination and the proceedings thereon, the
19 court may cause the defendant, if not then confined, to be
20 committed to a hospital or other suitable facility for the
21 purpose of the examination and may direct that qualified.

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1 physicians or psychologists retained by the defendant be
2 permitted to witness the examination. The examination and
3 report and the compensation of persons making or assisting in
4 the examination shall be in accordance with section 704-404(3),
5 (5)(a) [~~and~~], (b), (d) and (e), (7), (8), (9), (10), and (11).
6 As used in this section, the term "licensed psychologist"
7 includes psychologists exempted from licensure by
8 section 465-3(a)(3) and "qualified physician" means a physician
9 qualified by the court for a specific evaluation ordered."

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

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

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Report Title:

Fitness to Proceed; Misdemeanors; Petty Misdemeanors; DOH

Description:

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



The Judiciary, State of Hawai‘i

Testimony to the Senate Committee on Judiciary

Senator Karl Rhoads, Chair

Senator Jarrett Keohokalole, Vice Chair

Friday, 21, 10:45 a.m.

State Capitol, Conference Room 016

WRITTEN TESTIMONY ONLY

By

Shirley M. Kawamura

Deputy Chief Judge, Criminal Administrative Judge, Circuit Court of the First Circuit

Bill No. and Title: Senate Bill No. 2033, S.D. 1, Relating to the Administration of Justice

Purpose: Amends the effect of finding a defendant charged with a misdemeanor or petty misdemeanor not involving violence or attempted violence unfit to proceed. Amends the requirements of fitness determination hearings, court-appointed examiners, and examination reports.

Judiciary’s Position:

The Judiciary strongly supports this bill and the opportunity to work with the Department of Health and the Department of the Attorney General to propose refined language of this measure to address concerns. After consultation with the Department of Health, the Department of the Attorney General, the Department of the Prosecuting Attorney of the City and County of Honolulu, and the Office of the Public Defender, the Judiciary proposes the following amendments to S.B. 2033, S.D. 1. At this time the Department of Health, Department of the Attorney General, and the Judiciary support the amendments below. In addition, the below proposed amendments have been shared with the Department of the Prosecuting Attorney of the City and County of Honolulu and the Office of the Public Defender; at this time we do not know their position on these amendments.



SECTION 1, addition of the new section 704-_____

The Judiciary respectfully proposes that the criminal justice diversion program be made available at this time only for those petty misdemeanors not involving violence or attempted violence. This will allow the Department of Health to implement the provisions with existing resources and allow them to determine the resources necessary to expand the program in the future. In addition, the proposal is to amend the provisions of the section to make clear that those defendants deemed fit to proceed will have their criminal cases resumed and only those who cannot be determined to be fit to proceed will be diverted into the mental health system. The seven days will be available for those defendants to be evaluated and assessed as to the level of care they may require (in-patient, out-patient, or merely crisis intervention). Those individuals who may require or benefit from treatment will be diverted and their case will be dismissed. As is always within their discretion, the Department of Health may proceed under Chapter 334 if the situation so requires. The Judiciary believes that this will address the concerns raised by the prosecutors as well as the Office of the Public Defender. The Judiciary proposes the following language for section 704-_____ in place of Page 1, Line 4 through Page 3, Line 21 of .S.B.2033, S.D.1:

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

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



SECTION 2, amendment of section 704-404:

In light of the revision proposed above to section 704-___, further revisions are required for consistency and cohesiveness to section 704-404. In addition, the Judiciary suggests amendments to the proposed provisions of the expedited hearings and evaluations for the petty non-violent misdemeanors that will address potential straining of the resources of the Department of Health due to the expedited nature of the evaluations. Specifically, the Judiciary proposes that Page 4, line 3 through Page 5, line 11 of S.B. 2033, S.D.1 would be amended to state as follows:

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

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

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

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

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



SECTION 3, amendment of section 704-406:

In light of the revision proposed in section 704-___, we propose that Page 8, line 9 through Page 9, line 18 of S.B. 2033, S.D.1 be amended to state as follows:

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

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

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

SECTION 4, amendment of section 704-411:

It appears that the current version of S.B. 2033, S.D.1 may have a typographical error on Page 12, Line 1, and should read “qualified physicians; provided that one of the three”; it currently reads “the” instead of “that.”

Thank you for the opportunity to testify on this measure.



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

LATE

ON THE FOLLOWING MEASURE:

S.B. NO. 2033, S.D.1, RELATING TO THE ADMINISTRATION OF JUSTICE.

BEFORE THE:

SENATE COMMITTEE ON JUDICIARY

DATE: Friday, February 21, 2020

TIME: 10:45 a.m.

LOCATION: State Capitol, Room 016

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

(For more information, contact Debbie L. Tanakaya,
Deputy Attorney General, at (808) 587-3050)

Chair Rhoads and Members of the Committee:

The Department of the Attorney General offers the following comments.

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

The ordering of defendants to the custody of the Director of Health, found in section 1, page 1, line 14, through page 2, line 2, of the bill, raises constitutional due process concerns. This is because based on the amendments to the fitness to proceed examination in section 704-404(5), Hawaii Revised Statutes, the court order transferring

custody of defendant to the Director of Health does not require a finding that the defendant poses a danger to self or others, or any of the other requirements for a report of the fitness to proceed examination. See amendments on page 7, lines 1-2. The amendment to section 704-404(5), excepts out examination in connection with court orders transferring custody to the Director of Health; therefore, the fitness to proceed determination for diversion of defendants is without any standards. The Ninth Circuit Court of Appeals, in Suzuki v. Yuen, 617 F.2d 173 (1980), held that it is unconstitutional to commit a defendant who does not pose an imminent danger, and opined that "in drafting involuntary commitment statutes, states should be cognizant of the 'significant deprivation of liberty.' " (617 F.2d 176).

The due process concerns could be resolved by providing clear standards for the determination of fitness to proceed for purposes of these defendants ordered to the custody of the Director of Health.

Our department is available to work further with the Committee to address the intent of this measure.

Thank you for this opportunity to testify.

SB-2033-SD-1

Submitted on: 2/14/2020 7:31:47 PM

Testimony for JDC on 2/21/2020 10:45:00 AM

Submitted By	Organization	Testifier Position	Present at Hearing
Louis Erteschik	Testifying for Hawaii Disability Rights Center	Comments	No

Comments:

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



SB2033 SD1 Unfit to Proceed for Misdemeanors Not Involving Violence

COMMITTEE ON JUDICIARY:

- Sen. Karl Rhoads, Chair; Sen. Jarrett Keohokalole, Vice Chair
- Friday, Feb. 21, 2020: 10:45 am:
- Conference Room 016

Hawaii Substance Abuse Coalition **Recommends & Supports SB2033 SD1:**

GOOD MORNING CHAIR, VICE CHAIR AND DISTINGUISHED COMMITTEE MEMBERS. My name is Alan Johnson. I am the current chair of the Hawaii Substance Abuse Coalition (HSAC), a statewide organization of over 30 non-profit alcohol and drug treatment and prevention agencies.

HSAC defers to the Judiciary for appropriate language; however, we support the intent to direct persons towards appropriate treatment rather than recycling through the Judiciary systems.

HSAC Recommends changes:

- Several of the substance use disorder treatment centers now provide mental health treatment, which could include short term residential stays and/or outpatient treatment.
- Some individuals may need residential stays for a short term before entering outpatient treatment.
- Also, many persons with mental health also have substance use disorders, which could be treated at co-occurring disorder treatment centers, which is now done in some substance use disorder treatment centers.

SECTION 1. Chapter 704, Hawaii Revised Statutes, (b) (3)

If the defendant's clinical team determines that the defendant does not meet the criteria for involuntary hospitalization, or the family court denies the petition for involuntary hospitalization, or in the anticipation of discharge after involuntary hospitalization pursuant to section 334-60.3, the clinical team shall determine whether an assisted community treatment plan is appropriate pursuant to chapter 334, part VIII. If the clinical team determines that an assisted community treatment plan is appropriate, the psychiatrist or advanced practice registered nurse from the clinical team shall prepare the certificate for assisted community treatment specified by section 334-123. The clinical team shall identify a community mental health outpatient or co-occurring disorder program that agrees to provide mental health services to the defendant as the designated mental health program under the assisted community treatment order. The defendant may be held at the hospital or other suitable facility pending the family court hearing on the petition for assisted community treatment. If the petition is granted, the defendant shall be released for treatment with the designated mental health program once the assisted community treatment order is issued and the initial

treatment consistent with the assisted community treatment plan is administered to the defendant.

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

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

HSAC notes the following intent of this bill that follow the intent of national systemic changes:

1. **The intent is to help and protect persons** who are suffering from mental illness that may also include substance use disorders, which may cause harm to themselves or others.
2. **People who are high utilizers are excessive in their use of jails, police interventions, emergency rooms, and emergency workers** while often not engaging access to adequate mental health treatment or substance use disorder treatment. What they get is inadequate care over and over again.¹
3. **We are broadening our definition to allow systems more options to encourage and engage** the necessary community-based services that could help them.
4. **The need for follow up services is great.** People, who have chronic conditions of mental illness, substance use disorders or both, have disproportionately high rates of chronic and acute health conditions, traumatic injuries as well as assaults.

System transformation requires fundamental changes to produce high value care with improved outcomes at lower costs. As a community, we are wisely moving towards developing more community-based resources with higher quality treatments to improve coordinated care.

We appreciate the opportunity to provide testimony and are available for questions.

¹ PBS/NPR: WHYY; Anne Hoffman (2017): *High Utilizers tax state mental health services, but still don't get adequate care.* <https://whyy.org/articles/high-utilizers-tax-state-mental-health-services-but-still-dont-get-adequate-care/>



**Testimony of
SUZANNE D. CASE
Chairperson**

**Before the House Committee on
FINANCE**

**Friday, February 21, 2020
12:00pm
State Capitol, Conference Room 308**

**In consideration of
HOUSE BILL 2033 HOUSE DRAFT 1
RELATING THE DEPARTMENT OF LAND AND NATURAL RESOURCES**

House Bill 2033 House Draft 1 proposes to appropriate funds to be expended for forest resource management and development (LNR 172) for the Division of Forestry and Wildlife to purchase firefighting equipment. **Hawai'i Wildfire Management Organization (HWMO) supports this measure.**

HWMO is a statewide 501(c)3 nonprofit organization located in Waimea on the island of Hawai'i. We are a hub for wildfire related education and multi-agency collaborations. We also were formed to fill in the gaps for what our agencies don't have the capacity to address, and unfortunately there are many gaps despite the dedication and hard work of the people at those agencies, including the Division of Forestry and Wildlife (DOFAW).

The charge of the DOFAW fire program is huge. Fire is an under publicized and often misunderstood issue in Hawaii. Due to invasive fire prone grasses, which now cover over 26% of the state, that are highly flammable, and an increase in drought and high fire danger conditions, our fire issues are increasing. DOFAW has a huge responsibility in keeping lands and people safe from wildfire and their budget does not yet match the level of threat and work they are expected to take care of. As an organization that is tracking fire conditions, and whom works closely with DOFAW and county and federal fire agencies across the state, we strongly urge you to consider and fund their request for appropriate funds to purchase firefighting equipment so that our island communities and natural resources can be better protected from the devastating impacts of wildfire.

Thank you for the opportunity to comment on this measure.

With regards,

A handwritten signature in black ink on a light-colored rectangular background. The signature reads "Andrea Barretto" in a cursive script.

Andrea (Nani) Barretto
Co-Executive Director

SB-2033-SD-1

Submitted on: 2/18/2020 6:05:08 PM

Testimony for JDC on 2/21/2020 10:45:00 AM

Submitted By	Organization	Testifier Position	Present at Hearing
Colleen Fox	Individual	Support	No

Comments:

I support SB2033. Direct persons towards appropriate treatment rather than recycling through the Judiciary systems is less expensive and more effective.