



GOV. MSG. NO. 744

EXECUTIVE CHAMBERS
HONOLULU

LINDA LINGLE
GOVERNOR

June 16, 2009

The Honorable Colleen Hanabusa, President
and Members of the Senate
Twenty-Fifth State Legislature
State Capitol, Room 409
Honolulu, Hawaii 96813

Dear Madam President and Members of the Senate:

This is to inform you that on June 16, 2009, the following bill was signed into law:

SB937 HD1

A BILL FOR AN ACT
RELATING TO MENTAL HEALTH.
ACT 127 (09)

Sincerely,



LINDA LINGLE

A BILL FOR AN ACT

RELATING TO MENTAL HEALTH.

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

1 SECTION 1. Act 100, Session Laws of Hawaii 2008, enacted
2 several statutory changes "to minimize the census at Hawaii
3 State Hospital and promote community based health services for
4 forensic patients" largely based on recommendations stemming
5 from the task force established through Senate Concurrent
6 Resolution No. 117, S.D. 1, H.D. 1, in 2006. The task force
7 focused on the provisions of chapter 704, Hawaii Revised
8 Statutes, which govern penal responsibility and fitness to
9 proceed and provide an affirmative defense in criminal cases for
10 defendants who do not meet the test for penal responsibility on
11 account of physical or mental disease, disorder, or defect.

12 The statutes in chapter 704 authorize the courts to commit
13 defendants to a hospital or to the custody of the director of
14 health at several stages of the criminal process related to the
15 affirmative defense. These provisions govern the large majority
16 of admissions to, and discharges from, the Hawaii state
17 hospital. The time elapsed in cases involving hospital services



1 during chapter 704 processes and procedures directly affects the
2 rate of hospital admissions and discharges and, therefore,
3 directly affects the Hawaii state hospital census.

4 During its consideration of the actual time involved in the
5 application of chapter 704 procedures, the task force received
6 information about the long time frames usually involved in each
7 stage of the procedures, and many of the task force's
8 recommendations were aimed at shortening those time frames.
9 Senate Bill No. 2396, H.D. 1, considered during the regular
10 session of 2008, set forth the task force's proposed statutory
11 amendments, including an initial provision requiring judicial
12 review of commitments resulting from felony charges and all
13 conditional releases on an annual basis for the first five
14 years, and in biennial intervals thereafter.

15 As the bill continued through the legislative process, this
16 proposed judicial call back provision drew concern. The bill
17 was enacted as Act 100, Session Laws of Hawaii 2008, and added
18 the call back provision to section 704-411, Hawaii Revised
19 Statutes as subsections (5), (6), and (7). The enactment of
20 these call back provisions appears to have resulted,
21 inadvertently, in a two-tiered procedure for conditional release
22 or discharge from the custody of the director of health, or at



1 least, raised confusion about the interplay between the new call
2 back subsections and the conditional release and discharge
3 processes set forth in section 704-412, Hawaii Revised Statutes.

4 The purpose of this Act is to clarify that the provisions
5 of section 704-412, Hawaii Revised Statutes, govern the timing
6 and standards of decision for applications for conditional
7 release or discharge from the custody of the director of health
8 by:

9 (1) Repealing the judicial call back provisions added to
10 section 704-411, Hawaii Revised Statutes, by Act 100,
11 Session Laws of Hawaii 2008; and

12 (2) Including in section 704-412, Hawaii Revised Statutes,
13 a time frame for decisions on motions for conditional
14 release or discharge.

15 SECTION 2. Section 704-411, Hawaii Revised Statutes, is
16 amended to read as follows:

17 "§704-411 Legal effect of acquittal on the ground of
18 physical or mental disease, disorder, or defect excluding
19 responsibility; commitment; conditional release; discharge;
20 procedure for separate post-acquittal hearing. (1) When a
21 defendant is acquitted on the ground of physical or mental
22 disease, disorder, or defect excluding responsibility, the



1 court, on the basis of the report made pursuant to section 704-
2 404, if uncontested, or the medical or psychological evidence
3 given at the trial or at a separate hearing, shall make an order
4 as follows:

5 (a) The court shall order the defendant to be committed to
6 the custody of the director of health to be placed in
7 an appropriate institution for custody, care, and
8 treatment if the court finds that the defendant:

9 (i) Is affected by a physical or mental disease,
10 disorder, or defect;

11 (ii) Presents a risk of danger to self or others; and

12 (iii) Is not a proper subject for conditional release;

13 provided that the director of health shall place
14 defendants charged with misdemeanors or felonies not
15 involving violence or attempted violence in the least
16 restrictive environment appropriate in light of the
17 defendant's treatment needs and the need to prevent
18 harm to the person confined and others. The county
19 police departments shall provide to the director of
20 health and the defendant copies of all police reports
21 from cases filed against the defendant which have been
22 adjudicated by the acceptance of a plea of guilty or



1 no contest, a finding of guilt, acquittal, acquittal
2 pursuant to section 704-400, or by the entry of a plea
3 of guilty or no contest made pursuant to chapter 853,
4 so long as the disclosure to the director of health
5 and the defendant does not frustrate a legitimate
6 function of the county police departments, with the
7 exception of expunged records, records of or
8 pertaining to any adjudication or disposition rendered
9 in the case of a juvenile, or records containing data
10 from the United States National Crime Information
11 Center. The county police departments shall segregate
12 or sanitize from the police reports information that
13 would result in the likelihood or actual
14 identification of individuals who furnished
15 information in connection with the investigation of
16 who were of investigatory interest. Records shall not
17 be re-disclosed except to the extent permitted by law;

18 (b) The court shall order the defendant to be granted
19 conditional release with conditions as the court deems
20 necessary if the court finds that the defendant is
21 affected by physical or mental disease, disorder, or
22 defect and that the defendant presents a danger to



1 self or others, but that the defendant can be
2 controlled adequately and given proper care,
3 supervision, and treatment if the defendant is
4 released on condition; or

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

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

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

17 (a) In nonfelony cases, the court shall appoint a
18 qualified examiner to examine and report upon the
19 physical and mental condition of the defendant. The
20 court may appoint either a psychiatrist or a licensed
21 psychologist. The examiner may be designated by the
22 director of health from within the department of



1 health. The examiner shall be appointed from a list
2 of certified examiners as determined by the department
3 of health. The court, in appropriate circumstances,
4 may appoint an additional examiner or examiners; and

5 (b) In felony cases, the court shall appoint three
6 qualified examiners to examine and report upon the
7 physical and mental condition of the defendant. In
8 each case, the court shall appoint at least one
9 psychiatrist and at least one licensed psychologist.
10 The third member may be a psychiatrist, a licensed
11 psychologist, or a qualified physician. One of the
12 three shall be a psychiatrist or licensed psychologist
13 designated by the director of health from within the
14 department of health. The three examiners shall be
15 appointed from a list of certified examiners as
16 determined by the department of health.

17 To facilitate the examination and the proceedings thereon, the
18 court may cause the defendant, if not then confined, to be
19 committed to a hospital or other suitable facility for the
20 purpose of examination for a period not exceeding thirty days or
21 such longer period as the court determines to be necessary for
22 the purpose upon written findings for good cause shown. The



1 court may direct that qualified physicians or psychologists
2 retained by the defendant be permitted to witness the
3 examination. The examination and report and the compensation of
4 persons making or assisting in the examination shall be in
5 accord with section 704-404(3), (4)(a) and (b), (6), (7), (8),
6 and (9). As used in this section, the term "licensed
7 psychologist" includes psychologists exempted from licensure by
8 section 465-3(a)(3).

9 (4) Whether the court's order under subsection (1) is made
10 on the basis of the medical or psychological evidence given at
11 the trial, or on the basis of the report made pursuant to
12 section 704-404, or the medical or psychological evidence given
13 at a separate hearing, the burden shall be upon the State to
14 prove, by a preponderance of the evidence, that the defendant is
15 affected by a physical or mental disease, disorder, or defect
16 and may not safely be discharged and that the defendant should
17 be either committed or conditionally released as provided in
18 subsection (1).

19 ~~[(5) The director of health may apply to the court to~~
20 ~~conduct a hearing to assess any further need for inpatient~~
21 ~~hospitalization of a person who is acquitted on the ground of~~
22 ~~physical or mental disease, disorder, or defect excluding~~



1 ~~responsibility. The director shall make this application in a~~
2 ~~report to the circuit from which the order was issued. The~~
3 ~~director shall transmit a copy of the application and report to~~
4 ~~the prosecuting attorney of the county from which the order was~~
5 ~~issued.~~

6 ~~(6) Any person committed pursuant to this chapter may~~
7 ~~apply to the court to conduct a hearing to assess any further~~
8 ~~need for inpatient hospitalization of the committed person~~
9 ~~acquitted on the ground of physical or mental disease, disorder,~~
10 ~~or defect excluding responsibility. The application shall be~~
11 ~~accompanied by a letter from or supporting affidavit of a~~
12 ~~qualified physician or licensed psychologist. A copy of the~~
13 ~~application and letter or affidavit shall be transmitted to the~~
14 ~~circuit from which the order was issued. The person shall~~
15 ~~transmit a copy of the application and letter or affidavit to~~
16 ~~the prosecuting attorney of the county from which the order was~~
17 ~~issued.~~

18 ~~(7) Upon application to the court by either the director~~
19 ~~of health or the person committed, the court shall complete the~~
20 ~~hearing process and render a decision within sixty days of the~~
21 ~~application, provided that for good cause the court may extend~~



1 ~~the sixty day time frame upon the request of the director of~~
2 ~~health or the person.~~

3 ~~(8)]~~ (5) In any proceeding governed by this section, the
4 defendant's fitness shall not be an issue."

5 SECTION 3. Section 704-412, Hawaii Revised Statutes, is
6 amended to read as follows:

7 "§704-412 Committed person; application for conditional
8 release or discharge; by the director of health; by the person.

9 (1) After the expiration of at least ninety days following an
10 original order of commitment pursuant to section 704-411(1)(a),
11 or after the expiration of at least sixty days following the
12 revocation of conditional release pursuant to section 704-413,
13 if the director of health is of the opinion that the person
14 committed is still affected by a physical or mental disease,
15 disorder, or defect and may be granted conditional release or
16 discharged without danger to self or to the person or property
17 of others or that the person is no longer affected by a physical
18 or mental disease, disorder, or defect, the director shall make
19 an application for either the conditional release or discharge
20 of the person, as appropriate. In such a case, the director
21 shall submit a report to the court by which the person was
22 ordered committed and shall transmit copies of the application



1 and report to the prosecuting attorney of the county from which
2 the person was committed and to the person committed.

3 (2) After the expiration of ninety days from the date of
4 the order of commitment pursuant to section 704-411, or after
5 the expiration of sixty days following the revocation of
6 conditional release pursuant to section 704-413, the person
7 committed may apply to the court from which the person was
8 committed for an order of discharge upon the ground that the
9 person is no longer affected by a physical or mental disease,
10 disorder, or defect. The person committed may apply for
11 conditional release or discharge upon the ground that, though
12 still affected by a physical or mental disease, disorder, or
13 defect, the person may be released without danger to self or to
14 the person or property of others. A copy of the application
15 shall be transmitted to the prosecuting attorney of the county
16 from which the person was committed. If the court denies the
17 application, the person shall not be permitted to file another
18 application for either conditional release or discharge until
19 one year after the date of the hearing held on the immediate
20 prior application.

21 (3) Upon application to the court by either the director
22 of health or the person committed, the court shall complete the



1 hearing process and render a decision within sixty days of the
2 application; provided that for good cause the court may extend
3 the sixty-day time frame upon the request of the director of
4 health or the person committed."

5 SECTION 4. Statutory material to be repealed is bracketed
6 and stricken. New statutory material is underscored.

7 SECTION 5. This Act shall take effect on upon its
8 approval.

APPROVED this 16 day of JUN, 2009


GOVERNOR OF THE STATE OF HAWAII