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Rodney A. Maile
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December 8, 2020

Via electronic submission

The Honorable Ronald D. Kouchi
President of the Senate
State Capitol, Room 409
Honolulu, HI 96813

The Honorable Scott Saiki
Speaker of the House of Representatives
State Capitol, Room 431
Honolulu, HI 96813

Dear President Kouchi and Speaker Saiki:

Pursuant to Act 26, Session Laws of Hawai'i 2020, the Judiciary is transmitting a copy of the *Report on the Administration of Justice*.

In accordance with Section 93-16, Hawai'i Revised Statutes, we are also transmitting a copy of this report to the Legislative Reference Bureau Library.

The public may view an electronic copy of this report on the Judiciary's website at the following link: https://www.courts.state.hi.us/news_and_reports/reports/reports.

Should you have any questions regarding this report, please feel free to contact Karen Takahashi of the Judiciary's Legislative Coordinating Office at 808-539-4896, or via e-mail at Karen.T.Takahashi@courts.hawaii.gov.

Sincerely,

A handwritten signature in blue ink that reads "Rodney A. Maile".

Rodney A. Maile
Administrative Director of the Courts

Attachment

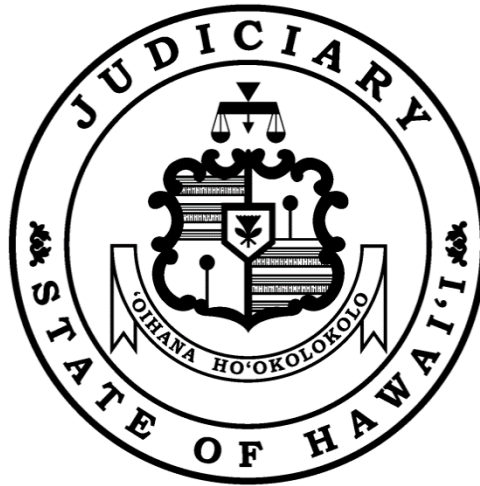
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Office of the Clerk, Hawai'i State Senate
Office of the Clerk, Hawai'i House of Representatives

**ANNUAL REPORT TO THE THIRY-FIRST LEGISLATURE
2021 REGULAR SESSION**

ON

**ACT 26, SESSION LAWS OF HAWAI'I 2020
PART III, SECTION 8**

**Report of the Judiciary's Findings and Recommendations on the
Effectiveness of Act 26, SLH 2020, Relating to the Administration of Justice**



Prepared by:

The Judiciary, State of Hawai'i

December 2020

Report of the Judiciary's Findings and Recommendations on the Effectiveness of Act 26, SLH 2020, Relating to the Administration of Justice

This report is respectfully submitted pursuant to Act 26, Session Laws of Hawai'i 2020, Part III, Section 8, which requires the Judiciary, in consultation with the prosecuting attorney of each county, to submit a report to the legislature of its findings and recommendations, including any proposed legislation, on the effectiveness of Act 26.

Act 26, was signed into law on September 15, 2020. The Act:

- 1) Amends the effect of finding a defendant charged with a petty misdemeanor not involving violence or attempted violence unfit to proceed;
- 2) Amends the requirements for fitness determination hearings, court-appointed examiners, and examination reports;
- 3) Authorizes the courts to enter into agreements to divert into residential, rehabilitative, and other treatment those defendants whose physical or mental disease, disorder, or defect is believed to have become or will become an issue in a judicial case;
- 4) Amends the requirements for appointing qualified examiners to perform examinations for penal responsibility;
- 5) Removes the time requirement for the ordering of the penal responsibility evaluation; and
- 6) Requires the Judiciary, in consultation with county prosecutors, to report to the Legislature on the effectiveness of the Act in 2021, 2022, and 2023.

The genesis of Act 26 (2020) arose from collaborative discussions between the Judiciary and Department of Health at a National Center for State Courts summit in May 2019 that pertained to improving the court and community response to those with mental illness.

Following this summit, the Judiciary, Department of Health, Department of Public Safety, and others planned and held a summit in Honolulu in late 2019. The Hawai'i summit, supported by the State Justice Institute and National Center for State Courts, included over 100 attendees representing the Judiciary, the Department of Health, the Office of the Attorney General, the Department of Public Safety, the Federal Courts, the police departments from each county, Federal Probation, each county's office of the prosecuting attorney, the Office of the Public Defender, the Hawai'i Association of Criminal Defense Lawyers, local hospitals and health service providers, the Office of Hawaiian Affairs, and members of the Hawai'i State Legislature.

Before, during, and since the Hawai'i summit, stakeholders from across the state have been involved in efforts to improve this critical aspect of the justice system. Legislators have been tremendous leaders in this regard.

Also before, during, and since the Hawai'i summit, DOH and judges in the First Circuit identified specific improvements that may be most impactful--in the high volume district courts and even circuit courts, considering the high percentage of cases that involve mental illness.

Accordingly, throughout the 2020 legislative session, First Circuit judges and DOH leadership planned to initiate implementation of certain aspects of the bill that are more natural to begin on Oahu, where certain DOH resources currently exist--namely, court-based examiners.

With this backdrop, with judges and others across the state eager to fully implement Act 26 as related resources become available in each community, with current and likely future budgetary challenges across the state, and with Act 26 being enacted into law less than three months ago (enacted on September 15, 2020), the below reports on progress towards implementation and the effectiveness of Act 26 thus far.

Report of the First Circuit

A. Circuit Court

This is a report from the First Circuit Court on the effectiveness of the portions of the Act relevant to the circuit court caseload, specifically, items two through five above. Please refer to the District Court section below for comment on item one.

With respect to the elimination of the mandatory psychiatrist provision, since the enactment into law of Act 26 on September 15, 2020, the circuit court has ordered thirty-four Chapter 704 examinations for fitness, penal responsibility, conditional release, and/or discharge from conditional release in forty-one total cases. Of those thirty-four cases, twenty-one of them continued to order a psychiatrist as one of the three panel doctors. This is strictly due to the fact that these twenty-one cases are defendants who have had prior Chapter 704 examinations and the examination is either for current fitness to proceed (after being found unfit) or for conditional release or discharge post-acquittal. Here in the First Circuit this has alleviated the strain on the two psychiatrists on the Department of Health certified list as they each were assigned six and a half fewer cases over the past sixty days than they would have received without the amendment. As we continue to wean out the cases where a psychiatrist was previously on the panel, the number assigned to the psychiatrist will decrease, resulting in fewer delays in the conducting of the examinations.

As the reports for the examinations are coming due over the next two weeks, it remains to be seen whether this has alleviated the delays caused by having only two psychiatrists, however, in discussing the matters with the doctors directly, it appears that they believe that they are able to complete their reports on time. It should be noted however that there have been significant delays in the reports over the last

several months for those defendants held in custody at the Oahu Community Correctional Center (OCCC) due to the facility limiting access to defendants due to COVID-19. This was due to defendants being in quarantine as well as the facility's decision to limit the amount of appointment times for such evaluations to just two per day.

With respect to the determination of the effectiveness of this amended provision on the integrity of the reports and the determinations to be made by the court under Chapter 704, as noted, the first return hearings will not be heard until the last week of November. Therefore, it is too early to tell whether the elimination of the psychiatrist requirement will have any impact on the Chapter 704 determinations.

Similarly, as the remaining provisions were only just enacted into law, as of now, in the First Circuit, there have been no cases diverted into residential, rehabilitative, or other treatment those defendants who lack penal responsibility, nor have there been any one panels ordered for a penal responsibility opinion on "C" felonies not involving violence. The court has not been presented with any requests nor agreements to divert applicable defendants into treatment

We have consulted with the City and County of Honolulu Prosecuting Attorney's office and, at this early stage, they have nothing to report regarding the effectiveness of the changes to the statutory provisions relevant to the circuit court cases other than what has been reported above. At this time the Judiciary and the City and County of Honolulu prosecutors do not have any proposed legislation to put forth at the circuit court level.

B. District Court

This is a report from the First Circuit on the effectiveness of the portions of the Act relevant to the district court caseload. Item one applies specifically to district court cases and amends the effect of finding a defendant charged with a petty misdemeanor not involving violence or attempted violence unfit to proceed.

With respect to the diversion of defendants charged with a petty misdemeanor not involving violence or attempted violence from the criminal justice system, since the enactment into law of Act 26 on September 15, 2020, the district court has ordered only one defendant to undergo an expedited fitness examination. At defendant's initial appearance on November 20, 2020, the court ordered an expedited fitness exam and committed the defendant to the custody of the Director of Health, due to defendant's mental health condition. On November 23, 2020, the court found defendant unfit to proceed and further committed defendant to the Hawai'i State Hospital for seven days. On November 30, 2020, the court again found Defendant unfit to proceed and dismissed the case. The treatment team at Hawai'i State Hospital linked the Defendant to IHS Homeless Outreach case management services. However, defendant will still have to return to court for return on 1-panel exams for other non-violent petty misdemeanor cases that predated the effective date of Act 26.

The reasons for the limited number of defendants in district court subject to the provisions of Act 26 are due to the fact that (1): Act 26 only became effective on September 15, 2020; (2) defendants often have a combination of offenses that include offenses that are beyond the scope of the Act, or have prior offenses that are precluded under the Act; and (3) under current Hawai'i Supreme Court orders effective August 27, 2020, all defendants charged with any petty misdemeanor must be released from custody. Therefore, at initial appearance of petty misdemeanor custody defendants, defense counsel will request release and not raise any fitness issue, as they do not want to risk having defendant committed to the hospital. However, if the defendant is in a mental health crisis, defense counsel will ask for an expedited fitness exam under Act 26. This was done only one time since the effective date of Act 26, and is the one case previously referred to in this report.

One of the possible amendments to Act 26 is to continue to allow the same disposition for all defendants that fall under item one above, whether they are in custody, or out of custody, but to clarify that the court is not required to commit out-of-custody defendants to the hospital for further examination and assessment after an examination (under 704-404(2)(b)) and finding that defendant is not fit to proceed. This is because out-of-custody defendants undergoing a fitness exam pursuant to 704-404(2)(b), have a much more comprehensive examination done by the examiner, which includes an assessment of the risk of danger to self, others, or property. This more comprehensive examination obviates the need for an out-of-custody defendant to be committed to the hospital for further examination and assessment after a finding by the court that defendant is not fit to proceed.

In addition, Act 26 should allow for retroactive application to defendants who have current charges that fall within the Act, but who also have other non-violent petty misdemeanors where proceedings were begun before the effective date of the Act. This is because many of the defendants will appear in court with a new charge that is subject to Act 26, but may not be able to take full advantage of the available treatment services offered because of the need to resolve the older, non-violent petty misdemeanors under the prior "restoration" model of 704-404. This delay and uncertainty in the disposition of prior non-violent petty misdemeanor charges that would otherwise qualify under Act 26, is an unnecessary obstacle for the defendant and results in additional costs for the Department of Health and the criminal justice system. All of which Act 26 was designed, in part, to reduce. In addition, unless, the Act allows for retroactive application in these select cases, the true effects and ameliorative aspects of the Act for many defendants will not be known for an extended period of time.

We have consulted with the City and County of Honolulu Prosecuting Attorney's office and, at this early stage, have this to report from them regarding the effectiveness of the changes to the statutory provisions:

Given the recent passage of Act 26 in September 2020, the prosecution has not had a full opportunity to assess the effectiveness of this legislation as it applies to Circuit and District Court cases. Further impacting our assessment is the affect the COVID 19 pandemic has on cases that fall under the purview of Act 26. Pursuant to Hawai'i Supreme Court orders, inmates previously detained, have been ordered released, particularly "non-violent" petty misdemeanants. With respect to non-violent petty misdemeanants, our concerns over Act 26 have not been allayed. Thus far, Act 26 has not shown that fitness to proceed can be restored in 7 days nor that public safety is not at risk, when dangerousness of a defendant who committed a non-violent petty misdemeanor, is not considered.

This concludes the report of the Judiciary, submitted pursuant to Act 26, Session Laws of Hawai'i 2020, Part III, Section 8.