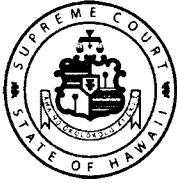


**REPORT OF THE COMMITTEE  
TO REVIEW AND RECOMMEND  
REVISIONS TO THE HAWAII PENAL CODE**



**Submitted to the Twenty-Eighth Legislature  
of the State of Hawai`i on December 30, 2015.**



**Supreme Court – THE JUDICIARY • STATE OF HAWAII**

417 South King Street • Aliʻiōlani Hale • Honolulu, Hawaiʻi • 96813-2943 • Ph: (808) 539-4700 • Fax (808) 539-4703

**Mark E. Recktenwald**  
CHIEF JUSTICE

December 30, 2015

The Honorable Joseph M. Souki  
Speaker, Hawaiʻi State House of Representatives  
State Capitol, Room 431  
415 South Beretania Street  
Honolulu, Hawaiʻi 96813

Re: Final Report of the Committee to Review and Recommend  
Revisions to the Hawaiʻi Penal Code

Dear Speaker Souki and House Members:

Pursuant to House Concurrent Resolution No. 155, S.D. 1, Twenty-Eighth Legislature of the State of Hawaiʻi, 2015 Regular Session, I am pleased to transmit for your consideration and review the final report of the Committee to Review and Recommend Revisions to the Hawaiʻi Penal Code (Penal Code Review Committee or Committee).

The report provides the Legislature with a total of eighty-four proposals and recommendations, consisting of amendments to fifty existing statutes, the recommendation to adopt four new statutes, the recommendation to move an existing statute to a different chapter of the penal code, and two recommendations going forward with regard to parts of the penal code.

The Penal Code Review Committee was comprised of twenty-nine members, including judges (appellate, circuit and district courts); the Chair of the Senate Committee on Judiciary and Labor; the Chair of the House Judiciary Committee; the Attorney General; the Director of the Department of Public Safety; the Prosecuting Attorneys for the County of Maui, the County of Hawaiʻi, the County of Kauai; a representative from the Prosecuting Attorney, City and County of Honolulu; a representative from the Office of the Public Defender; representatives from the Honolulu Police Department; a representative from the Office of Hawaiian Affairs; a member of the Judicial Council; representatives of the criminal defense bar; crime victim advocates; and community advocates. Moreover, Committee members were encouraged to reach out to relevant stakeholders throughout the community for suggestions and input into the Committee's work.

The Honorable Joseph M. Souki  
December 30, 2015  
Page 2

The Committee met in plenary session on seven occasions between June 19 and December 18, 2015. Additionally, the five subcommittees met separately on a number of occasions to consider and prepare proposals which the subcommittees were responsible for submitting to the entire Committee for consideration.

The Committee's report is the result of the combined efforts of Committee members, their respective staffs, the judiciary's Legislative Coordinating Office, and others in the community who provided input to the Committee. It would be fair to say that thousands of hours have been contributed to the work of the Committee and the resulting report.

General consensus was reached for most of the proposals. However, given the breadth of representation of the relevant viewpoints, stakeholders and constituencies, it is understandable that consensus could not be achieved on each of the Committee's proposals. Where appropriate, the report points out differing opinions and the reasons therefor. Without question, of course, the Penal Code Review Committee and each of its members were motivated by the best interests of our citizens.

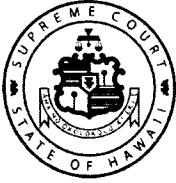
Finally, I am pleased to note that the Committee was able to accomplish its substantial duties with a minimum of expense. Several members carried the costs of their own travel to the Committee meetings. Further, I would like to thank the Legislature for sharing in the expenses that were incurred.

On behalf of the Penal Code Review Committee and the Judicial Council, thank you for the opportunity to be of service to the Legislature and the people of Hawai'i.

Respectfully submitted,



Mark E. Recktenwald  
Chief Justice



**Supreme Court – THE JUDICIARY • STATE OF HAWAII**

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**Mark E. Recktenwald**  
CHIEF JUSTICE

December 30, 2015

The Honorable Ronald D. Kouchi  
President, Hawaiʻi State Senate  
Hawaiʻi State Capitol, Room 409  
415 South Beretania Street  
Honolulu, Hawaiʻi 96813

Re: Final Report of the Committee to Review and Recommend  
Revisions to the Hawaiʻi Penal Code

Dear President Kouchi and Senate Members:

Pursuant to House Concurrent Resolution No. 155, S.D. 1, Twenty-Eighth Legislature of the State of Hawaiʻi, 2015 Regular Session, I am pleased to transmit for your consideration and review the final report of the Committee to Review and Recommend Revisions to the Hawaiʻi Penal Code (Penal Code Review Committee or Committee).

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The Honorable Ronald D. Kouchi  
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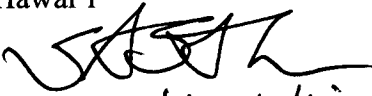

On behalf of the Penal Code Review Committee and the Judicial Council, thank you for the opportunity to be of service to the Legislature and the people of Hawai'i.

Respectfully submitted,



Mark E. Recktenwald  
Chief Justice

TO: Chief Justice Mark E. Recktenwald  
 Supreme Court of the State of Hawai'i

FROM: Judge Steven S. Alm, Chair   
 Associate Judge Lisa M. Ginoza, Reporter   
 Penal Code Review Committee

RE: Final Report of the Penal Code Review Committee

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- B. Subcommittee Rosters and Work-up

## **I. Introduction**

This is the final report of the Penal Code Review Committee, appointed by Chief Justice Mark E. Recktenwald and the Judicial Council, to carry out the requests in House Concurrent Resolution No. 155, S.D. 1 (H.C.R. No. 155, S.D. 1), Twenty-Eighth Legislature of the State of Hawai`i, Regular Session of 2015, to review and provide recommended revisions to the Hawai`i penal code. The Committee’s primary work product, contained in the section entitled “Legislative Proposals and Recommendations,” sets out the proposals in the language approved by the Committee. We further note, however, that the Committee has been providing its proposed legislation to the Legislative Reference Bureau (LRB), so that LRB can work toward putting the proposals into draft bill format and to make technical, non-substantive changes.

H.C.R. No. 155, S.D. 1 requested that the Judicial Council appoint a Committee to review the Hawai`i penal code and for the Committee to:

- (1) Recommend revisions to the Hawai`i penal code that the committee concludes will help ensure that sentences are fair and proportionate to the crime committed, with particular attention paid to those sections that base culpability on dollar amounts;
- (2) Recommend updates to the Hawai`i penal code by:
  - (a) reviewing the American Law Institute Model Penal Code, including recently proposed amendments; the criminal codes of other states; and other criminal law resources;
  - (b) assessing the application of the principles of the report entitled “Justice Reinvestment in Hawaii: Analyses & Policy Options” (August 2014), by the Council of State Governments Justice Center, to code sections in which culpability is linked to a dollar value; and
  - (c) analyzing whether grades and punishment are appropriate and proportionate to other sentences imposed for criminal or civil offenses and are cost-effective in deterring crime, reducing recidivism, and providing restitution to victims in a manner that provides equal justice and punishment regardless of socioeconomic class or ethnicity.

A copy of H.C.R. No. 155, S.D. 1 is attached hereto as Appendix A.

In response to H.C.R. No. 155, S.D. 1, Chief Justice Mark E. Recktenwald convened the Judicial Council of Hawai`i which appointed a Penal Code Review Committee, chaired by Judge Steven S. Alm. The membership of the Committee is set forth in Section II below.

H.C.R. No. 155, S.D. 1 requests that the Judicial Council submit its findings and recommendations, including any proposed legislation, to the Governor and the Legislature, no later than twenty days prior to the convening of the 2016 regular session of the Legislature. This report is submitted in response to that request.

## **II. Membership of the Committee**

H.C.R. No. 155, S.D. 1 resolved that members of the Committee include representatives from a variety of groups. There are 29 members on the Committee. Care was taken to ensure that an equal number of prosecutors and defense counsel were on the committee. The membership also included six full time judges and one justice, of whom two were former defense counsel, and four were former prosecutors, including the Chair (formerly a local prosecutor and the United States Attorney for Hawaii). The members of the 2015 Penal Code Review Committee are:

- (1) Hon. Steven S. Alm, Chair  
Circuit Court of the First Circuit
- (2) Hon. Lisa M. Ginoza, Reporter  
Intermediate Court of Appeals
- (3) William C. Bagasol, Esq.  
Office of the Public Defender, State of Hawai‘i
- (4) Kat Brady, Coordinator  
Community Alliance on Prisons
- (5) Hayley Y.C. Cheng, Esq.  
Attorney at Law
- (6) Douglas S. Chin, Esq.  
Attorney General, State of Hawai‘i
- (7) Dennis Dunn, Director  
Victim Witness Kokua Services,  
Department of the Prosecuting Attorney  
City and County of Honolulu
- (8) Nolan Espinda, Director  
Department of Public Safety, State of Hawai‘i
- (9) Pamela Ferguson-Brey  
Crime Victim Compensation Commission
- (10) Janice T. Futa, Esq.  
Department of the Prosecuting Attorney  
City and County of Honolulu
- (11) Peter Gellatly  
Better Media



- (12) Jeffrey A. Hawk, Esq.  
Attorney at Law
- (13) Hon. Gilbert S.C. Keith- Agaran  
Chair, Senate Committee on Judiciary and Labor
- (14) John D. Kim, Esq.  
Prosecuting Attorney, County of Maui
- (15) Justin F. Kollar, Esq.  
Prosecuting Attorney, County of Kaua‘i
- (16) Carmel Kwock, Esq.  
Attorney at Law
- (17) Major Larry Lawson and Major Janet Crotteau  
Honolulu Police Department
- (18) Hon. Lono Lee  
District Court of the First Circuit
- (19) Benjamin E. Lowenthal, Esq.  
Attorney at Law
- (20) Kamaile Maldonado  
Office of Hawaiian Affairs
- (21) Hon. Trish K. Morikawa  
District Family Court of the First Circuit, Per Diem  
Attorney at Law
- (22) Hon. Craig H. Nakamura  
Intermediate Court of Appeals
- (23) Hon. Richard Perkins  
Circuit Court of the First Circuit
- (24) Hon. Richard Pollack  
Hawai‘i Supreme Court
- (25) Hon. Karl Rhoads  
Chair, House Committee on Judiciary
- (26) Mitchell Roth, Esq.  
Prosecuting Attorney, County of Hawai‘i

- (27) Richard H.S. Sing, Esq.  
Attorney at Law
- (28) Robert S. Toyofuku, Esq.  
Attorney at Law  
Member, Judicial Council
- (29) Hon. Rom Trader  
Circuit Court of the First Circuit

Importantly, the Committee must also recognize the significant and indispensable assistance provided by the following individuals from the Judiciary's Legislative Coordinating Office.

Karen T. Takahashi, Special Projects Coordinator  
Caryn M. Moran, Research Analyst  
Lori A. Rutherford, Legislative Office Assistant

### **III. Organization of Subcommittees**

The Committee was divided into five subcommittees, each with primary responsibility for one or more chapters of the Hawai'i penal code, as follows:

- (1) HRS Chapter 704: Penal Responsibility and Fitness to Proceed  
Subcommittee Chair -- Judge Richard K. Perkins
- (2) HRS Chapter 706: Sentencing  
Subcommittee Chair -- Judge Rom Trader
- (3) HRS Chapters 707, 709 and 711: Offenses Against the Person, Offenses Against  
Family, and Offenses Against Public Order  
Subcommittee Chair -- William Bagasol, Esq.
- (4) HRS Chapters 708 and 710: Offenses Against Property Rights, Offenses Against  
Public Administration  
Subcommittee Chair -- Judge Craig H. Nakamura
- (5) HRS Chapter 712: Offenses Against Public Health and Morals, Miscellaneous  
Subcommittee Chair -- Judge Lono Lee

Appendix B, attached hereto, contains the subcommittee rosters, meeting dates, authorities and organizations consulted, and other work-up information.

#### **IV. Work of the Committee**

The Committee met in plenary session on the following dates:

June 19, 2015  
July 31, 2015  
August 26, 2015  
September 18, 2015  
October 30, 2015  
November 18, 2015  
December 18, 2015

The subcommittees undertook the significant workload of initially reviewing the assigned Chapters of the penal code and preparing proposals for the entire Committee to consider. Each subcommittee was pre-assigned the date on which it would present its proposals to the Committee. The subcommittees submitted draft proposals with explanatory commentaries prior to the scheduled plenary sessions, commencing with the July 31, 2015 session. Plenary sessions, which were three (3) hours in length, were devoted to presenting the subcommittee proposals, and considering, debating, and resolving issues raised by the subcommittee proposals. The Committee agreed that a quorum would be required for action by the Committee, that consensus was preferable, but that where there was a significant minority position, the report could set out the minority position as well. Committee members themselves were required to attend the meetings, but if unable to attend they could vote on a proposal by giving their proxy to another Committee member who would be in attendance. The recommendations in this final report are products of that process.

#### **V. Executive Summary**

The criminal justice community is looking to be tough on crime when appropriate but also to be smart on crime. The Committee drew on the collective experience of its diverse membership and, at the same time, attempted to see what current criminal justice research could teach us. The Committee recognized the importance of innovative programs that were being implemented in Hawai‘i, but also looked at other states to stay abreast of current thinking and practices in coming up with its recommendations.

As set forth in detail in the “Legislative Proposals and Recommendations” section, the Committee has approved a total of 84 proposals and recommendations to the Legislature, which include: proposed amendments to 50 existing statutes; the addition of four new sections; the relocation of one statute to another chapter; and 2 non-legislation recommendations. Comments are provided for each proposal to explain the reasoning by the Committee, and also to reflect any significant minority view. The proposals and the recommendations are summarized as follows:

### ***Chapter 704: Penal Responsibility and Fitness to Proceed***

The Committee recommends a proposal to clarify that, where a court suspends proceedings due to questions about a defendant's physical or mental capacity, the right to bail and proceedings under Chapter 804 are not suspended. See § 704-404 (1).

The Committee makes several proposals so that forensic examinations of defendants can be conducted in a more efficient and timely manner. In felony cases, three examiners are required and one of the three must be a psychiatrist or licensed psychologist designated by the Director of the Department of Health "from within the department of health." Given existing staff shortages within the Department of Health, the Committee recommends throughout Chapter 704 that the language "from within the department of health" be deleted, so that the Director of the Department of Health may select an examiner from either within or outside the Department of Health. See §§ 704-404(2), 704-411(3)(b), 704-414(1). The Committee proposes to sunset this amendment in two years. Another proposal would clarify that examinations may be conducted while the defendant is in or out of custody. See § 704-404 (2). Further, the Committee recommends amendments clarifying that courts can make records available to examiners in hard copy or digital format, and also authorizing courts to make pertinent records available to prosecutors and defense counsel. See § 704-404 (8). There is also a proposal to adopt a new section to ensure that all examiner reports be provided to the Director of the Department of Health.

The Committee proposes amendments to give the court discretion whether to order an examination where a defendant seeks only to modify conditions of release. See § 704-414. Further, in situations where a defendant is on conditional release and there are concerns requiring the defendant's hospitalization, there is a proposal to authorize courts to order temporary hospitalization, rather than the current process which requires revocation of conditional release, hospitalization for at least sixty days, and examinations if the defendant thereafter seeks to go back on conditional release. See § 704-413.

The Committee proposes an amendment to an existing section and the adoption of a new section to clarify that, for a defendant who is granted conditional release in a non-felony case, the period of the conditional release shall be no longer than one year. See proposed new section in Chapter 704 and § 704-411(1)(b).

Finally, throughout Chapter 704, the Committee recommends clarifying language to expressly refer to § 334-60.2 (Involuntary Hospitalization Criteria) and § 334-121 (Criteria for Assisted Community Treatment). See §§ 704-406, 704-407.

### ***Chapter 706: Disposition of Convicted Defendants***

Several proposals are made to help ensure that, regardless of whether a pre-sentence diagnosis is done, reasonable efforts are made to inform victims and their families of the right to be present at sentencing and to be heard, particularly in felony cases. See § 706-601 and § 706-604.

A new section is proposed to clearly set out the priority of payments that a defendant is ordered to make, including restitution, crime victim compensation fee, probation services fee, human trafficking victim services fee, other fees, DNA analysis monetary assessment, and fines. Further, throughout Chapter 706 and in one statute outside the penal code, amendments are proposed to reference the new section. See §§ 706-603, 706-605, 706-642, 706-646, 706-648, 706-650, 706-650.5, and 846F-3.

The Committee proposes to amend § 706-605.1 to delete a provision which currently precludes a defendant convicted of a crime involving serious or substantial bodily injury within the last five years from being eligible for intermediate sanctions (*i.e.*, alternative sanctions in lieu of incarceration such as Drug Court, Veterans Treatment Court, and Mental Health Court).

The Committee proposes to repeal § 706-605.5, which authorizes the Department of Public Safety to implement a program of “regimental discipline” for offenders. Such a program has never been implemented.

Amendments are proposed for § 706-606.5 (Sentencing for Repeat Offenders) which would: add subsection lettering for the numerous class C felonies that are set forth in that statute; and remove the offense under § 712-1243 (Promoting a Dangerous Drug in the Third Degree) from the class C felony list which requires repeat offender mandatory minimum imprisonment.

Amendments are proposed to § 706-622.5 and § 706-622.9 that would authorize probation officers to request expungements on behalf of defendants.

Amendments are proposed to § 706-624 that would expressly give a court discretion to add, as conditions of probation, that the defendant: submit to search of his or her person, residence, vehicle or other sites and property under his or her control by a probation officer under certain conditions; sign a waiver of extradition and pay extradition costs as determined and ordered by the court; and/or comply with a service plan developed from current assessment tools.

An amendment is proposed to § 706-646 (Victim Restitution) which would require that while a defendant is in the custody of the Department of Public Safety, restitution be collected in conformity with Chapter 353, which requires that restitution is deducted at the rate of 25% from an inmate’s earnings, money deposited or money credited to the inmate’s account. The proposed amendment suspends any court ordered payment schedule while the defendant is in custody in favor of the Chapter 353 requirements.

The Committee recommends that the Legislature conduct a further and more comprehensive study of Chapter 706 with regard to sentencing and the setting of minimum terms of imprisonment by the Hawai‘i Paroling Authority.

### ***Chapter 707: Offenses Against the Person***

The Committee proposes to amend the definition of “sexual contact” in § 707-700 to delete the exception for married couples currently existing in the definition, which exempts married couples from certain sex assault offenses. In conjunction with the amendment, however, the Committee reached a compromise by also proposing to maintain the marriage exemption in § 707-733(1)(a) (Sexual Assault in the Fourth Degree). Should the Legislature decide not to delete the marriage exception, the Committee recommends at a minimum that the Legislature address the problem where a person is charged with sexual contact with a minor under 14 years of age, which under the current definition of “sexual contact,” requires that the prosecution charge and prove that the minor is not married to the alleged offender. The comments for § 707-700 provide further explanation.

Non-substantive amendments are proposed for § 707-711 (Assault in the Second Degree) to better align the language consistent with § 707-712 (Assault in the Third Degree).

### ***Chapter 708: Offenses Against Property Rights***

The Committee proposes to amend § 708-803 (Habitual Property Crime) to better target habitual property criminals, who under this statute are subject to a class C felony. Under the proposed amendments, a person is subject to this offense if the person commits a misdemeanor property crime and is a “habitual property crime perpetrator” (*i.e.*, a person who, within ten years of the instant offense, has convictions for any combination of three felonies and/or misdemeanors for theft, forgery or related offenses). The proposed amendments expand the time, from five to ten years, for prior convictions to be considered.

The Committee proposes to amend § 708-831 (Theft in the Second Degree) to raise the property value threshold from \$300 to \$750 for felony theft. Related amendments are proposed to other theft statutes in Chapter 708, to update the subject property values. See §§ 708-832 (Theft in the Third Degree), 708-833 (Theft in the Fourth Degree), 708-833.5 (Shoplifting), 708-839.5 (Theft of Utility Services). The Committee also proposes that the Judicial Council recommend adjustments to the threshold dollar amounts for the theft statutes every five years.

The Committee proposes to amend § 708-893 (Use of a Computer in the Commission of a Separate Crime) by removing theft in the first or second degree as underlying offenses that would subject a person to the separate offense and enhanced penalties under § 708-893.

### ***Chapter 709: Offenses Against the Family and Against Incompetents***

The Committee proposes amendments to § 709-906 (Abuse of Family or Household Member) that would: (1) define “persons jointly residing or formerly residing

in the same dwelling unit” to remove adult roommates or cohabitants that are only in an economic or contractual affiliation from the purview of § 709-906 (such individuals would still be subject to offenses under other code sections); (2) revise current language and add a new subsection to give the police discretion, on a case by case basis, whether to order a minor under the age of 18 to leave the premises for a period of separation; and (3) clarify that for the elevated offense when physical abuse occurs in the presence of a family or household member under 14 years of age, the minor is present such that the minor can see or hear the abuse.

The Committee proposes to move § 709-908 (Tobacco and Electronic Smoking Devices Prohibited) from Chapter 709 (Offenses Against the Family and Against Incompetents) to Chapter 712 (Public Health and Morals).

### ***Chapter 710: Offenses Against Public Administration***

The Committee proposes to amend § 710-1027 (Resisting an Order to Stop a Motor Vehicle) to rename and renumber that offense as “Resisting an Order to Stop a Motor Vehicle in the Second Degree.” Concurrently, the Committee proposes to add a new section entitled “Resisting an Order to Stop a Motor Vehicle in the First Degree,” which would make it a class C felony when a person commits the offense of Resisting an Order to Stop a Motor Vehicle in the Second Degree and, while intentionally fleeing or attempting to elude law enforcement, operates the vehicle in reckless disregard of the safety of others, or operates the vehicle more than 30 mph over the speed limit or 80 mph or more.

### ***Chapter 712: Offenses Against Public Health and Morals***

The Committee proposes to amend § 712-1200 (Prostitution) to clarify the subsection that applies to a prostitute, as opposed to a client of a prostitute.

The Committee proposes to amend § 712-1240.7 (Methamphetamine Trafficking in the First Degree), and to repeal § 712-1240.8 (Methamphetamine Trafficking in the Second Degree), to remove possession and distribution of methamphetamine from the methamphetamine statutes, which require mandatory sentencing and mandatory minimum terms of imprisonment, and to place these offenses in the Promoting Dangerous Drug statutes (§ 712-1241 and § 712-1242). Distribution of methamphetamine to a minor, as well as the manufacture of methamphetamine, would remain in § 712-1240.7 (Methamphetamine Trafficking in the First Degree). Extensive comments are provided for these proposals.

### ***Other Statutes Outside the Penal Code***

The Committee first notes that, because its proposals involve statutes outside of the penal code, a bill encompassing all of the Committee’s proposals would need to have a sufficiently broad title to cover all of the statutory provisions.

The Committee recommends a revision to § 291-12 to make it clearly apply to the negligent operation of a vehicle.

The Committee proposes to amend the definition of “alcohol” in § 291E-1 to make it clearer and simpler, without effecting a substantive change. Although the Committee believes that the current definition of “alcohol” is not tied to any federal funding, it is recommended that this be confirmed before the new definition is adopted.

A clarifying amendment is proposed for § 353-22.6 to ensure that it applies to amounts deducted from an inmate’s earnings or account while incarcerated, notwithstanding other laws to the contrary.

The Committee proposes to amend the definition of “persons jointly residing or formerly residing in the same dwelling unit” in § 586-1 (regarding Domestic Abuse Protective Orders) to not include adult roommates or cohabitants that are only in an economic or contractual affiliation. This proposal is related to a proposed amendment to § 709-906 (Abuse of Family or Household Member).

The Committee proposes to amend § 804-7.2 (Violations of Conditions of Release on Bail, Recognizance, or Supervised Release) such that, when a defendant violates a condition of bail, recognizance or supervised release, a pretrial officer in the Department of Public Safety’s Intake Service Center is authorized to submit a verified application to a court to request the defendant’s appearance in court or that a warrant be issued for the defendant’s arrest and appearance in court.

An amendment is proposed to §806-73 (Duties and Powers of Probation Officer; Adult Probation Records) to authorize a court to allow prosecutors and defense counsel access to records obtained by the adult probation division, in accordance with the related proposed amendment to § 704-404(8).

The Committee proposes to amend § 806-83 (Felonies for Which Criminal Charges may be Instituted by Written Information) to add subsection numbering for the many offenses listed in the statute that can be charged by written information.

The Committee proposes to amend § 831-3.2 (Expungement Orders) so that persons who have obtained an expungement order may request in writing that the court seal or remove judiciary files or judiciary information from public access, including from the judiciary’s electronic databases.

The Committee proposes to amend § 853-4 to clarify that, in the specified provisions, Chapter 853 (Criminal Procedure; Deferred Acceptance of Guilty Plea, Nolo Contendere Plea) would not apply when an offender has previously been granted either a deferred acceptance of guilty plea or a deferred acceptance of no contest plea.



## **VI. Legislative Proposals and Recommendations**

### **Chapter 704: Penal Responsibility and Fitness to Proceed**

#### **§ 704-404 Examination of defendant with respect to physical or mental disease, disorder, or defect.**

(1) Whenever the defendant has filed a notice of intention to rely on the defense of physical or mental disease, disorder, or defect excluding responsibility, or there is reason to doubt the defendant's fitness to proceed, or reason to believe that the physical or mental disease, disorder, or defect of the defendant will or has become an issue in the case, the court may immediately suspend all further proceedings in the prosecution[-]; provided that the right to bail and proceedings pursuant to chapter 804 shall not be suspended. If a trial jury has been empanelled, 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, the court shall appoint three qualified examiners in felony cases and one qualified examiner in nonfelony cases to examine and report upon the physical and mental condition of the defendant. In felony cases the court shall appoint at least one psychiatrist and at least one licensed psychologist. The third member may be a psychiatrist, licensed psychologist, or qualified physician. One of the three shall be a psychiatrist or licensed psychologist designated by the director of health [~~from within the department of health~~]. In nonfelony cases the court may appoint either a psychiatrist or a licensed psychologist. All examiners 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. The examination may be conducted [~~on an out-patient basis~~] in or out of custody or, in the court's discretion, when necessary the court may order the defendant to be committed to a hospital or other suitable facility for the purpose of the examination for a period not exceeding thirty days, or such longer period as the court determines to be necessary for the purpose. The court may direct that one or more qualified physicians or psychologists retained by the defendant be permitted to witness the examination. As used in this section, the term "licensed psychologist" includes psychologists exempted from licensure by section 465-3(a)(3).

(3) An examination performed under this section may employ any method that is accepted by the professions of medicine or psychology for the examination of those alleged to be affected by a physical or mental disease, disorder, or defect; provided that each examiner shall form and render diagnoses and opinions upon the physical and mental condition of the defendant independently from the other examiners, and the examiners, upon approval of the court, may secure the services of clinical psychologists and other medical or paramedical specialists to assist in the examination and diagnosis.

(4) The report of the examination shall include the following:

- (a) A description of the nature of the examination;
- (b) A diagnosis of the physical or mental condition of the defendant;
- (c) An opinion as to the defendant's capacity to understand the proceedings against the defendant and to assist in the defendant's own defense;

- (d) An opinion as to the extent, if any, to which the capacity of the defendant to appreciate the wrongfulness of the defendant's conduct or to conform the defendant's conduct to the requirements of law was impaired at the time of the conduct alleged;
- (e) When directed by the court, an opinion as to the capacity of the defendant to have a particular state of mind that is required to establish an element of the offense charged; and
- (f) Where more than one examiner is appointed, a statement that the diagnosis and opinion rendered were arrived at independently of any other examiner, unless there is a showing to the court of a clear need for communication between or among the examiners for clarification. A description of the communication shall be included in the report. After all reports are submitted to the court, examiners may confer without restriction.

(5) If the examination cannot be conducted by reason of the unwillingness of the defendant to participate therein, the report shall so state and shall include, if possible, an opinion as to whether such unwillingness of the defendant was the result of physical or mental disease, disorder, or defect.

(6) Three copies of the report of the examination, including any supporting documents, shall be filed with the clerk of the court, who shall cause copies to be delivered to the prosecuting attorney and to counsel for the defendant.

(7) Any examiner shall be permitted to make a separate explanation reasonably serving to clarify the examiner's diagnosis or opinion.

(8) The court shall obtain all existing medical, mental health, social, police, and juvenile records, including those expunged, and other pertinent records in the custody of public agencies, notwithstanding any other ~~[statutes]~~ statute, and make such records available for inspection by the examiners[-] in hard copy or digital format. The court may order that the records so obtained be made available to the prosecuting attorney and counsel for the defendant in such form or manner, and under such conditions, as the court may determine. If, pursuant to this section, the court orders the defendant committed to a hospital or other suitable facility under the control of the director of health, then the county police departments shall provide to the director of health and the defendant copies of all police reports from cases filed against the defendant which have been adjudicated by the acceptance of a plea of guilty or no contest, a finding of guilt, acquittal, acquittal pursuant to section 704-400, or by the entry of plea of guilty or no contest made pursuant to chapter 853, so long as the disclosure to the director of health and the defendant does not frustrate a legitimate function of the county police departments, with the exception of expunged records, records of or pertaining to any adjudication or disposition rendered in the case of a juvenile, or records containing data from the United States National Crime Information Center. The county police departments shall segregate or sanitize from the police reports information that would result in the likelihood or actual identification of individuals who furnished information in connection with its investigation, or who were of investigatory interest. Records shall not be re-disclosed except to the extent permitted by law.

(9) All public agencies in possession of medical, mental health, social, and juvenile records, and any other pertinent records of a defendant ordered to be examined

under this chapter, shall provide those records to the court, notwithstanding any other state statute.

(10) The compensation of persons making or assisting in the examination, other than those retained by the nonindigent defendant, who are not undertaking the examination upon designation by the director of health as part of their normal duties as employees of the State or a county, shall be paid by the State.

**Comment:**

**Subsection (1):** The proposed revision makes clear that bail issues may be raised and determined notwithstanding that proceedings are otherwise suspended pending a court ordered mental examination.

**Subsection (2):** The first proposed revision addresses workload issues in the Department of Health's courts and corrections branch by permitting the Director of the Department of Health to select either an examiner from within the Department of Health, or a private psychologist or psychiatrist, rather than requiring an examiner from within the Department of Health in every felony case. *The committee recommends a sunset date of two years for this provision.* This two year period will allow the Department of Health time to address staffing needs in its courts and corrections branch, and also allow for a further extension of time if necessary. The second proposed revision clarifies that the examination may occur whether the defendant is "in or out of custody," rather than "on an out patient basis."

**Subsection (8):** The proposal does the following: (1) makes a simple style change from "statutes" to "statute"; (2) expressly allows digital transmission to the examiners of records obtained by the court (through the adult probation division); and (3) removes a perceived impediment, based on HRS § 806-73, to the court granting the prosecutor and defense counsel access to records obtained by the adult probation division. A related amendment is proposed for HRS § 806-73, *infra*.

**§ 704-406 Effect of finding of unfitness to proceed**

(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 704-407, and the court shall commit the defendant to the custody of the director of health to be placed in an appropriate institution for detention, 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

(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 the person or 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. A copy of the ~~[report]~~ reports filed pursuant to section 704-404 shall be attached to the order of commitment or order of release on conditions that is provided to the department of health. When the defendant is committed to the custody of the director of health for detention, care, and treatment, the county police departments shall provide to the director of health and the defendant copies of all police reports from cases filed against the defendant that have been adjudicated by the acceptance of a plea of guilty or nolo contendere, a finding of guilt, acquittal, acquittal pursuant to section 704-400, or by the entry of a plea of guilty or nolo contendere made pursuant to chapter 853, so long as the disclosure to the director of health and the defendant does not frustrate a legitimate function of the county police departments; provided that expunged records, records of or pertaining to any adjudication or disposition rendered in the case of a juvenile, or records containing data from the United States National Crime Information Center shall not be provided. The county police departments shall segregate or sanitize from the police reports information that would result in the [likely] or actual identification of individuals who furnished information in connection with the investigation or who were of investigatory interest. Records shall not be re-disclosed except to the extent permitted by law.

(2) When the defendant is released on conditions after a finding of unfitness to proceed, the department of health shall establish and monitor a fitness restoration program consistent with conditions set by the court order of release, and shall inform the prosecuting attorney of the county that charged the defendant of the program and report the defendant's compliance therewith.

[(3)] When the court, on its own motion or upon the application of the director of health, the prosecuting attorney, or the defendant, determines, after a hearing if a hearing is requested, that the defendant has regained fitness to proceed, the penal proceeding shall be resumed. If, however, the court is of the view that so much time has elapsed since the commitment or release on conditions of the defendant that it would be unjust to resume the proceeding, the court may dismiss the charge and:

(a) Order the defendant to be discharged;

(b) Subject to ~~[the law governing the involuntary civil commitment of persons affected by physical or mental disease, disorder, or defect]~~ section 334-60.2 regarding involuntary hospitalization criteria, order the defendant to be committed to the custody of the director of health to be placed in an appropriate institution for detention, care, and treatment; or

(c) Subject to ~~[the law governing involuntary outpatient treatment]~~ section 334-121 regarding assisted community treatment criteria, order the defendant to be released on conditions the court determines necessary.

[(4)] If a defendant committed to the custody of the director of health for a limited period pursuant to subsection (1) is not found fit to proceed prior to the expiration of the commitment, the charge for which the defendant was committed for a limited period shall be dismissed. Upon dismissal of the charge, the defendant shall be released from custody unless the defendant is subject to prosecution for other charges~~[, in which case, unless the~~

~~defendant is subject to the law governing involuntary civil commitment,] or subject to section 334-60.2 regarding involuntary hospitalization criteria, in which case the court shall order the defendant's commitment to the custody of the director of health to be placed in an appropriate institution for detention, care, and treatment. Within a reasonable time following any other commitment under subsection (1), the director of health shall report to the court on whether the defendant presents a substantial likelihood of becoming fit to proceed in the future. The court, in addition, may appoint a panel of three qualified examiners in felony cases or one qualified examiner in nonfelony cases to make a report. If, following a report, the court determines that the defendant probably will remain unfit to proceed, the court may dismiss the charge and:~~

- (a) Release the defendant; or
- (b) Subject to ~~[the law governing involuntary civil commitment]~~ section 334-60.2 regarding involuntary hospitalization criteria, order the defendant to be committed to the custody of the director of health to be placed in an appropriate institution for detention, care, and treatment.

~~[(5)] If a defendant released on conditions for a limited period pursuant to subsection (1) is not found fit to proceed prior to the expiration of the release on conditions order, the charge for which the defendant was released on conditions for a limited period shall be dismissed. Upon dismissal of the charge, the defendant shall be discharged from the release on conditions unless the defendant is subject to prosecution for other charges or subject to ~~[the law governing involuntary civil commitment]~~ section 334-60.2 regarding involuntary hospitalization criteria, in which case the court shall order the defendant's commitment to the custody of the director of health to be placed in an appropriate institution for detention, care, and treatment. Within a reasonable time following any other release on conditions under subsection (1), the court shall appoint a panel of three qualified examiners in felony cases or one qualified examiner in nonfelony cases to report to the court on whether the defendant presents a substantial likelihood of becoming fit to proceed in the future. If, following the report, the court determines that the defendant probably will remain unfit to proceed, the court may dismiss the charge and:~~

- (a) Release the defendant; or
- (b) Subject to ~~[the law governing involuntary civil commitment]~~ section 334-60.2 regarding involuntary hospitalization criteria, order the defendant to be committed to the custody of the director of health to be placed in an appropriate institution for detention, care, and treatment.

**Comment:**

**Subsection (1):** The proposed revisions clarify that copies of the examiners reports need be attached only to the commitment and conditional release orders provided to the department of health

**Subsection (3):** The proposed revision clarifies the law by specifying the governing statutory section.

**Subsection (4):** The language first deleted from subsection (4) corrects an apparent drafting error. The rest of the proposed revisions clarify the law by specifying the governing statutory section.

**Subsection (5):** The proposed revisions clarify the law by specifying the governing statutory section.

**§ 704-407 Special hearing following commitment or release on conditions**

(1) At any time after commitment as provided in section 704-406, the defendant or the defendant's counsel or the director of health may apply for a special post-commitment or post-release hearing. If the application is made by or on behalf of a defendant not represented by counsel, the defendant shall be afforded a reasonable opportunity to obtain counsel, and if the defendant lacks funds to do so, counsel shall be assigned by the court. The application shall be granted only if the counsel for the defendant satisfies the court by affidavit or otherwise that, as an attorney, the counsel has reasonable grounds for a good faith belief that the counsel's client has an objection based upon legal grounds to the charge.

(2) If the motion for a special post-commitment or post-release hearing is granted, the hearing shall be by the court without a jury. No evidence shall be offered at the hearing by either party on the issue of physical or mental disease, disorder, or defect as a defense to, or in mitigation of, the offense charged.

(3) After the hearing, the court shall rule on any legal objection raised by the application and, in an appropriate case, may quash the indictment or other charge, find it to be defective or insufficient, or otherwise terminate the proceedings on the law. In any such case, unless all defects in the proceedings are promptly cured, the court shall terminate the commitment or release ordered under section 704-406 and:

(a) Order the defendant to be discharged;

(b) Subject to [~~the law governing involuntary civil commitment of persons affected by a physical or mental disease, disorder, or defect~~] section 334-60.2 regarding involuntary hospitalization criteria, order the defendant to be committed to the custody of the director of health to be placed in an appropriate institution for detention, care, and treatment; or

(c) Subject to [~~the law governing involuntary outpatient treatment~~] section 334-121 regarding assisted community treatment criteria, order the defendant to be released on such conditions as the court deems necessary.

**Comment:** The proposed revisions clarify the law by specifying the governing statutory section.

**§ 704-411 Legal effect of acquittal on the ground of physical or mental disease, disorder, or defect excluding responsibility; commitment; conditional release; discharge; procedure for separate post-acquittal hearing**

(1) When a defendant is acquitted on the ground of physical or mental disease, disorder, or defect excluding responsibility, the court, on the basis of the report made pursuant to section 704-404, if uncontested, or the medical or psychological evidence given at the trial or at a separate hearing, shall order that:

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

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

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

(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. The county police departments shall provide to the director of health and the defendant copies of all police reports from cases filed against the defendant that have been adjudicated by the acceptance of a plea of guilty or nolo contendere, a finding of guilt, acquittal, acquittal pursuant to section 704-400, or by the entry of a plea of guilty or nolo contendere made pursuant to chapter 853, so long as the disclosure to the director of health and the defendant does not frustrate a legitimate function of the county police departments; provided that expunged records, records of or pertaining to any adjudication or disposition rendered in the case of a juvenile, or records containing data from the United States National Crime Information Center shall not be provided. The county police departments shall segregate or sanitize from the police reports information that would result in the likelihood or actual identification of individuals who furnished information in connection with the investigation or who were of investigatory interest. Records shall not be re-disclosed except to the extent permitted by law;

(b) The defendant shall be 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. ~~For any defendant granted conditional release pursuant to this paragraph, and who was charged with a petty misdemeanor, misdemeanor, or violation, the period of conditional release shall be no longer than one year~~; or

(c) The defendant shall be 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 psychologist, or a qualified physician. One of the three shall be a psychiatrist or licensed psychologist designated by the director of health [~~from within the department of health~~]. The three examiners shall be appointed from a list of certified examiners as determined by the department of health.

To facilitate the examination and the proceedings thereon, the court may cause the defendant, if not then confined, to be committed to a hospital or other suitable facility for the purpose of examination for a period not exceeding thirty days or such longer period as the court determines to be necessary for the purpose upon written findings for good cause shown. The court may direct that qualified physicians or psychologists retained by the defendant be permitted to witness the examination. The examination and report and the compensation of persons making or assisting in the examination shall be in accord with section 704-404(3), (4)(a) and (b), (6), (7), (8), and (9). As used in this section, the term "licensed psychologist" includes psychologists exempted from licensure by section 465-3(a)(3).

(4) Whether the court's order under subsection (1) is made 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) In any proceeding governed by this section, the defendant's fitness shall not be an issue.

**Comment:**

**Subsection (1)(b):** For defendants acquitted of *non-felony* charges due to a physical or mental disease, disorder or defect, the Committee proposes that a one year cap apply to all conditional release orders. Currently, the one year cap only applies to non-felony conditional release orders issued pursuant to § 704-411(1)(b) (*i.e.*, when the defendant is acquitted due to a physical or mental disease, disorder or defect and ordered *directly* to conditional release). However, a defendant acquitted due to a physical or mental disease, disorder or defect can also be ordered committed to hospitalization, and then subsequently ordered to conditional release. In this latter circumstance, because there is no current provision regarding a one year cap, some Defendants charged with a non-felony are under conditional release for a period longer than any potential sentence if they had been convicted. The Committee proposes to delete the applicable language in § 704-411(1)(b) and to add a new provision to Chapter 704 so that a one year cap will apply to all non-felony conditional release orders.



**Subsection (3)(b):** The proposed revision addresses workload issues in the Department of Health’s courts and corrections branch by permitting the Director of the Department of Health to select either an examiner from within the Department of Health, or a private psychologist or psychiatrist; rather than requiring an examiner from within the Department of Health in every felony case. *The committee recommends a sunset date of two years for this provision.* This two year period will allow the Department of Health time to address staffing needs in its courts and corrections branch, and also allow for a further extension of time if necessary.

**Add a new section to Chapter 704 to read:**

**“§ 704-XXX Conditional release; limit on duration in nonfelony cases.** For any defendant granted conditional release in a nonfelony case pursuant to section 704-411(1)(b) or sections 704-412, 704-414, and 704-415, the period of conditional release shall be no longer than one year.”

**Comment:** This is a companion to the proposed revision to § 704-411(1)(b). As explained in regard to § 704-411(1)(b), above, this proposed new section would provide for a one year cap on conditional release for all *non-felony* cases.

**§ 704-413 Conditional release; application for modification or discharge; termination of conditional release and commitment**

(1) Any person granted conditional release pursuant to this chapter 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 a mental health professional who is treating a 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 person granted conditional release. The probation officer may order the 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 period, as computed pursuant to section 1-29, unless a hearing has been held pursuant to subsection (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 of conditional release 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 this chapter, 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 an application for the discharge from, or modification of, the order of conditional release in a report to the circuit from which the order was issued. 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 issued, 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.

(3) Any person granted conditional release pursuant to this chapter 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 court denies the application, the person shall not be permitted to file another application for either discharge or modification of conditional release until one year after the date of the denial.

(4) If, at any time after the order pursuant to this chapter 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 in accordance with the procedure prescribed in section 704-412[-]; provided that, if satisfied that the person would benefit from temporary hospitalization which may render a revocation of conditional release unnecessary, the court may, in lieu of revocation, order 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, and may reinstate or revoke conditional release at any time during the temporary hospitalization.

(5) Upon application for discharge from, or modification of, the order of conditional release by either the director of health or the person, the court shall complete the hearing process and render a decision within sixty days of the application, provided that for good cause the court may extend the sixty day time frame upon the request of the director of health or the person.

**Comment:** The proposed revision to subsection (4) gives the court the option of temporarily hospitalizing a defendant rather than revoking conditional release. Temporary hospitalization is a flexible way to stabilize the defendant and return him or

her to conditional release as soon as he or she is ready. Under existing law, if the defendant requires hospitalization – even for just a few days – the only option is to revoke conditional release, in which event the defendant would be hospitalized for a minimum of sixty days before being eligible to apply for conditional release and, upon his or her application, the court would be required to schedule a hearing within another sixty days and appoint examiners (three in felony cases and one in nonfelony cases) to review and report on the defendant’s condition. The expense and often unnecessary hospitalization accompanying the revocation and reinstatement cycle can almost always be avoided by using the temporary hospitalization option. The proposed revision mirrors the temporary hospitalization option available in probation officer ordered hospitalization situations under section 704-413(1).

**§ 704-414 Procedure upon application for discharge, conditional release, or modification of conditions of release**

(1) Upon filing of an application pursuant to section 704-412 for discharge or conditional release, or upon the filing of an application pursuant to section 704-413 for discharge [~~or for modification of conditions of release~~], the court shall appoint three qualified examiners in felony cases and one qualified examiner in nonfelony cases to examine and report upon the physical and mental condition of the defendant. In felony cases the court shall appoint at least one psychiatrist and at least one licensed psychologist. The third member may be a psychiatrist, a licensed psychologist, or a qualified physician. One of the three shall be a psychiatrist or licensed psychologist designated by the director of health [~~from within the department of health~~]. The examiners shall be appointed from a list of certified examiners as determined by the department of health. To facilitate the examination and the proceedings thereon, the court may cause the defendant, if not then confined, to be committed to a hospital or other suitable facility for the purpose of the examination and may direct that qualified physicians or psychologists retained by the defendant be permitted to witness the examination. The examination and report and the compensation of persons making or assisting in the examination shall be in accord with section 704-404(3), (4)(a) and (b), (6), (7), (8), and (9). As used in this section, the term “licensed psychologist” includes psychologists exempted from licensure by section 465-3(a)(3).

(2) Upon the filing of an application pursuant to section 704-413 for modification of conditions of release, the court may proceed as provided in subsection (1).

**Comment:** This proposal does the following: (1) makes examinations that are mandatory under existing law discretionary with the court when only a modification of conditional release is sought. At present, before any condition of release may be modified, the court must appoint a panel of three examiners in felony cases and one examiner in nonfelony cases to examine and report on the physical and mental condition of the defendant. Some release conditions, like those requiring the defendant to reside at a particular address or participate in a particular treatment program are regularly modified while a defendant is on conditional release. In most cases, reports and recommendations from the defendant’s probation officer and treatment team and input from the prosecuting attorney and defense counsel render the expensive, statutorily mandated examinations

unnecessary; and (2) addresses workload issues in the Department of Health's courts and corrections branch by permitting the Director of Health to select either an examiner from within the Department of Health or a private psychologist or psychiatrist, rather than requiring an examiner from within the Department of Health in every felony case. *The committee recommends a sunset date of two years for this provision.* This two year period will allow the Department of Health time to address staffing needs in its courts and corrections branch, and also allow for a further extension of time if necessary.

**Add another new section to Chapter 704 to read:**

**§704- Examination reports; provided to director of health.** Copies of all examiner reports made pursuant to sections 704-404, 704-406, 704-411, and 704-414 shall be provided to the director of the department of health.

**Comment:** This proposed new section would require that all examiner reports made pursuant to the specified sections be provided to the Director of the Department of Health. This will assist the Department of Health to have a more complete record about defendants who are ordered into the custody of the Department of Health or where the Department of Health has oversight of a defendant for various reasons, including related to: the defendant's fitness to proceed in a case; the defendant's release on conditions; or the defendant's acquittal on grounds of physical or mental disease, disorder or defect excluding responsibility.

**Chapter 706: Disposition of Convicted Defendants**

**§ 706-601 Pre-sentence diagnosis and report**

(1) Except as provided in subsections (3) and (4), the court shall order a pre-sentence correctional diagnosis of the defendant and accord due consideration to a written report of the diagnosis before imposing sentence where:

- (a) The defendant has been convicted of a felony; or
- (b) The defendant is less than twenty-two years of age and has been convicted of a crime.

(2) The court may order a pre-sentence diagnosis in any other case.

(3) With the consent of the court, the requirement of a pre-sentence diagnosis may be waived by agreement of both the defendant and the prosecuting attorney, provided in felony cases the prosecuting attorney has informed or has made reasonable efforts to inform the victim, victim's family or surviving immediate family members of their right to be present and provide information relating to the impact of the crime, including any requested restitution, and to be present at the sentencing hearing.

(4) The court on its own motion may waive a pre-sentence correctional diagnosis where:

- (a) A prior pre-sentence diagnosis was completed within one year preceding the sentencing in the instant case;

- (b) The defendant is being sentenced for murder or attempted murder in any degree; or
- (c) The sentence was agreed to by the parties and approved by the court under rule 11 of the Hawaii rules of penal procedure.

**Comment:** The proposed amendment clarifies and ensures that crime victims in felony cases have a meaningful opportunity to be heard at sentencing even when both the State and the defendant waive the requirement for a pre-sentence diagnosis.

**Add a new section to Chapter 706 regarding the order of priority for a defendant's payments, as follows:**

§ 706-XXX

When a defendant is ordered to make payments pursuant to Chapters 351, 706, 846F, 853 or as provided by law, payments by the defendant shall be made in the following order of priority:

- (a) Restitution;
- (b) Crime victim compensation fee;
- (c) Probation services fee;
- (d) Human trafficking victim services fee;
- (e) Other fees, including but not limited to internet crimes against children fee and drug demand reduction assessment fee;
- (f) DNA analysis monetary assessment; and
- (g) Fines.

**Comment:** The proposed amendment would create a new section detailing the priority of a defendant's payment in order to provide clarity and consistency in all cases. Currently, provisions regarding order of payment are found in 706-603, 706-605, 706-642, 706-646, 706-648, 706-650, 706-650.5, and 846F-3. Proposed amendments to relevant sections are set forth below to cite to this proposed new section.

**§ 706-603 DNA analysis monetary assessment; DNA registry special fund**

(1) In addition to any disposition authorized by chapter 706 or 853, every defendant convicted of a felony offense shall be ordered to pay a monetary assessment of \$500 or the actual cost of the DNA analysis, whichever is less. The court may reduce the monetary assessment if the court finds, based on evidence presented by the defendant and not rebutted by the State, that the defendant is not and will not be able to pay the full monetary assessment and, based on the finding, shall instead order the defendant to pay an assessment that the defendant will be able to pay within five years.

(2) Notwithstanding any other law to the contrary, the assessment and penalty provided by this section shall be in addition to, and not in lieu of, and shall not be used to offset or reduce, any fine or restitution authorized or required by law. All assessments

and penalties shall be paid into the DNA registry special fund established in subsection (3).

(3) There is established a special fund to be known as the DNA registry special fund which shall be administered by the attorney general. The fund shall consist of:

- (a) All assessments and penalties ordered pursuant to subsection (1);
- (b) All other moneys received by the fund from any other source; and
- (c) Interest earned on any moneys in the fund.

Moneys in the DNA registry special fund shall be used for DNA collection, DNA testing, and related costs of recording, preserving, and disseminating DNA information pursuant to chapter 844D.

(4) Restitution [~~to the victim of a sexual or violent crime~~] shall be made before payment of the monetary assessment, as provided in section 706-XXX.

**Comment:** The proposed amendment clarifies that restitution generally, not just for victims of sexual or violent crimes, has priority over the DNA assessment. The amendment refers to the proposed new section regarding the priority order for payments by a defendant.

#### **§ 706-604 Opportunity to be heard with respect to sentence; notice of pre-sentence report; opportunity to controvert or supplement; transmission of report to department**

(1) Before imposing sentence, the court shall afford a fair opportunity to the defendant to be heard on the issue of the defendant's disposition.

(2) The court shall furnish to the defendant or the defendant's counsel and to the prosecuting attorney a copy of the report of any pre-sentence diagnosis or psychological, psychiatric, or other medical examination and afford fair opportunity, if the defendant or the prosecuting attorney so requests, to controvert or supplement them. The court shall amend or order the amendment of the report upon finding that any correction, modification, or addition is needed and, where appropriate, shall require the prompt preparation of an amended report in which material required to be deleted is completely removed or other amendments, including additions, are made.

(3) In all circuit court cases, whether a presentence report has been prepared or waived, the court shall afford a fair opportunity to the victim to be heard on the issue of the defendant's disposition, before imposing sentence. The court, service center, or agency personnel who prepare the pre-sentence diagnosis and report shall inform the victim of the sentencing date and of the victim's opportunity to be heard. In the case of a homicide or where the victim is a minor or is otherwise unable to appear at the sentencing hearing, the victim's family shall be afforded the fair opportunity to be heard.

(4) If the defendant is sentenced to imprisonment, a copy of the report of any pre-sentence diagnosis or psychological, psychiatric, or other medical examination, which shall incorporate any amendments ordered by the court, shall be transmitted immediately to the department of public safety.

**Comment:** The first proposed amendment in subsection (3) clarifies and ensures that crime victims have a meaningful opportunity to be heard at sentencing whether a

presentence report has been prepared or waived. The second proposed amendment in subsection (3) clarifies that where the victim is a minor, the victim's family has a right to be heard on sentencing.

**§ 706-605 Authorized disposition of convicted defendants**

(1) Except as provided in parts II and IV or in section 706-647 and subsections (2), (6), and (7), and subject to the applicable provisions of this Code, the court may sentence a convicted defendant to one or more of the following dispositions:

- (a) To be placed on probation as authorized by part II;
- (b) To pay a fine as authorized by part III and section 706-624;
- (c) To be imprisoned for a term as authorized by part IV; or
- (d) To perform services for the community under the supervision of a governmental agency or benevolent or charitable organization or other community service group or appropriate supervisor; provided that the convicted person who performs such services shall not be deemed to be an employee of the governmental agency or assigned work site for any purpose. All persons sentenced to perform community service shall be screened and assessed for appropriate placement by a governmental agency coordinating public service work placement as a condition of sentence.

(2) The court shall not sentence a defendant to probation and imprisonment except as authorized by part II.

(3) In addition to any disposition authorized in subsection (1), the court may sentence a person convicted of a misdemeanor or petty misdemeanor to a suspended sentence.

(4) The court may sentence a person who has been convicted of a violation to any disposition authorized in subsection (1) except imprisonment.

(5) The court shall sentence a corporation or unincorporated association that has been convicted of an offense in accordance with section 706-608.

(6) The court shall impose a compensation fee upon every person convicted of a criminal offense pursuant to section 351-62.6; provided that the court shall waive the imposition of a compensation fee if it finds that the defendant is unable to pay the compensation fee. When a defendant is ordered to make payments in addition to the compensation fee, payments by the defendant shall be made as provided in section 706-XXX [~~in the following order of priority:~~

- ~~(a) Restitution;~~
- ~~(b) Crime victim compensation fee;~~
- ~~(c) Probation services fee;~~
- ~~(d) Other fees; and~~
- ~~(e) Fines].~~

(7) The court shall order the defendant to make restitution for losses as provided in section 706-646. In ordering restitution, the court shall not consider the defendant's financial ability to make restitution in determining the amount of restitution to order. The court, however, shall consider the defendant's financial ability to make restitution for the purpose of establishing the time and manner of payment.

(8) This chapter does not deprive the court of any authority conferred by law to decree a forfeiture of property, suspend or cancel a license, remove a person from office, or impose any other civil penalty. Such a judgment or order may be included in the sentence.

**Comment:** The proposed amendment eliminates confusion caused by multiple provisions addressing the priority of payments by a defendant.

**§ 706-605.1 Intermediate sanctions; eligibility; criteria and conditions**

(1) The judiciary shall implement alternative programs that place, control, supervise, and treat selected defendants in lieu of a sentence of incarceration.

(2) Defendants may be considered for sentencing to alternative programs if they[~~;~~ ~~(a)-H~~] have not been convicted of a non-probationable class A felony[~~;~~ ~~and~~ ~~(b) Have not, within the previous five years, been convicted of a crime involving serious bodily injury or substantial bodily injury as defined by chapter 707].~~

(3) A defendant may be sentenced by a district, family, or circuit court judge to alternative programs.

(4) As used in this section, “alternative programs” means programs that, from time to time, are created and funded by legislative appropriation or federal grant naming the judiciary or one of its operating agencies as the expending agency and that are intended to provide an alternative to incarceration. Alternative programs may include:

- (a) House arrest, or curfew using electronic monitoring and surveillance, or both;
- (b) Drug court programs for defendants with assessed alcohol or drug abuse problems, or both;
- (c) Therapeutic residential and nonresidential programs, including secure drug treatment facilities;
- (d) [A program of regimental discipline pursuant to section 706-605.5; and
- ~~(e)]~~ Similar programs created and designated as alternative programs by the legislature or the administrative director of the courts for qualified defendants who do not pose significant risks to the community.

**Comment:**

**Subsection (2):** The proposed amendment deletes § 706-605.1(2)(b) because it currently disqualifies persons with this type of conviction from participating in specialty and/or treatment courts, *i.e.*, Mental Health Court, Veterans Court, Drug Court. This amendment would allow the sentencing court to refer defendants to receive treatment, services, and close supervision under these specialty courts when deemed appropriate by the court. These now well-established courts are in the best position to make those admissions decisions.

**Subsection (4):** The proposed amendment deletes § 706-605.1(4)(d) relating to regimental discipline, because the Committee proposes *infra* to repeal § 706-606.5, which authorizes regimental discipline.



## Repeal § 706-605.5 regarding regimental discipline

### ~~§ 706-605.5 Program of regimental discipline~~

~~(1) The department of public safety is authorized to implement a rigorous offender program based on regimental discipline. Participants shall undergo a regimen of hard work, physical training, intensive counseling, and educational and treatment programs within a highly structured and motivational environment. The program shall be available to defendants and committed persons who:~~

- ~~(a) Have not been convicted of a class A felony;~~
- ~~(b) Are not considered violent;~~
- ~~(c) Are chosen by the director of public safety;~~
- ~~(d) Are in good physical condition;~~
- ~~(e) Have not been previously sentenced to an indeterminate term of imprisonment; and~~
- ~~(f) Are willing to participate in the program.~~

~~(2) The court, with the approval of the director of public safety, may order a defendant to satisfactorily complete a program of regimental discipline of not less than ninety days before the court sentences a defendant or as a condition of probation or a deferred acceptance of guilty plea.~~

~~(3) If a defendant is ordered to complete a program, the director of public safety shall certify to the court whether the defendant completed the program satisfactorily. If the defendant fails to complete the program satisfactorily as a condition of a deferred acceptance of guilty plea, such a failure shall be considered in accordance with section 853-3. If a defendant fails to complete the program satisfactorily as a condition of probation, such a failure shall be considered in accordance with section 706-625.~~

**Comment:** The proposal is to repeal § 706-605.5 because in over twenty years, it has never been used, likely due to resource demands on the Department of Public Safety and questions regarding the effectiveness of regimental discipline.

### § 706-606.5 Sentencing of repeat offenders

- (1) Notwithstanding section 706-669 and any other law to the contrary, any person convicted of murder in the second degree, any class A felony, any class B felony, or any of the following class C felonies:
- a) section 134-7 relating to persons prohibited from owning, possessing, or controlling firearms or ammunition;
  - b) section 134-8 relating to ownership, etc., of certain prohibited weapons;
  - c) section 134-17 only as it relates to providing false information or evidence to obtain a permit under section 134-9;
  - d) section 188-23 relating to possession or use of explosives, electrofishing devices, and poisonous substances in state waters;
  - e) section 386-98(d)(1) relating to fraud violations and penalties;
  - f) section 431:2-403(b)(2) relating to insurance fraud;
  - g) section 707-703 relating to negligent homicide in the second degree;
  - h) section 707-711 relating to assault in the second degree;

- i) section 707-713 relating to reckless endangering in the first degree;
- j) section 707-716 relating to terroristic threatening in the first degree;
- k) section 707-721 relating to unlawful imprisonment in the first degree;
- l) section 707-732 relating to sexual assault in the third degree;
- m) section 707-752 relating to promoting child abuse in the third degree;
- n) section 707-757 relating to electronic enticement of a child in the second degree;
- o) section 707-766 relating to extortion in the second degree;
- p) section 708-811 relating to burglary in the second degree;
- q) section 708-821 relating to criminal property damage in the second degree;
- r) section 708-831 relating to theft in the second degree;
- s) section 708-835.5 relating to theft of livestock;
- t) section 708-836 relating to unauthorized control of propelled vehicle;
- u) section 708-839.55 relating to unauthorized possession of confidential personal information;
- v) section 708-839.8 relating to identity theft in the third degree;
- w) section 708-852 relating to forgery in the second degree;
- x) section 708-854 relating to criminal possession of a forgery device;
- y) section 708-875 relating to trademark counterfeiting;
- z) section 710-1071 relating to intimidating a witness;
- aa) section 711-1103 relating to riot;
- bb) section 712-1221 relating to promoting gambling in the first degree;
- cc) section 712-1224 relating to possession of gambling records in the first degree;  
~~section 712-1243 relating to promoting a dangerous drug in the third degree;~~
- dd) section 712-1247 relating to promoting a detrimental drug in the first degree;
- ee) section 846E-9 relating to failure to comply with covered offender registration requirements,

or who is convicted of attempting to commit murder in the second degree, any class A felony, any class B felony, or any of the class C felony offenses enumerated above and who has a prior conviction or prior convictions for the following felonies, including an attempt to commit the same: murder, murder in the first or second degree, a class A felony, a class B felony, any of the class C felony offenses enumerated above, or any felony conviction of another jurisdiction, shall be sentenced to a mandatory minimum period of imprisonment without possibility of parole during such period as follows:

- (a) One prior felony conviction:
  - (i) Where the instant conviction is for murder in the second degree or attempted murder in the second degree--ten years;
  - (ii) Where the instant conviction is for a class A felony--six years, eight months;
  - (iii) Where the instant conviction is for a class B felony--three years, four months; and
  - (iv) Where the instant conviction is for a class C felony offense enumerated above--one year, eight months;
- (b) Two prior felony convictions:
  - (i) Where the instant conviction is for murder in the second degree or attempted murder in the second degree--twenty years;

- (ii) Where the instant conviction is for a class A felony--thirteen years, four months;
  - (iii) Where the instant conviction is for a class B felony--six years, eight months; and
  - (iv) Where the instant conviction is for a class C felony offense enumerated above--three years, four months;
- (c) Three or more prior felony convictions:
- (i) Where the instant conviction is for murder in the second degree or attempted murder in the second degree--thirty years;
  - (ii) Where the instant conviction is for a class A felony--twenty years;
  - (iii) Where the instant conviction is for a class B felony--ten years; and
  - (iv) Where the instant conviction is for a class C felony offense enumerated above--five years.
- (2) Except as in subsection (3), a person shall not be sentenced to a mandatory minimum period of imprisonment under this section unless the instant felony offense was committed during such period as follows:
- (a) Within twenty years after a prior felony conviction where the prior felony conviction was for murder in the first degree or attempted murder in the first degree;
  - (b) Within twenty years after a prior felony conviction where the prior felony conviction was for murder in the second degree or attempted murder in the second degree;
  - (c) Within twenty years after a prior felony conviction where the prior felony conviction was for a class A felony;
  - (d) Within ten years after a prior felony conviction where the prior felony conviction was for a class B felony;
  - (e) Within five years after a prior felony conviction where the prior felony conviction was for a class C felony offense enumerated above;
  - (f) Within the maximum term of imprisonment possible after a prior felony conviction of another jurisdiction.
- (3) If a person was sentenced for a prior felony conviction to a special term under section 706-667, then the person shall not be sentenced to a mandatory minimum period of imprisonment under this section unless the instant felony offense was committed during such period as follows:
- (a) Within eight years after a prior felony conviction where the prior felony conviction was for a class A felony;
  - (b) Within five years after the prior felony conviction where the prior felony conviction was for a class B felony;
  - (c) Within four years after the prior felony conviction where the prior felony conviction was for a class C felony offense enumerated above.
- (4) Notwithstanding any other law to the contrary, any person convicted of any of the following misdemeanor offenses:
- (a) Section 707-712 relating to assault in the third degree;
  - (b) Section 707-717 relating to terroristic threatening in the second degree;
  - (c) Section 707-733 relating to sexual assault in the fourth degree;
  - (d) Section 708-822 relating to criminal property damage in the third degree;

(e) Section 708-832 relating to theft in the third degree; and  
(f) Section 708-833.5(2) relating to misdemeanor shoplifting,  
and who has been convicted of any of the offenses enumerated above on at least three prior and separate occasions within three years of the date of the commission of the present offense, shall be sentenced to no less than nine months of imprisonment. Whenever a court sentences a defendant under this subsection for an offense under section 707-733, the court shall order the defendant to participate in a sex offender assessment and, if recommended based on the assessment, participate in the sex offender treatment program established by chapter 353E.

(5) The sentencing court may impose the above sentences consecutive to any sentence imposed on the defendant for a prior conviction, but such sentence shall be imposed concurrent to the sentence imposed for the instant conviction. The court may impose a lesser mandatory minimum period of imprisonment without possibility of parole than that mandated by this section where the court finds that strong mitigating circumstances warrant such action. Strong mitigating circumstances shall include, but shall not be limited to the provisions of section 706-621. The court shall provide a written opinion stating its reasons for imposing the lesser sentence.

(6) A person who is imprisoned in a correctional institution pursuant to subsection (1) shall not be paroled prior to the expiration of the mandatory minimum term of imprisonment imposed pursuant to subsection (1).

(7) For purposes of this section:

(a) Convictions under two or more counts of an indictment or complaint shall be considered a single conviction without regard to when the convictions occur;

(b) A prior conviction in this or another jurisdiction shall be deemed a felony conviction if it was punishable by a sentence of death or of imprisonment in excess of one year; and

(c) A conviction occurs on the date judgment is entered.

**Comment:** The first proposed amendment is a non-substantive reformatting of subsection (1) to add an alphabetical listing for the class C felonies in order to make it easier to understand which offenses are included and for ease of reference. Given the proposed addition of the alphabetical listing, the currently existing subsections (1)(a), (1)(b) and (1)(c), will need to be renumbered or reformatted, which we understand will be addressed by LRB.

The second proposed amendment to subsection (1) is to delete § 712-1243, Promoting a Dangerous Drug in the Third Degree (PDD 3), from repeat offender mandatory minimum imprisonment. PDD 3 (small drug possession) cases are very common. Because PDD 3 is a repeat offender offense, courts have very little discretion and often must impose prison. Eliminating PDD 3 from the repeat offender statute would provide courts with discretion to consider probation and drug treatment as options (research has shown that drug treatment is more effective in the community than in prison). Pursuant to the Hawai'i Paroling Authority's 2014 Annual Report, the Paroling Authority set minimum terms for a total of 1,499 offenders with a total of 1,992 offenses in fiscal year 2014. Of these, 187 offenders with 240 offenses were for PDD 3.

The Committee's recommendation to remove PDD 3 from the repeat offender statute should not be viewed as a new or novel approach to the way our criminal justice

system deals with chronic drug offenders. This amendment simply represents the next logical step in recognizing that many drug offenders are better managed and treated on probation instead of in a prison setting.

Back in the 1990 and 2000s, when methamphetamine was perceived to be at epidemic levels, the Legislature's response was to enact a series of mandatory sentencing laws for the manufacture, distribution, and possession of methamphetamine. The logic behind this approach was the hope that harsh penalties would result in the decrease of these types of offenses. In 1996, the Legislature in Act 308 amended the PDD 3 statute (Section 712-1243), to make even the possession of small amounts of methamphetamine subject to a mandatory prison term. In 2002, however, the Legislature began to chart a different course by its passage of Act 161. This new law enabled qualifying property offenders and certain PDD 3 methamphetamine possession offenders to be eligible for probation in lieu of mandatory prison, which had been required by the repeat offender law. Then, in 2004, Act 44 eliminated the mandatory sentencing aspect of the PDD 3 statute for methamphetamine offenders.

Thus, our laws have evolved significantly in favor of providing courts with the discretion of sentencing certain non-violent drug offenders, who would have previously been facing mandatory prison terms, to probation instead. The enactment of § 706-622.5 (first-time and second-time drug offender sentencing) and § 706-622.9 (first-time property offender sentencing) were predicated upon the realization that certain drug offenders are often better managed and treated in the community as opposed to prison. Prior to this approach, sentencing courts had no choice except to sentence these offenders to prison. While these reforms have been very effective, they have been restricted to "non-violent" offenders and therefore have resulted in a fairly narrow application. For example, an offender who previously may have been involved in a minor altercation with a neighbor that resulted in a misdemeanor conviction for either an assault or a threatening type of offense would not qualify for probation under either of these provisions. Thus, despite the sentencing judge's view that this particular offender would benefit from probation and drug treatment, the court would have no other option and would be required to impose a prison term.

The recommendation to eliminate PDD3 as a qualifying offense under Section 706-606.5, and thus provide sentencing courts with discretion to impose probation sentences where appropriate, would be consistent with the rationale supporting existing law relating to these offenders. To be clear, this does not mean that drug offenders will be treated more leniently; judges would still retain the discretion to send offenders to prison if appropriate. However, if adopted by the Legislature, this recommended reform would provide our courts, and the community, with much needed flexibility in dealing with drug offenders effectively.

*Minority comment:* A significant minority comprising of law enforcement stakeholders, however, felt the elimination of PDD 3 minimized what they perceived to be a link between drug usage and further serious crimes that, without mandatory prison sentences, would occur out of custody.

### **§ 706-622.5 Sentencing for drug offenders; expungement**

(1) Notwithstanding section 706-620(3), a person convicted for the first or second time for any offense under section 329-43.5 involving the possession or use of drug paraphernalia or any felony offense under part IV of chapter 712 involving the possession or use of any dangerous drug, detrimental drug, harmful drug, intoxicating compound, marijuana, or marijuana concentrate, as defined in section 712-1240, but not including any offense under part IV of chapter 712 involving the distribution or manufacture of any such drugs or substances and not including any methamphetamine trafficking offenses under sections 712-1240.7 and 712-1240.8, is eligible to be sentenced to probation under subsection (2) if the person meets the following criteria:

- (a) The court has determined that the person is nonviolent after reviewing the person's criminal history, the factual circumstances of the offense for which the person is being sentenced, and any other relevant information;
- (b) The person has been assessed by a certified substance abuse counselor to be in need of substance abuse treatment due to dependency or abuse under the applicable Diagnostic and Statistical Manual and Addiction Severity Index; and
- (c) Except for those persons directed to substance abuse treatment under the supervision of the drug court, the person presents a proposal to receive substance abuse treatment in accordance with the treatment plan prepared by a certified substance abuse counselor through a substance abuse treatment program that includes an identified source of payment for the treatment program.

(2) A person eligible under subsection (1) may be sentenced to probation to undergo and complete a substance abuse treatment program if the court determines that the person can benefit from substance abuse treatment and, notwithstanding that the person would be subject to sentencing as a repeat offender under section 706-606.5, the person should not be incarcerated to protect the public. If the person fails to complete the substance abuse treatment program and the court determines that the person cannot benefit from any other suitable substance abuse treatment program, the person shall be subject to sentencing under the applicable section under this part. As a condition of probation under this subsection, the court may direct the person to undergo and complete substance abuse treatment under the supervision of the drug court if the person has a history of relapse in treatment programs. The court may require other terms and conditions of probation, including requiring that the person contribute to the cost of the substance abuse treatment program, comply with deadlines for entering into the substance abuse treatment program, and reside in a secure drug treatment facility.

(3) For the purposes of this section, “substance abuse treatment program” means drug or substance abuse treatment services provided outside a correctional facility by a public, private, or nonprofit entity that specializes in treating persons who are diagnosed with having substance abuse or dependency and preferably employs licensed professionals or certified substance abuse counselors.

(4) The court, upon written application from a person sentenced under this part or a probation officer, shall issue a court order to expunge the record of conviction for that particular offense; provided that a person has successfully completed the substance abuse treatment program and complied with other terms and conditions of probation. A person sentenced to probation under this section who has not previously been sentenced under this section shall be eligible for one time only for expungement under this subsection.

(5) Nothing in this section shall be construed to give rise to a cause of action against the State, a state employee, or a treatment provider.

**Comment:** The proposed amendment to subsection (4) would permit probation officers to file requests for expungements on behalf of defendants. This would be consistent with the current practice of probation officers who initiate, on behalf of defendants, requests to dismiss deferred acceptance of guilty pleas and deferred acceptance of no contest pleas.

#### **§ 706-622.9 Sentencing for first-time property offenders; expungement**

(1) Notwithstanding section 706-620(3), a person convicted for the first time of any class C felony property offense under chapter 708 who has not previously been sentenced under section 706-606.5, section 706-622.5, or this section is eligible to be sentenced to probation under subsection (2) if the person meets the following criteria:

- (a) The court has determined that the person is nonviolent after reviewing the person's criminal history, the factual circumstances of the offense for which the person is being sentenced, and any other relevant information;
- (b) The person has been assessed by a certified substance abuse counselor to be in need of substance abuse treatment due to dependency or abuse under the applicable Diagnostic and Statistical Manual and Addiction Severity Index;
- (c) The court has determined that the offense for which the person is being sentenced is related to the person's substance abuse dependency or addiction;
- (d) The court has determined that the person is genuinely motivated to obtain and maintain substance abuse treatment, based upon consideration of the person's history, including whether substance abuse treatment has previously been afforded to the person, and an appraisal of the person's current circumstances and attitude; and
- (e) Except for those persons directed to substance abuse treatment under the supervision of the drug court, the person presents a proposal to receive substance abuse treatment in accordance with the treatment plan prepared by a certified substance abuse counselor through a substance abuse treatment program that includes an identified source of payment for the treatment program.

(2) A person eligible under subsection (1) may be sentenced to probation to undergo and complete a substance abuse treatment program if the court determines that the person can benefit from substance abuse treatment and, notwithstanding that the person would be subject to sentencing as a repeat offender under section 706-606.5, the person should not be incarcerated to protect the public. If the person fails to complete the substance abuse treatment program and the court determines that the person cannot benefit from any other suitable substance abuse treatment program, the person shall be sentenced as provided in this part. As a condition of probation under this subsection, the court may direct the person to undergo and complete substance abuse treatment under the supervision of the drug court if the person has a history or relapse in treatment programs. The court may require other terms and conditions of probation, including requiring that the person contribute to the cost of the substance abuse treatment program, comply with deadlines for entering into the substance abuse treatment program, and reside in a secure drug treatment facility.

(3) The court, upon written application from a person sentenced under this part or a probation officer, shall issue a court order to expunge the record of conviction for that particular offense; provided that a person has successfully completed the substance abuse treatment program and complied with other terms and conditions of probation. A person sentenced to probation under this section shall be eligible for expungement under this subsection only if the person has not been previously convicted of a felony offense in this or another jurisdiction.

(4) Nothing in this section shall be construed to give rise to a cause of action against the State, a state employee, or a treatment provider.

(5) For the purposes of this section, “substance abuse treatment program” means drug or substance abuse treatment services provided outside a correctional facility by a public, private, or nonprofit entity that specializes in treating persons who are diagnosed with having substance abuse or dependency and preferably employs licensed professionals or certified substance abuse counselors.

**Comment:** The proposed amendment to subsection (3) would permit probation officers to file requests for expungements on behalf of defendants. This would be consistent with the current practice of probation officers who initiate, on behalf of defendants, requests to dismiss deferred acceptance of guilty pleas and deferred acceptance of no contest pleas.

#### **§ 706-624 Conditions of probation**

(1) Mandatory conditions. The court shall provide, as an explicit condition of a sentence of probation:

- (a) That the defendant not commit another federal or state crime or engage in criminal conduct in any foreign jurisdiction or under military jurisdiction that would constitute a crime under Hawaii law during the term of probation;
- (b) That the defendant report to a probation officer as directed by the court or the probation officer;
- (c) That the defendant remain within the jurisdiction of the court, unless granted permission to leave by the court or a probation officer;
- (d) That the defendant notify a probation officer prior to any change in address or employment;
- (e) That the defendant notify a probation officer promptly if arrested or questioned by a law enforcement officer;
- (f) That the defendant permit a probation officer to visit the defendant at the defendant's home or elsewhere as specified by the court; and
- (g) That the defendant make restitution for losses suffered by the victim or victims if the court has ordered restitution pursuant to section 706-646.

(2) Discretionary conditions. The court may provide, as further conditions of a sentence of probation, to the extent that the conditions are reasonably related to the factors set forth in section 706-606 and to the extent that the conditions involve only deprivations of liberty or property as are reasonably necessary for the purposes indicated in section 706-606(2), that the defendant:

- (a) Serve a term of imprisonment to be determined by the court at sentencing in class A felony cases under section 707-702, not exceeding two years in class A



felony cases under part IV of chapter 712, not exceeding eighteen months in class B felony cases, not exceeding one year in class C felony cases, not exceeding six months in misdemeanor cases, and not exceeding five days in petty misdemeanor cases; provided that notwithstanding any other provision of law, any order of imprisonment under this subsection that provides for prison work release shall require the defendant to pay thirty per cent of the defendant's gross pay earned during the prison work release period to satisfy any restitution order. The payment shall be handled by the adult probation division and shall be paid to the victim on a monthly basis;

- (b) Perform a specified number of hours of services to the community as described in section 706-605(1)(d);
- (c) Support the defendant's dependents and meet other family responsibilities;
- (d) Pay a fine imposed pursuant to section 706-605(1)(b);
- (e) Work conscientiously at suitable employment or pursue conscientiously a course of study or vocational training that will equip the defendant for suitable employment;
- (f) Refrain from engaging in a specified occupation, business, or profession bearing a reasonably direct relationship to the conduct constituting the crime or engage in the specified occupation, business, or profession only to a stated degree or under stated circumstances;
- (g) Refrain from frequenting specified kinds of places or from associating unnecessarily with specified persons, including the victim of the crime, any witnesses, regardless of whether they actually testified in the prosecution, law enforcement officers, co-defendants, or other individuals with whom contact may adversely affect the rehabilitation or reformation of the person convicted;
- (h) Refrain from use of alcohol or any use of narcotic drugs or controlled substances without a prescription;
- (i) Refrain from possessing a firearm, ammunition, destructive device, or other dangerous weapon;
- (j) Undergo available medical or mental health assessment and treatment, including assessment and treatment for substance abuse dependency, and remain in a specified facility if required for that purpose;
- (k) Reside in a specified place or area or refrain from residing in a specified place or area;
- (l) Submit to periodic urinalysis or other similar testing procedure;
- (m) Refrain from entering specified geographical areas without the court's permission;
- (n) Refrain from leaving the person's dwelling place except to go to and from the person's place of employment, the office of the person's physician or dentist, the probation office, or any other location as may be approved by the person's probation officer pursuant to court order. As used in this paragraph, "dwelling place" includes the person's yard or, in the case of condominiums, the common elements;
- (o) Comply with a specified curfew;
- (p) Submit to monitoring by an electronic monitoring device; [∅]

(q) Submit to search of your person, residence, vehicle or other sites and property under your control by any probation officer, with or without a warrant, based upon reasonable suspicion that illicit substances or contraband may be in the place of a search;

(r) Sign a waiver of extradition and pay extradition costs as determined and ordered by the Court;

(s) Comply with a service plan developed from current assessment tools; or

~~(q)~~(t) Satisfy other reasonable conditions as the court may impose.

(3) Written statement of conditions. The court shall order the defendant at the time of sentencing to sign a written acknowledgment of receipt of conditions of probation. The defendant shall be given a written copy of any requirements imposed pursuant to this section, stated with sufficient specificity to enable the defendant to comply with the conditions accordingly.

**Comment:**

**Subsection (2)(j):** The proposed amendment authorizes the court to make medical or mental health *assessments* a condition of probation.

**New Subsection 2(q):** Adds a new subsection authorizing a condition of probation under which probation officers may search a defendant's person, residence, vehicle or other places under the defendant's control, based on a reasonable suspicion that illicit substances or contraband may be located in the place of search. Adding this provision will assist probation officers and protect them from liability.

**New Subsection 2(r):** Adds a new subsection authorizing a condition of probation under which a defendant must sign a waiver of extradition and pay extradition costs as ordered by the court.

**New Subsection 2(s):** Adds a new subsection authorizing a condition of probation under which a defendant must comply with a service plan that is developed from current assessment tools.

**New Subsection 2(t):** Provides for the renumbering of an existing provision given the proposed new subsections.

**§ 706-642 Time and method of payment**

(1) When a defendant is sentenced to pay a fine, the court may grant permission for the payment to be made within a specified period of time or in specified installments. If no such permission is embodied in the sentence, the fine shall be payable forthwith by cash, check, or by a credit card approved by the court.

(2) When a defendant sentenced to pay a fine is also sentenced to probation, the court may make the payment of the fine a condition of probation.

(3) When a defendant sentenced to pay a fine is also ordered to make restitution or reparation to the victim or victims, or to the person or party who has incurred loss or damage because of the defendant's crime, the payment of restitution or reparation shall have priority over the payment of the fine as provided in section 706-XXX. No fine shall be collected until the restitution or reparation order has been satisfied.

**Comment:** Consistent with prior proposals, this amendment refers to a new section in Chapter 706, which will set forth the priority of payments a defendant is ordered to make.

**§ 706-646 Victim restitution**

(1) As used in this section, “victim” includes any of the following:

- (a) The direct victim of a crime including a business entity, trust, or governmental entity;
- (b) If the victim dies as a result of the crime, a surviving relative of the victim as defined in chapter 351;
- (c) A governmental entity that has reimbursed the victim for losses arising as a result of the crime or paid for medical care provided to the victim as a result of the crime; or
- (d) Any duly incorporated humane society or duly incorporated society for the prevention of cruelty to animals, contracted with the county or State to enforce animal-related statutes or ordinances, that impounds, holds, or receives custody of a pet animal pursuant to section 711-1109.1, 711-1109.2, or 711-1110.5; provided that this section does not apply to costs that have already been contracted and provided for by the counties or State.

(2) The court shall order the defendant to make restitution for reasonable and verified losses suffered by the victim or victims as a result of the defendant's offense when requested by the victim. The court shall order restitution to be paid to the crime victim compensation commission in the event that the victim has been given an award for compensation under chapter 351. If the court orders payment of a fine in addition to restitution or a compensation fee, or both, the payment of restitution and compensation fee shall have priority ~~[over the payment of the fine, and payment of restitution shall have priority over payment of a compensation fee]~~ as provided in section 706-XXX.

(3) In ordering restitution, the court shall not consider the defendant's financial ability to make restitution in determining the amount of restitution to order. The court, however, shall consider the defendant's financial ability to make restitution for the purpose of establishing the time and manner of payment. The court shall specify the time and manner in which restitution is to be paid. While in the custody of the Department of Public Safety, restitution shall be collected in conformity with chapter 353 and any court ordered payment schedule shall be suspended while the defendant is in the custody of the Department of Public Safety. Restitution shall be a dollar amount that is sufficient to reimburse any victim fully for losses, including but not limited to:

- (a) Full value of stolen or damaged property, as determined by replacement costs of like property, or the actual or estimated cost of repair, if repair is possible;
- (b) Medical expenses; and
- (c) Funeral and burial expenses incurred as a result of the crime.

(4) The restitution ordered shall not affect the right of a victim to recover under section 351-33 or in any manner provided by law; provided that any amount of restitution actually recovered by the victim under this section shall be deducted from any award under section 351-33.

**Comment:**

**Subsection (2):** Consistent with prior proposals, this amendment refers to a new section in Chapter 706, which will set forth the priority of payments a defendant is ordered to make.

**Subsection (3):** The proposed amendment to subsection (3) requires that restitution collected from a defendant while in the custody of the Department of Public Safety shall be in conformity with chapter 353 and that any court ordered payment schedule be suspended during that time. This proposed amendment is made in reference to § 353-22.6 (Victim Restitution), which provides that the amount deducted for victim restitution by the Director of Public Safety from all money earned, new deposits or credits to an inmate's account while incarcerated, shall be 25%. A related amendment is proposed to § 353-22.6 to clarify that the 25% deduction applies "notwithstanding any law to the contrary."

**§ 706-648 Probation services fee**

(1) The court, when sentencing a defendant to probation or granting deferral of a plea under section 853-1, shall order the defendant to pay a probation services fee. The amount of the fee shall be as follows:

(a) \$150, when the term of probation or period of deferral is for more than one year; or

(b) \$75, when the term of probation or period of deferral is for one year or less; provided that no fee shall be ordered when the court determines that the defendant is unable to pay the fee.

(2) The entire fee ordered or assessed shall be payable forthwith by cash, check, or by a credit card approved by the court. When a defendant is also ordered to pay a fine, make restitution, pay a crime victim compensation fee, or pay other fees in addition to the probation services fee under subsection (1), payments by the defendant shall be made ~~in~~ the following order of priority:

~~(a) Restitution;~~

~~(b) Crime victim compensation fee;~~

~~(c) Probation services fee;~~

~~(d) Other fees; and~~

~~(e) Fines] as provided in section 706-XXX.~~

(3) Any defendant received for supervision pursuant to chapter 353B shall be assessed a probation services fee pursuant to this section.

(4) The defendant shall pay the fee to the clerk of the court. The fee shall be deposited with the director of finance who shall transmit the fee to the probation services special fund pursuant to section 706-649.

**Comment:** Consistent with prior proposals, the proposed amendment to subsection (2) refers to a new section in Chapter 706, which will set forth the priority of payments a defendant is ordered to make.

**[§ 706-650] Drug demand reduction assessments; special fund**

(1) In addition to any disposition authorized by chapter 706 or 853, any person who is:

- (a) Convicted of an offense under part IV of chapter 712, except sections 712-1250.5 and 712-1257;
- (b) Convicted under section 707-702.5;
- (c) Convicted of a felony or misdemeanor offense under part IV of chapter 329;
- (d) Convicted under section 291-3.1, 291-3.2, 291-3.3, 291E-61, or 291E-61.5;
- (e) Found in violation of part III of chapter 291E; or
- (f) Charged with any offense under paragraphs (a) to (d) who has been granted a deferred acceptance of guilty or no contest plea;

shall be ordered to pay a monetary assessment under subsection (2), except as provided under subsection (6).

(2) Monetary assessments for individuals subject to subsection (1) shall not exceed the following:

- (a) \$3,000 when the offense is a class A felony;
- (b) \$2,000 when the offense is a class B felony;
- (c) \$1,000 when the offense is a class C felony;
- (d) \$500 when the offense is a misdemeanor; or
- (e) \$250 when the person has been found guilty of an offense under section 712-1249, 291-3.1, 291-3.2, 291-3.3, 291E-61, or has been found in violation of part III of chapter 291E.

Notwithstanding sections 706-640 and 706-641 and any other law to the contrary, the assessments provided by this section shall be in addition to and not in lieu of, and shall not be used to offset or reduce, any fine authorized or required by law and shall be paid as provided in section 706-XXX.

(3) There is established a special fund to be known as the “drug demand reduction assessments special fund” to be administered by the department of health. The disbursement of money from the drug demand reduction assessments special fund shall be used to supplement substance abuse treatment and other substance abuse demand reduction programs.

(4) All monetary assessments paid and interest accrued on funds collected pursuant to this section shall be deposited into the drug demand reduction assessments special fund.

(5) Restitution to the victim of a crime enumerated in subsection (1) shall be made, and probation fees and crime victim compensation fees imposed under part III of chapter 706 shall be paid, before payment of the monetary assessment.

(6) If the court determines that the person has the ability to pay the monetary assessment and is eligible for probation or will not be sentenced to incarceration, unless otherwise required by law, the court may order the person to undergo a substance abuse treatment program at the person's expense. If the person undergoes a substance abuse treatment program at the person's expense, the court may waive or reduce the amount of the monetary assessment. Upon a showing by the person that the person lacks the financial ability to pay all or part of the monetary assessment, the court may waive or reduce the amount of the monetary assessment.

**Comment:** Consistent with prior proposals, the proposed amendment to subsection (2) refers to a new section in Chapter 706, which will set forth the priority of payments a defendant is ordered to make.

**[§ 706-650.5] Human trafficking victim services fund**

- (1) In addition to any disposition authorized by chapter 706, any individual who is:
  - (a) Convicted of an offense under part VIII of chapter 707; or
  - (b) Convicted of an offense under part I of chapter 712;shall be ordered to pay a fee under subsection (2).
- (2) Fees for individuals subject to subsection (1) shall not exceed the following:
  - (a) \$5,000 when the offense is a class A felony;
  - (b) \$2,500 when the offense is a class B felony;
  - (c) \$1,000 when the offense is a class C felony;
  - (d) \$500 when the offense is a misdemeanor; or
  - (e) \$250 when the offense is a petty misdemeanor.
- (3) There is established within the state treasury a special fund to be known as the human trafficking victim services fund to be administered by the department of labor and industrial relations. The disbursement of money from the human trafficking victim services fund shall be used to supplement programs, grants, or purchase of service contracts that support or provide comprehensive services to victims of labor trafficking crimes under part VIII of chapter 707, or victims of trafficking related to crimes under part I of chapter 712. Moneys in the special fund shall be used for new or existing programs, grants, or purchase of service contracts and shall not supplant any other moneys previously allocated to these programs, grants, or purchase of service contracts.
- (4) All fees paid and interest accrued on funds collected pursuant to this section shall be deposited into the human trafficking victim services fund.
- (5) When a defendant is ordered to make payments in addition to the human trafficking victim services fee authorized under subsection (2), payments by the defendant shall be made [~~in the following order of priority:~~
  - ~~(a) Restitution imposed under section 706-646, 707-785, or 707-786;~~
  - ~~(b) Crime victim compensation fee imposed under section 351-62.6;~~
  - ~~(c) Probation services fee imposed under section 706-648;~~
  - ~~(d) Human trafficking victim services fee imposed under subsection (2);~~
  - ~~(e) Other fees; and~~
  - ~~(f) Fines] as provided in section 706-XXX.~~
- (6) The department of labor and industrial relations shall submit to the legislature no later than twenty days prior to the convening of each regular session a written annual report that provides the following:
  - (a) An accounting of the receipts of and expenditures from the human trafficking victim services fund; and
  - (b) Any recommendations to improve support of and services to victims of labor trafficking crimes under part VIII of chapter 707, or victims of trafficking related to crimes under part I of chapter 712.

**Comment:** Consistent with prior proposals, the proposed amendment to subsection (5) refers to a new section in Chapter 706, which will set forth the priority of payments a defendant is ordered to make.

**Committee Recommendation regarding Chapter 706:**

The Committee strongly recommends the Legislature conduct a further and more comprehensive study of Chapter 706, Hawaii Revised Statutes, with regard to sentencing and the setting of minimum terms of imprisonment by the Hawaii Paroling Authority. During the course of the Committee’s work, there was substantial discussion concerning the continuing efficacy of many of these provisions. In order to consider possible reforms, a thorough examination is required to identify concerns, gather information and feedback from a broad variety of perspectives, and consider the potential alternatives and the anticipated impact these changes may have across the entire criminal justice system. The views and concerns of key stakeholders such as law enforcement agencies, corrections officials, probation officers, parole officers, prosecutors, crime victims, and advocacy groups, as well as, offenders, defense counsel, treatment providers, judges and the community should be compiled and considered.

While the Committee has labored to make our review of the penal code as thorough as possible, given the time constraints within which we were required to complete our work, the consensus was that it would not be possible to make fully informed recommendations involving complex systemic changes to our current sentencing scheme and the setting of minimum terms of incarceration. Therefore, it is recommended that the Legislature consider and best decide how to further explore system-wide criminal justice reforms in these areas.

**Chapter 707: Offenses Against the Person**

**§707-700 Definitions of terms in this chapter.**

...

“Sexual contact” means any touching, other than acts of “sexual penetration”, of the sexual or other intimate parts of [~~a person not married to the actor~~] another, or of the sexual or other intimate parts of the actor by [~~the person~~] another, whether directly or through the clothing or other material intended to cover the sexual or other intimate parts.

...

**Comment:** The proposed amendment deletes the exception for married couples that currently exists within the definition of “sexual contact.” Exceptions that allow married persons to force their spouses to have unwanted sexual contact are based on the outdated legal notion that a marriage contract represents unconditional sexual consent by one spouse (historically, the wife) to the other. However, all fifty states have recognized, in banning forcible sexual penetration in the context of marriage since the 1970s, that unwanted sexual activity in marriage is a form of spousal abuse and domestic violence,

and not an obligatory feature of marriage that people consent to when they get married. Unwanted sexual contact can be a violent, traumatizing event for anyone, including a non-consenting spouse. Further, an exception for a married person to have nonconsensual sexual contact by force with his or her spouse fails to provide the spouse with protections that exist for unmarried persons. Under the current definition of “sexual contact,” it is an offense if a person, on the day before his or her wedding, is forced to have sexual contact with the person they intend to marry; but, if the same act occurred on the day after the wedding, it would not be an offense unless the sexual contact escalated to sexual penetration.

There was extensive discussion by the committee about this proposal over the course of several meetings. Ultimately, a compromise proposal was approved by the committee wherein the above amendment would be proposed to the definition of “sexual contact” *in conjunction with* a proposed amendment to § 707-733(1)(a) (Sexual Assault in the Fourth Degree), which would maintain the exception for married couples in regard to that offense.

If the definition of “sexual contact” is amended as proposed, there no longer would be a marriage exception for the offense under § 707-732(f) (Sexual Assault in the Third Degree), which provides that the actor “knowingly, by strong compulsion, has sexual contact with another person or causes another person to have sexual contact with the actor.” (Emphasis added). “Strong compulsion” is defined as “the use of or attempt to use one or more of the following to overcome a person: (1) [a] threat, express or implied, that places a person in fear of bodily injury to the individual or another person, or in fear that the person or another person will be kidnapped; (2) [a] dangerous instrument; or (3) [p]hysical force.” See §707-700.

However, under the compromise proposal, § 707-733(1)(a) (Sexual Assault in the Fourth Degree), would be amended to maintain the existing *exception* when the actor is married to the other person. This provision currently states that it is an offense when “[t]he person knowingly subjects another person to sexual contact by compulsion or causes another person to have sexual contact with the actor by compulsion.” In turn, “compulsion” is defined as “absence of consent, or a threat, express or implied, that places a person in fear of public humiliation, property damage, or financial loss.” Some committee members were concerned about the relatively low threshold to act by “compulsion” in the context of a marriage and therefore the committee agreed upon the compromise to also propose an amendment to preserve the marriage exception for purposes of § 707-733(1)(a) (Sexual Assault in the Fourth Degree). See § 707-733 below.

Importantly, the proposed amendment to the definition of “sexual contact” *also* remedies a problematic issue when a person is charged with Sexual Assault in the Third Degree under § 707-732(1)(b), which provides that “(1) [a] person commits the offense of sexual assault in the third degree if . . . (b) [t]he person knowingly subjects to sexual contact another person who is less than fourteen years old or causes such a person to have sexual contact with the person[.]” (Emphasis added). Given the current definition of “sexual contact,” an element for proving a violation of § 707-732(1)(b) is that the defendant was aware that the minor under age fourteen was not married to the defendant, and the failure to establish or charge this element has resulted in overturned convictions due to the marriage exception in the definition of “sexual contact.” However, Hawaii law



prohibits a minor less than fourteen years old to marry. See HRS § 572-1(2). By removing the marriage exception from the definition of “sexual contact,” proving that a defendant committed Sexual Assault in the Third Degree against a minor under the age of fourteen will no longer require proof that the minor is not married to the actor. It should be noted that, even before the committee had agreed to remove the marriage exception from the definition of “sexual contact,” it had approved language that would have addressed the issue set forth in this paragraph. (The proposal would have been to add at the end of the definition of “sexual contact” the following sentence: “For sexual contact involving a person who is less than fourteen years old, proof that the person is not married to the actor shall not be required.”) Should the Legislature decide not to delete the marriage exception from the definition of “sexual contact,” it should at a minimum address the problem set forth in this paragraph of the comment.

### **§707-711 Assault in the second degree.**

- (1) A person commits the offense of assault in the second degree if:
- (a) The person intentionally, ~~[or]~~ knowingly, or recklessly causes substantial bodily injury to another;
  - (b) The person recklessly causes serious ~~or substantial~~ bodily injury to another;
  - (c) The person intentionally or knowingly causes bodily injury to a correctional worker, as defined in section 710-1031(2), who is engaged in the performance of duty or who is within a correctional facility;
  - (d) The person intentionally or knowingly causes bodily injury to another with a dangerous instrument;
  - (e) The person intentionally or knowingly causes bodily injury to an educational worker who is engaged in the performance of duty or who is within an educational facility. For the purposes of this paragraph, “educational worker” means any administrator, specialist, counselor, teacher, or employee of the department of education or an employee of a charter school; a person who is a volunteer, as defined in section 90-1, in a school program, activity, or function that is established, sanctioned, or approved by the department of education; or a person hired by the department of education on a contractual basis and engaged in carrying out an educational function;
  - (f) The person intentionally or knowingly causes bodily injury to any emergency medical services provider who is engaged in the performance of duty. For the purposes of this paragraph, “emergency medical services provider” means emergency medical services personnel, as defined in section 321-222, and physicians, physician's assistants, nurses, nurse practitioners, certified registered nurse anesthetists, respiratory therapists, laboratory technicians, radiology technicians, and social workers, providing services in the emergency room of a hospital;
  - (g) The person intentionally or knowingly causes bodily injury to a person employed at a state-operated or -contracted mental health facility. For the purposes of this paragraph, “a person employed at a state-operated or -contracted mental health facility” includes health care professionals as defined in section 451D-2, administrators, orderlies, security personnel, volunteers, and any other

person who is engaged in the performance of a duty at a state-operated or -contracted mental health facility;

(h) The person intentionally or knowingly causes bodily injury to a person who:

(i) The defendant has been restrained from, by order of any court, including an ex parte order, contacting, threatening, or physically abusing pursuant to chapter 586; or

(ii) Is being protected by a police officer ordering the defendant to leave the premises of that protected person pursuant to section 709-906(4), during the effective period of that order; or

[(i)] The person intentionally or knowingly causes bodily injury to any firefighter or water safety officer who is engaged in the performance of duty. For the purposes of this paragraph, “firefighter” has the same meaning as in section 710-1012 and “water safety officer” means any public servant employed by the United States, the State, or any county as a lifeguard or person authorized to conduct water rescue or ocean safety functions.

(2) Assault in the second degree is a class C felony.

**Comment:** This proposal aligns the organization of the mental state requirements for Assault in the Second Degree Assault with that of Assault in the Third Degree. This proposal does not substantively change Assault in the Second Degree, but clears up confusion given the current inconsistent alignment with the language for Assault in the Third Degree.

#### § 707-733. Sexual assault in the fourth degree

(1) A person commits the offense of sexual assault in the fourth degree if:

(a) The person knowingly subjects another person, not married to the actor, to sexual contact by compulsion or causes another person, not married to the actor, to have sexual contact with the actor by compulsion;

(b) The person knowingly exposes the person's genitals to another person under circumstances in which the actor's conduct is likely to alarm the other person or put the other person in fear of bodily injury; or

(c) The person knowingly trespasses on property for the purpose of subjecting another person to surreptitious surveillance for the sexual gratification of the actor.

(2) Sexual assault in the fourth degree is a misdemeanor.

(3) Whenever a court sentences a defendant for an offense under this section, the court may order the defendant to submit to a pre-sentence mental and medical examination pursuant to section 706-603.

**Comment:** This proposed amendment is made *in conjunction with* the proposal to delete the marriage exception from the definition of “sexual contact” in § 707-700. Please see the comments for the proposed amendment to § 707-700.

## Chapter 708: Offenses Against Property Rights

### § 708-803 Habitual property crime

(1) A person commits the offense of habitual property crime if the person is a habitual property crime perpetrator and commits a misdemeanor property crime [~~offense within this chapter~~].

(2) For the purposes of this section: [7]

(a) a person commits a misdemeanor property crime if the person engages in conduct that constitutes a violation of any misdemeanor offense under parts IV and VI of this chapter. The prosecution establishes that the person has committed a misdemeanor property crime by proving that the person is guilty of committing any such misdemeanor offense.

(b) “habitual property crime perpetrator” means a person who, within [~~five~~] ten years of the instant offense, has convictions for [7]

~~(a) Three felonies within this chapter;~~

~~(b) Three misdemeanors within this chapter; or~~

~~(c) A~~ any combination of three felonies and/or misdemeanors [within] under parts IV and/or VI of this chapter.

The convictions must [~~have occurred on separate dates and~~] be for separate incidents on separate dates. The prosecution is not required to prove any state of mind with respect to the person’s status as a habitual property crime perpetrator. It is the Legislature’s intent that the person is subject to absolute liability regarding the person’s status as a habitual property crime perpetrator and proof that the person has the requisite three prior convictions is sufficient to establish this element.

(3) Habitual property crime is a class C felony.

(4) For a conviction under this section, the sentence shall be either:

(a) An indeterminate term of imprisonment of five years; provided that the minimum term of imprisonment shall be not less than one year; or

(b) A term of probation of five years, with conditions to include but not be limited to one year of imprisonment; provided that probation shall only be available for a first conviction under this section.

### **Comment:**

1. The proposed amendments limit the types of crimes covered by the statute to Theft and Related Offenses in Part IV and Forgery and Related Offenses in Part VI. The committee believes that the offenses in these two parts are the ones most frequently committed by professional property criminals. The current statute, by including all offenses within Chapter 708, groups together a broad range of offenses, many of which are unrelated. Focusing the statute on repeat theft and forgery offenders will serve to target the professional property criminals for whom the enhanced punishment is most appropriate. Some other Parts of Chapter 708 already have statutes with their own habitual offender enhancement, namely, HRS § 708-823.5 Aggravated Criminal Property Damage, and HRS § 708-8301, Habitual Unlicensed Contracting Activity.

2. The proposed amendments expand the time period for qualifying prior convictions from five years to ten years and eliminates the requirement that the prior convictions must have occurred on separate dates. The committee believes that the

current five-year window for the three prior convictions is too restrictive. A person convicted of three prior felony or misdemeanor offenses under Parts IV and VI within ten years of the instant offense has demonstrated that he or she is a chronic violator for whom enhanced punishment is necessary and warranted. Such person should be eligible for prosecution as a habitual property criminal upon the person's commission of a fourth offense within the ten-year time frame. Under the proposed amendments, a person would also be eligible for prosecution as long as the three prior convictions were for separate incidents on separate dates. By removing the requirement that the prior convictions must have occurred on separate dates, the proposed amendments ensure that a person cannot evade eligibility as a habitual property crime perpetrator by having several separate theft cases consolidated and convictions entered on the same day.

3. The proposed amendments make clear that the prosecution is not required to prove any state of mind for the defendant with respect to the defendant's status as a habitual property crime perpetrator. Under the Hawai'i Penal Code, if no mental state is specified, the default states of mind of intentionally, knowingly, or recklessly apply, unless the Legislature's purpose to impose absolute liability plainly appears. The committee believes that if the defendant in fact has the required three prior convictions, no proof of the defendant's state of mind regarding his knowledge or awareness of the prior convictions is required. The defendant's culpability arises from his status as a habitual property crime perpetrator and not his state of mind as to that status. Eliminating the state of mind requirement as to this element will also simplify the proof required at trial.

4. Because the statute provides that convictions for *any combination* of three prior felonies or misdemeanors is sufficient, the committee recommends for stylistic reasons that the separate references to three prior felonies and three prior misdemeanors be deleted as unnecessary.

#### **§ 708-831 Theft in the second degree**

(1) A person commits the offense of theft in the second degree if the person commits theft:

- (a) Of property from the person of another;
- (b) Of property or services the value of which exceeds [~~\$300~~] \$750;
- (c) Of an aquacultural product or part thereof from premises that are fenced or enclosed in a manner designed to exclude intruders or there is prominently displayed on the premises a sign or signs sufficient to give notice and reading as follows: "Private Property", "No Trespassing", or a substantially similar message;
- (d) Of agricultural equipment, supplies, or products, or part thereof, the value of which exceeds \$100 but does not exceed \$20,000, or of agricultural products that exceed twenty-five pounds, from premises that are fenced, enclosed, or secured in a manner designed to exclude intruders or there is prominently displayed on the premises a sign or signs sufficient to give notice and reading as follows: "Private Property", "No Trespassing", or a substantially similar message; or if at the point of entry of the premise, a crop is visible. The sign or signs, containing letters not

less than two inches in height, shall be placed along the boundary line of the land in a manner and in such position as to be clearly noticeable from outside the boundary line. Possession of agricultural products without ownership and movement certificates, when a certificate is required pursuant to chapter 145, is prima facie evidence that the products are or have been stolen; or

(e) Of agricultural commodities that are generally known to be marketed for commercial purposes. Possession of agricultural commodities without ownership and movement certificates, when a certificate is required pursuant to section 145-22, is prima facie evidence that the products are or have been stolen; provided that “agriculture commodities” has the same meaning as in section 145-21.

(2) Theft in the second degree is a class C felony. A person convicted of committing the offense of theft in the second degree under [subsection (1)](c) and (d) shall be sentenced in accordance with chapter 706, except that for the first offense, the court may impose a minimum sentence of a fine of at least \$1,000 or two-fold damages sustained by the victim, whichever is greater.

**Comment:** The proposed amendment raises the felony theft threshold in section (1) (b) from \$300 to \$750. The last time the threshold value for felony theft was increased was in 1986, thirty years ago. Prices of consumer items have substantially increased in the ensuing thirty years and Hawai‘i’s felony threshold amount is among the lowest in the nation. A survey conducted of other states and the District of Columbia show that among these fifty-one jurisdictions, Hawai‘i’s felony theft threshold is the fifth lowest, placing us in the bottom ten percent. Thirty-one of the fifty-one jurisdictions have felony thresholds of \$1,000 or more. Since 2005, twenty-six states and the District of Columbia have increased their felony theft thresholds.

Raising the felony theft threshold from \$300 to \$750 to reduce the number of felony cases and avoid labeling lower-level offenders as felons was one of the policy recommendations made by the Council of State Governments Justice Center in its 2014 report, *Justice Reinvestment in Hawaii: Analyses & Policy Options to Reduce Spending on Corrections and Reinvest in Strategies to Increase Public Safety*. Updating the felony theft threshold will save the State from unnecessarily incurring the costs associated with felony prosecutions for lower-level thefts.

The Committee acknowledges concerns raised by the business community that raising the felony theft threshold will cause an increase in losses caused by professional shoplifters and savvy offenders, as well as concerns by the prosecutors regarding losing the potential deterrent effect of the lower threshold \$300 figure. These offenders seek to avoid serious punishment by consciously stealing merchandise valued at just under the felony threshold. To address these concerns and ensure that professional thieves are adequately deterred, the increase in the felony theft threshold is coupled with a proposal to amend the habitual property crime statute to target professional property criminals and make it more effective in prosecuting and deterring such repeat offenders.

*Minority comment:* A significant minority comprising of law enforcement stakeholders noted that the business community was neither represented on the Committee nor was it consulted. The proposed increase more than doubles the current

threshold and converts the theft of certain items valued between \$300 and \$750 from felonies into misdemeanors. A proposal to entertain a separate compromise vote at a value less than \$750 was not entertained.

### **§ 708-832 Theft in the third degree**

- (1) A person commits the offense of theft in the third degree if the person commits theft:
- (a) Of property or services the value of which exceeds [~~\$100~~] \$250; or
  - (b) Of gasoline, diesel fuel, or other related petroleum products used as propellants of any value not exceeding [~~\$300~~] \$750.
- (2) Theft in the third degree is a misdemeanor.

#### **Comment:**

1. The proposed amendment increases the dollar threshold from \$100 to \$250. This threshold value has not been updated since 1986.
2. The proposed amendment increases the dollar ceiling for petroleum products from \$300 to \$750 to make it consistent with the proposed increase to the felony theft threshold in HRS § 708-831(1)(b).

*Minority comment:* A significant minority comprising of law enforcement stakeholders voted against the increase.

### **§ 708-833 Theft in the fourth degree**

- (1) A person commits the offense of theft in the fourth degree if the person commits theft of property or services of any value not in excess of [~~\$100~~] \$250.
- (2) Theft in the fourth degree is a petty misdemeanor.

**Comment:** The proposed amendment raises the dollar ceiling on petty-misdemeanor theft from \$100 to \$250, to make it consistent with the proposed increase to the misdemeanor theft threshold in HRS § 708-832(1)(a)

*Minority comment:* A significant minority comprising of law enforcement stakeholders voted against the increase.

### **§ 708-833.5 Shoplifting**

A person convicted of committing [~~the offense~~] theft by means of shoplifting as defined in section 708-830 shall be sentenced [~~as follows~~] to the following minimum fines:

- (1) In cases involving [~~property the value or aggregate value of which exceeds \$300; as~~] a class C felony, [~~provided that~~] the minimum fine shall be four times the value or aggregate value of the property involved;
- (2) In cases involving [~~property the value or aggregate value of which exceeds \$100; as~~] a misdemeanor, [~~provided that~~] the minimum fine shall be three times the value or aggregate value of the property involved;
- (3) In cases involving [~~property the value or aggregate value of which is \$100 or less; as~~] a petty misdemeanor, [~~provided that~~] the minimum fine shall be twice the value or aggregate value of the property involved;

(4) If a person has previously been convicted of committing [~~the offense~~] theft by means of shoplifting as defined in section 708-830, the minimum fine shall be doubled that specified in paragraphs (1), (2), and (3), respectively, as set forth above; provided in the event the convicted person defaults in payment of any fine, and the default was not contumacious, the court may sentence the person to community services as authorized by section [706-605(1)(d)].

**Comment:**

1. Since shoplifting is identified as a type of theft in § 708-830 and there is technically no separate shoplifting offense, the proposed amendment clarifies that this section applies to persons committing theft by means of shoplifting as defined in § 708-830.

2. Proposed amendments also make this statute consistent with the other proposed amendments to §§ 708-831, 708-832, and 708-833. The grade or class of the offense is listed rather than the dollar amount because under the proposed amendments, the dollar amounts would change.

*Minority comment:* A significant minority comprising of law enforcement stakeholders voted against the increase.

**[§ 708-839.5] Theft of utility services**

(1) For purposes of this section:

“Customer” means the person in whose name the utility service is provided.

“Divert” means to change the intended course or path of utility services without the authorization or consent of the utility.

“Person” means any individual, partnership, firm, association, corporation, or other legal entity.

“Reconnection” means the reconnection of utility service by a customer or other person after service has been lawfully disconnected by the utility.

“Utility” means any public utility as defined in section 269-1, that provides electricity, gas, or water services.

“Utility service” means the provision of electricity, gas, water, or any other service provided by the utility for compensation.

(2) A person commits the offense of theft of utility services if the person, with intent to obtain utility services for the person's own or another's use without paying the full lawful charge therefor, or with intent to deprive any utility of any part of the full lawful charge for utility services it provides, commits, authorizes, solicits, aids, or abets any of the following:

(a) Diverts, or causes to be diverted utility services, by any means whatsoever;

(b) Prevents any utility meter, or other device used in determining the charge for utility services, from accurately performing its measuring function;

(c) Makes or causes to be made any connection or reconnection with property owned or used by the utility to provide utility services, without the authorization or consent of the utility; or

(d) Uses or receives the direct benefit of all or a portion of utility services with knowledge or reason to believe that a diversion, prevention of accurate measuring

function, or unauthorized connection existed at the time of use or that the use or receipt was otherwise without the authorization or consent of the utility.

(3) In any prosecution under this section, the presence of any of the following objects, circumstances, or conditions on premises controlled by the customer, or by the person using or receiving the direct benefit of all or a portion of utility services obtained in violation of this section, shall create a rebuttable presumption that the customer or person intended to and did violate this section:

- (a) Any instrument, apparatus, or device primarily designed to be used to obtain utility services without paying the full lawful charge therefor; or
- (b) Any meter that has been diverted or prevented from accurately performing its measuring function so as to cause no measurement or inaccurate measurement of utility services.

(4) A person commits the offense of theft of utility services in the first degree in cases where the theft:

- (a) Accrues to the benefit of any commercial trade or business, including any commercial trade or business operating in a residence, home, or dwelling;
- (b) Is obtained through the services of a person hired to commit the theft of utility services; in which event, both the person hired and the person responsible for the hiring shall be punished under this section as a class C felony; or
- (c) Accrues to the benefit of a residence, home, or dwelling where the value of the theft of utility services exceeds [~~\$300~~] \$750.

Theft of utility services in the first degree is a class C felony, and shall be sentenced in accordance with chapter 706, except that for a first offense the court shall impose a minimum sentence of a fine of at least \$1,000 or two times the value of the theft, whichever is greater.

(5) A person commits theft of utility services in the second degree if the person commits theft of utility services other than as provided in subsection (4). Theft of utility services in the second degree is a misdemeanor and shall be sentenced in accordance with chapter 706, except that for a first offense the court shall impose a minimum sentence of a fine of \$500, with an increase of \$500 for each succeeding conviction under this subsection.

**Comment:** The proposed amendment increases the threshold amount in subsection (4)(c) from \$300 to \$750 to make it consistent with the proposed increase to the second-degree theft threshold in § 708-732(1)(b). Subsection (4)(c) was enacted in 1996 (1996 Haw. Sess. L. Act 256 § 2) and it appears that the \$300 threshold was tied to the amount of the then-existing second-degree felony theft threshold.

*Minority comment:* A significant minority comprising of law enforcement stakeholders voted against the increase.

**Committee Recommendation Regarding Theft Statutes:** The Judicial Council shall recommend adjustments to the threshold dollar amounts for theft statutes every five years.

**Comment:** This proposal is to provide for a periodic review to ensure that the threshold dollar amounts are kept up to date.



**§ 708-893 Use of a computer in the commission of a separate crime**

(1) A person commits the offense of use of a computer in the commission of a separate crime if the person[:

~~(a) Intentionally uses a computer to obtain control over the property of the victim to commit theft in the first or second degree; or~~

~~(b) K] knowingly uses a computer to identify, select, solicit, persuade, coerce, entice, induce, procure, pursue, surveil, contact, harass, annoy, or alarm the victim or intended victim of the following offenses:~~

~~(i) Section 707-726, relating to custodial interference in the first degree;~~

~~(ii) Section 707-727, relating to custodial interference in the second degree;~~

~~(iii) Section 707-731, relating to sexual assault in the second degree;~~

~~(iv) Section 707-732, relating to sexual assault in the third degree;~~

~~(v) Section 707-733, relating to sexual assault in the fourth degree;~~

~~(vi) Section 707-751, relating to promoting child abuse in the second degree;~~

~~(vii) Section 711-1106, relating to harassment;~~

~~(viii) Section 711-1106.5, relating to harassment by stalking; or~~

~~(ix) Section 712-1215, relating to promoting pornography for minors.~~

(2) Use of a computer in the commission of a separate crime is an offense one class or grade, as the case may be, greater than the offense facilitated. Notwithstanding any other law to the contrary, a conviction under this section shall not merge with a conviction for the separate crime.

**Comment:** The proposed amendment, to repeal subsection (1)(a), would remove first and second degree theft from the list of offenses that subject a person to the separate offense and enhanced penalties provided by this section for using a computer to commit the underlying crime. The removed offenses, first and second degree theft, are already subject to prosecution as a class B and class C felony, respectively. Currently, the enhanced penalties for use of a computer in the commission of a separate crime converts first-degree theft into a class A felony and second-degree theft into a class B felony. The definition of “computer” for purposes of this section would appear to include devices such as smartphones. Given the prevalence of such devices and the widespread use of “computers” in today’s society in general, imposing the enhanced penalties for the use of a computer in committing theft seems unduly harsh.

*Minority comment:* A significant minority comprising of law enforcement stakeholders felt the elimination of a specific separate crime identified by the Legislature should not be disturbed. Due to time constraints, the Committee did not review actual statistics involving prosecutions under this subsection.

A separate minority view was that this statute as a whole was problematic in creating a separate, upgraded offense when a person committed the relevant offenses by using a computer. Given the widespread use of smartphones and other devices, a minority felt the separate, upgraded offenses did not make sense.

## **Chapter 709: Offenses Against the Family and Against Incompetents**

### **§ 709-906. Abuse of family or household members; penalty**

(1) It shall be unlawful for any person, singly or in concert, to physically abuse a family or household member or to refuse compliance with the lawful order of a police officer under subsection (4). The police, in investigating any complaint of abuse of a family or household member, upon request, may transport the abused person to a hospital or safe shelter.

For the purposes of this section:

“Business day” means any calendar day, except Saturday, Sunday, or any state holiday.

“Family or household member” means spouses or reciprocal beneficiaries, former spouses or reciprocal beneficiaries, persons in a dating relationship as defined under section 586-1, persons who have a child in common, parents, children, persons related by consanguinity, and persons jointly residing or formerly residing in the same dwelling unit. “Persons jointly residing or formerly residing in the same dwelling unit” shall not include adult roommates or cohabitants that are only in an economic or contractual affiliation.

(2) Any police officer, with or without a warrant, may arrest a person if the officer has reasonable grounds to believe that the person is physically abusing, or has physically abused, a family or household member and that the person arrested is guilty thereof.

(3) A police officer who has reasonable grounds to believe that the person is physically abusing, or has physically abused, a family or household member shall prepare a written report.

(4) Any police officer, with or without a warrant, shall take the following course of action, regardless of whether the physical abuse or harm occurred in the officer's presence:

(a) The police officer shall make reasonable inquiry of the family or household member upon whom the officer believes physical abuse or harm has been inflicted and other witnesses as there may be;

(b) The police officer lawfully shall order the person, age 18 or older, who the police officer reasonably believes to have inflicted the abuse to leave the premises for a period of separation, during which time the person shall not initiate any contact, either by telephone or in person, with the family or household member; provided that the person is allowed to enter the premises with police escort to collect any necessary personal effects. The period of separation shall commence when the order is issued and shall expire at 6:00 p.m. on the second business day following the day the order was issued; provided that the day the order is issued shall not be included in the computation of the two business days;

(c) The police officer may order a minor, under age 18, who the police officer reasonably believes to have inflicted the abuse to leave the premises for a period of separation, during which time the minor shall not initiate any contact, either by telephone or in person, with the family or household member; provided that if the minor is ordered to leave that the minor be allowed to enter the premises with police escort to collect any necessary personal effects. The period of separation shall commence when the order is issued and shall expire at 6:00 p.m. on the second business day following the day the order was issued; provided that the day the order is issued shall not be included in the

computation of the two business days. The order of separation of a minor may be amended at any time by a judge of the Family Court. In determining whether to order a minor to leave, the police officer may look at the following factors: age of the minor, relationship between the minor and the family or household member, and ability and willingness of the parent, guardian, or other authorized adult to maintain custody and control of the minor.

~~(c)~~(d) All persons who are ordered to leave as stated above shall be given a written warning citation stating the date, time, and location of the warning and stating the penalties for violating the warning. A copy of the warning citation shall be retained by the police officer and attached to a written report which shall be submitted in all cases. A third copy of the warning citation shall be given to the abused person;

~~(d)~~(e) If the person so ordered refuses to comply with the order to leave the premises or returns to the premises before the expiration of the period of separation, or if the person so ordered initiates any contact with the abused person, the person shall be placed under arrest for the purpose of preventing further physical abuse or harm to the family or household member; and

~~(e)~~(f) The police officer shall seize all firearms and ammunition that the police officer has reasonable grounds to believe were used or threatened to be used in the commission of an offense under this section.

(5) Abuse of a family or household member and refusal to comply with the lawful order of a police officer under subsection (4) are misdemeanors and the person shall be sentenced as follows:

(a) For the first offense the person shall serve a minimum jail sentence of forty-eight hours; and

(b) For a second offense that occurs within one year of the first conviction, the person shall be termed a “repeat offender” and serve a minimum jail sentence of thirty days.

Upon conviction and sentencing of the defendant, the court shall order that the defendant immediately be incarcerated to serve the mandatory minimum sentence imposed; provided that the defendant may be admitted to bail pending appeal pursuant to chapter 804. The court may stay the imposition of the sentence if special circumstances exist.

(6) Whenever a court sentences a person pursuant to subsection (5), it also shall require that the offender undergo any available domestic violence intervention programs ordered by the court. However, the court may suspend any portion of a jail sentence, except for the mandatory sentences under subsection (5)(a) and (b), upon the condition that the defendant remain arrest-free and conviction-free or complete court-ordered intervention.

(7) For a third or any subsequent offense that occurs within two years of a second or subsequent conviction, the offense shall be a class C felony.

(8) Where the physical abuse consists of intentionally or knowingly impeding the normal breathing or circulation of the blood of the family or household member by applying pressure on the throat or the neck, abuse of a family or household member is a class C felony.

(9) Where physical abuse occurs in the audio or visual presence of any family or household member who is less than fourteen years of age, abuse of a family or household member is a class C felony.

(10) Any police officer who arrests a person pursuant to this section shall not be subject to any civil or criminal liability; provided that the police officer acts in good faith, upon reasonable belief, and does not exercise unreasonable force in effecting the arrest.

(11) The family or household member who has been physically abused or harmed by another person may petition the family court, with the assistance of the prosecuting attorney of the applicable county, for a penal summons or arrest warrant to issue forthwith or may file a criminal complaint through the prosecuting attorney of the applicable county.

(12) The respondent shall be taken into custody and brought before the family court at the first possible opportunity. The court may dismiss the petition or hold the respondent in custody, subject to bail. Where the petition is not dismissed, a hearing shall be set.

(13) This section shall not operate as a bar against prosecution under any other section of this Code in lieu of prosecution for abuse of a family or household member.

(14) It shall be the duty of the prosecuting attorney of the applicable county to assist any victim under this section in the preparation of the penal summons or arrest warrant.

(15) This section shall not preclude the physically abused or harmed family or household member from pursuing any other remedy under law or in equity.

(16) When a person is ordered by the court to undergo any domestic violence intervention, that person shall provide adequate proof of compliance with the court's order. The court shall order a subsequent hearing at which the person is required to make an appearance, on a date certain, to determine whether the person has completed the ordered domestic violence intervention. The court may waive the subsequent hearing and appearance where a court officer has established that the person has completed the intervention ordered by the court.

**Comment:**

**Subsection (1):** Amends the definition of “family or household member” to exclude “adult roommates or cohabitants that are only in an economic or contractual affiliation.” The Committee found that individuals who are simply roommates should not be included within the purview of the chapter regulating abuse between family and household members. This statute is targeted toward domestic and familial relationships which require special protections and mandatory penalties. Assaults between individuals who are simply roommates may still be penalized under other statutes and can proceed more appropriately outside of family court. A similar amendment is proposed for the definition of “family or household member” in HRS § 586-1, which pertains to “Domestic Abuse Protective Orders.”

**Subsection (4)(b):** Amends this subsection so that it only applies to persons *over* eighteen years old. This subsection currently mandates a period of separation for all persons who the police reasonably believe have abused a family or household member. A new subsection (4)(c) is concurrently proposed to address persons *under* eighteen years old who the police reasonably believe have abused a family or household member, which gives discretion to police whether to impose a period of separation on a case-by-case basis.

**New Subsection (4)(c):** The Committee proposes a new subsection (4)(c) to address the situation when the person committing abuse of a family or household member is under eighteen years old. In this circumstance, the new subsection would give the police *discretion* whether to order a period of separation for the minor, rather than mandating

separation as in subsection (4)(b). Under the current statute, police feel obligated to impose a period of separation, even when the person committing the abuse is a minor, which leads to a variety of issues and concerns, such as where to place the minor if no other family is available to care for, or house, the minor. The Committee considered a variety of possible amendments to address the situation, and after substantial discussion over the course of multiple meetings, approved this proposed amendment.

**Subsections (4)(d) – (f):** These subsections are renumbered to accommodate the addition of the new proposed subsection 4(c).

**Subsection (9):** This provision allows a sentence under this statute to be elevated if the abuse took place in the presence of a minor under fourteen years of age. The intention of this law is to prevent the cycle of violence that can be perpetuated when young children witness domestic violence in the home. The proposed language clarifies that the elevated sentence should only apply when the minor was present in such a way that the minor sees or hears the abuse.

**The Committee recommends moving “§709-908 Tobacco and electronic smoking devices prohibited; minors” to HRS Chapter 712 regarding “Offenses Against Public Health and Morals.”**

**§709-908 Tobacco and electronic smoking devices prohibited; minors**

(1) It shall be unlawful to sell or furnish tobacco in any shape or form, including chewing tobacco and snuff, or an electronic smoking device to a minor under eighteen years of age.

(2) Signs using the statement, “The sale of tobacco products or electronic smoking devices to persons under eighteen is prohibited”, shall be posted on or near any vending machine in letters at least one-half inch high and at or near the point of sale of any other location where tobacco products or electronic smoking devices are sold in letters at least one-half inch high.

(3) It shall be unlawful for a minor under eighteen years of age to purchase any tobacco product, as described under subsection (1), or an electronic smoking device, as described under subsection (5). This provision does not apply if a person under the age of eighteen, with parental authorization, is participating in a controlled purchase as part of a law enforcement activity or a study authorized by the department of health under the supervision of law enforcement to determine the level of incidence of tobacco or electronic smoking devices sales to minors.

(4) Any person who violates subsection (1) or (2), or both, shall be fined \$500 for the first offense. Any subsequent offenses shall subject the person to a fine not less than \$500 nor more than \$2,000. Any minor under eighteen years of age who violates subsection (3) shall be fined \$10 for the first offense. Any subsequent offense shall subject the violator to a fine of \$50, no part of which shall be suspended, or the person shall be required to perform not less than forty-eight hours nor more than seventy-two hours of community service during hours when the person is not employed and is not attending school.

(5) For the purposes of this section:

“Electronic smoking device” means any electronic product that can be used to simulate smoking in the delivery of nicotine or other substances to the person inhaling from the device, including but not limited to an electronic cigarette, electronic cigar, electronic

cigarillo, or electronic pipe, and any cartridge or other component of the device or related product.

**Comment:** HRS §709-908 prohibits the sale of tobacco products and electronic smoking devices to minors under age 18. This section is currently embedded in HRS Chapter 709 “Offenses against the family and against incompetents.” This section appears out of place among laws relating to endangering the welfare and abuse of a child, and would seem to be better placed in HRS Chapter 712 which deals with “Offenses Against Public Health and Morals.”

### **Chapter 710: Offenses Against Public Administration**

With regard to § 710-1027 (Resisting an order to stop a motor vehicle), the Committee recommends adding a new section and also revising/renumbering the existing section.

**Add a new section, entitled "Resisting an order to stop a motor vehicle in the first degree," to read as follows:**

#### **§ [ ] . Resisting an order to stop a motor vehicle in the first degree.**

(1) A person commits the offense of resisting an order to stop a motor vehicle in the first degree if the person:

- (a) intentionally fails to obey a direction of a law enforcement officer, acting under color of the law enforcement officer's official authority, to stop the person's motor vehicle; and
- (b) while intentionally fleeing from or attempting to elude a law enforcement officer,
  - (i) operates the person's motor vehicle in reckless disregard of the safety of other persons; or
  - (ii) operates the person's motor vehicle in reckless disregard of the risk that the speed of the person's vehicle exceeds: (1) the applicable state or county speed limit by thirty miles per hour or more; or (2) eighty miles per hour or more irrespective of the applicable state or county speed limit.

For purposes of this section, the phrase "the applicable state or county speed limit" has the same meaning set forth for that phrase in section 291C-105.

(2) Resisting an order to stop a motor vehicle in the first degree is a class C felony.

#### **Comment:**

1. The current offense of "Resisting an order to stop a motor vehicle" prohibits a person from intentionally failing "to obey a direction of a law enforcement officer, acting under color of the law enforcement officer's official authority, to stop the person's motor vehicle." The proposed amendment adds a new section to provide enhanced penalties for a person who commits the current offense of resisting an order to stop a motor vehicle,

and then additionally, while fleeing from or attempting to flee from law enforcement, drives in reckless disregard of the safety of other people or speeds excessively. The proposed new offense is designed to address the serious increased risk to public safety and officer safety that occurs when a driver refuses to obey an officer's order to stop a motor vehicle, and then drives in reckless disregard of the safety of others or speeds excessively in an attempt to flee. Such conduct endangers the safety of other motorists and pedestrians who share our roads. The proposed new "first degree" offense is punished as a class C felony, whereas the currently existing offense is punished as a misdemeanor.

2. The proposed "first degree" offense contains both an intentional and reckless state of mind. The committee discussed the potential issues this may raise with respect to possible confusion over what state of mind attaches to each element of the offense. It was recommended that subsection (1)(b)(i) be construed in a manner consistent with the requirements for committing the offense of reckless driving of a vehicle, in violation of HRS 291-2, and that subsection (1)(b)(ii) be construed in a manner consistent with the requirements for committing the offense of excessive speeding, in violation of HRS 291C-105. The proposed "first degree" offense incorporates the definition for the phrase "the applicable state or county speed limit" set forth in the excessive speeding statute.

### **Revise and Renumber the existing § 710-1027**

#### **§ ~~[710-1027]~~ 710-. Resisting an order to stop a motor vehicle in the second degree.**

(1) A person commits the offense of resisting an order to stop a motor vehicle in the second degree if the person intentionally fails to obey a direction of a law enforcement officer, acting under color of the law enforcement officer's official authority, to stop the person's motor vehicle.

(2) Resisting an order to stop a motor vehicle in the second degree is a misdemeanor.

**Comment:** The proposed amendment re-designates this offense as a "second degree" offense in light of the proposed new "first degree" offense. The proposed amendments are not substantive but involve conforming and stylistic changes.

### **Chapter 712: Offenses Against Public Health and Morals**

#### **§ 712-1200 Prostitution**

(1) A person commits the offense of prostitution if the person:

- (a) Engages in, or agrees or offers to engage in, sexual conduct with another person in return for a fee; or
- (b) Pays, agrees to pay, or offers to pay a fee to another to engage in sexual conduct.

(2) As used in subsection (1), "sexual conduct" means "sexual penetration", "deviate sexual intercourse", or "sexual contact", as those terms are defined in section 707-700, or "sodomasochistic abuse" as defined in section 707-752.

(3) Prostitution is a petty misdemeanor.

(4) A person convicted of committing the offense of prostitution shall be sentenced as follows:

(a) For the first offense, when the court has not deferred further proceedings pursuant to chapter 853, a fine of not less than \$500 but not more than \$1,000 and the person may be sentenced to a term of imprisonment of not more than thirty days or probation; provided that in the event the convicted person defaults in payment of the fine, and the default was not contumacious, the court may sentence the person to perform services for the community as authorized by section 706-605(1).

(b) For any subsequent offense, a fine of not less than \$500 but not more than \$1,000 and a term of imprisonment of thirty days or probation, without possibility of deferral of further proceedings pursuant to chapter 853 and without possibility of suspension of sentence.

(c) For the purpose of this subsection, if the court has deferred further proceedings pursuant to chapter 853, and notwithstanding any provision of chapter 853 to the contrary, the defendant shall not be eligible to apply for expungement pursuant to section 831-3.2 until four years following discharge. A plea previously entered by a defendant under section 853-1 for a violation of this section shall be considered a prior offense. When the court has ordered a sentence of probation, the court may impose as a condition of probation that the defendant complete a course of prostitution intervention classes; provided that the court may only impose such condition for one term of probation.

(5) This section shall not apply to any member of a police department, a sheriff, or a law enforcement officer acting in the course and scope of duties, unless engaged in sexual penetration or sadomasochistic abuse.

**Comment:** The proposed amendment to subsection (1)(a) clarifies that subsection (1)(a) applies to a prostitute and not a client of a prostitute. The purpose of the proposed revision is to conform §712-1200, subsections (1)(a) and (1)(b), to the legislative intent articulated during the 1990 and 2012 amendments to the statute and to remove any ambiguity in the charging process by making it clear that prostitutes would be charged under §712-1200(1)(a) and that clients of prostitutes would be charged under §712-1200(1)(b). This would, in turn, provide consistency with the legislative purpose behind excluding offenses under §712-1200(1)(b) from deferral under § 853-4, as discussed in regard to Act 53, 2013 Session Laws.

**[§ 712-1240.7] Methamphetamine trafficking in the first degree**

(1) A person commits the offense of methamphetamine trafficking ~~in the first degree~~ if the person knowingly:

~~(a) Possesses one or more preparations, compounds, mixtures, or substances of an aggregate weight of one ounce or more containing methamphetamine or any of its salts, isomers, and salts of isomers;~~



~~(b) Distributes one or more preparations, compounds, mixtures, or substances of an aggregate weight of one eighth ounce or more containing methamphetamine or any of its salts, isomers, and salts of isomers;~~

~~[(e)](a) Distributes methamphetamine in any amount to a minor; or~~

~~[(d)](b) Manufactures methamphetamine in any amount.~~

(2) Methamphetamine trafficking ~~in the first degree~~ is a class A felony for which the defendant shall be sentenced as provided in subsection (3).

(3) Notwithstanding sections 706-620(2), 706-640, 706-641, 706-659, 706-669, and any other law to the contrary, a person convicted of methamphetamine trafficking ~~in the first degree~~ shall be sentenced to an indeterminate term of imprisonment of twenty years with a mandatory minimum term of imprisonment of not less than two years and not greater than eight years and a fine not to exceed \$20,000,000; provided that:

(a) If the person has one prior conviction for methamphetamine trafficking pursuant to this section or section 712-1240.8, the mandatory minimum term of imprisonment shall be not less than six years, eight months and not greater than thirteen years, four months;

(b) If the person has two prior convictions for methamphetamine trafficking pursuant to this section or section 712-1240.8, the mandatory minimum term of imprisonment shall be not less than thirteen years, four months and not greater than twenty years; or

(c) If the person has three or more prior convictions for methamphetamine trafficking pursuant to this section or section 712-1240.8, the mandatory minimum term of imprisonment shall be twenty years.

**Comment:**

**Subsection (1):** The proposed amendments, along with the proposal to repeal § 712-1240.8 (Methamphetamine Trafficking in the Second Degree), removes possession and distribution of methamphetamine from the current Methamphetamine Trafficking statutes and places those offenses in the existing Promoting Dangerous Drug statutes.

Methamphetamine has been the dominant illegal drug in the criminal justice system in Hawaii since the late 1980s. It has resulted in serious harm to users and their families across the state. Methamphetamine is the drug most commonly treated in our drug treatment programs and the illegal drug that accounts for most of the positive drug tests (60%) for those on felony probation. Over the years, the Legislature has made changes to the law to address the dangers and challenges of methamphetamine.

While the Committee recognizes these dangers and challenges, it is of the opinion that the current Methamphetamine Trafficking statutes are not properly addressing those challenges and should be changed based on the experience of the Committee regarding the application of these provisions in the criminal justice system in Hawaii. In 2003, a Joint House-Senate Task Force on Ice and Drug Abatement convened and made recommendations to the 2004 Legislature. The ensuing legislation in 2004 created a Methamphetamine Trafficking statute, and, where possession of any amount of methamphetamine had called for a mandatory prison term (since 1996) the Legislature changed that to give the courts discretion in sentencing on a case-by-case basis (for possession of less than an eighth of an ounce of methamphetamine) to impose the prison term or supervision in the community on probation (the bill, Act 44, was vetoed by the

Governor, then the veto was overridden by the Legislature). In 2006, the current versions of the Methamphetamine Trafficking statutes were adopted, and the Legislature similarly gave the courts discretion in sentencing for possession of less than an ounce of methamphetamine. The amendments proposed here would place the distribution of methamphetamine (except for distribution to a minor) and possession of methamphetamine in any amount in the Promoting Dangerous Drugs statutes, along with heroin, cocaine, and the other dangerous drugs, and allow for a similar case-by-case judicial decision to be made.

Currently the Department of Public Safety reports that 85% of the Methamphetamine Trafficking cases are of the Second Degree type (distribution in any amount), amounting to 103 of the 122 Methamphetamine Trafficking cases since 2007. The Committee noted that most of the large-scale trafficking cases are handled in federal court, and that, in fact, the term “trafficking” is a misnomer in the large majority of cases in state court. The Committee noted that the vast majority of Methamphetamine Trafficking in the Second Degree cases were sales of very small amounts (\$20-\$40 quantities), where the sellers were doing so to support their own drug habits. Given that research has shown that drug treatment is more effective when done in the community than when provided in prison (which is too artificial of an environment), the Committee felt it more effective to give the judges in these cases the discretion, on a case-by-case basis, with input from the prosecutor and the defense, to either send the offender to prison or to have him or her supervised in the community with better treatment options. The money saved by not incarcerating some of those peddler/users could be used to increase the amount of treatment available in the community. While it may be true that many of what are now Methamphetamine Trafficking in the First Degree cases (distribution of at least an eighth of an ounce) will warrant a prison sentence, there may be cases where probation may be more appropriate. At the same time, while many of the current Methamphetamine Trafficking in the Second Degree cases (distribution of any amount) may be more appropriate for probation, there may be cases where a prison term is warranted. These amendments would allow for that case-by-case determination to be made.

The Committee did, however, feel that the distribution of any amount of methamphetamine to a minor or the manufacture of any amount of methamphetamine to be such serious misconduct that the mandatory 20 year prison sentence now required for Methamphetamine Trafficking in the First Degree should be retained in all cases.

*Minority comment:* A significant minority comprising of law enforcement stakeholders felt that methamphetamine is so pervasive and destructive to the community and the people of the state that mandatory prison sentences for methamphetamine trafficking should be retained in all cases regardless of the amount involved. Methamphetamine, due to its impact upon the community, should continue to be treated differently by the Legislature. Amending these statutes lowers their overall deterrent effect and increases the risk of violent and property crimes.

**Subsection (3):** Because a proposed amendment below is to repeal § 712-1240.8 (Methamphetamine Tracking in Second Degree), but subsection (3) contains references to prior convictions under § 712-1240.8 that will continue to affect mandatory minimum sentencing for the offenses that will remain under the amended § 712-1240.7, *i.e.* convictions for distributing methamphetamine to a minor or manufacturing

methamphetamine, the Committee has requested that LRB recommend how the references to § 712-1240.8 in subsection (3) should be addressed for purposes of drafting legislation.

### **Repeal § 712-1240.8 regarding Methamphetamine trafficking in the second degree**

#### **~~§ 712-1240.8~~ Methamphetamine trafficking in the second degree**

~~(1) A person commits the offense of methamphetamine trafficking in the second degree if the person knowingly distributes methamphetamine in any amount.~~

~~(2) Methamphetamine trafficking in the second degree is a class B felony for which the defendant shall be sentenced as provided in subsection (3).~~

~~(3) Notwithstanding sections 706-620, 706-640, 706-641, 706-660, 706-669, and any other law to the contrary, a person convicted of methamphetamine trafficking in the second degree shall be sentenced to an indeterminate term of imprisonment of ten years with a mandatory minimum term of imprisonment of not less than one year and not greater than four years and a fine not to exceed \$10,000,000; provided that:~~

~~(a) If the person has one prior conviction for methamphetamine trafficking pursuant to this section or section 712-1240.7, the mandatory minimum term of imprisonment shall be not less than three years, four months and not greater than six years, eight months;~~

~~(b) If the person has two prior convictions for methamphetamine trafficking pursuant to this section or section 712-1240.7, the mandatory minimum term of imprisonment shall be not less than six years, eight months and not greater than ten years; or~~

~~(c) If the person has three or more prior convictions for methamphetamine trafficking pursuant to this section or section 712-1240.7, the mandatory minimum term of imprisonment shall be ten years.~~

**Comment:** The proposal is to repeal § 712-1240.8. Please see the comments above for the related proposed amendment to § 712-1240.7 (Methamphetamine Trafficking in the First Degree).

#### **[§ 712-1240.9] Methamphetamine trafficking; restitution and reimbursement**

When sentencing a defendant convicted of methamphetamine trafficking pursuant to section 712-1240.7 ~~or 712-1240.8~~, the court may order restitution or reimbursement to the State or appropriate county government for the cost incurred for any cleanup associated with the manufacture or distribution of methamphetamine and to any other person injured as a result of the manufacture or distribution of methamphetamine.

**Comment:** This proposed amendment is related to the proposed repeal of § 712-1240.8 (Methamphetamine Trafficking in the Second Degree). Please see the comments above for the related proposed amendment to § 712-1240.7 (Methamphetamine Trafficking in the First Degree).

**§ 712-1241 Promoting a dangerous drug in the first degree**

(1) A person commits the offense of promoting a dangerous drug in the first degree if the person knowingly:

- (a) Possesses one or more preparations, compounds, mixtures, or substances of an aggregate weight of:
  - (i) One ounce or more, containing methamphetamine, heroin, morphine, or cocaine or any of their respective salts, isomers, and salts of isomers; or
  - (ii) One and one-half ounce or more, containing one or more of any of the other dangerous drugs [~~except methamphetamine~~];
- (b) Distributes [~~except for methamphetamine~~]:
  - (i) Twenty-five or more capsules, tablets, ampules, dosage units, or syrettes containing one or more dangerous drugs; or
  - (ii) One or more preparations, compounds, mixtures, or substances of an aggregate weight of:
    - (A) One-eighth ounce or more, containing methamphetamine, heroin, morphine, or cocaine or any of their respective salts, isomers, and salts of isomers; or
    - (B) Three-eighths ounce or more, containing any other dangerous drug;
- (c) Distributes any dangerous drug in any amount to a minor except for methamphetamine; or
- (d) Manufactures a dangerous drug in any amount, except for methamphetamine; provided that this subsection shall not apply to any person registered under section 329-32.

(2) Promoting a dangerous drug in the first degree is a class A felony.

**Comment:** Consistent with the proposals above, this proposed amendment moves possession and distribution of methamphetamine in certain amounts from the Methamphetamine Trafficking statutes to the Promoting a Dangerous Drug statutes. Please see the comments above for the related proposed amendment to § 712-1240.7 (Methamphetamine Trafficking in the First Degree).

**§ 712-1242 Promoting a dangerous drug in the second degree**

(1) A person commits the offense of promoting a dangerous drug in the second degree if the person knowingly:

- (a) Possesses twenty-five or more capsules, tablets, ampules, dosage units, or syrettes, containing one or more dangerous drugs;
- (b) Possesses one or more preparations, compounds, mixtures, or substances of an aggregate weight of:
  - (i) One-eighth ounce or more, containing methamphetamine, heroin, morphine, or cocaine or any of their respective salts, isomers, and salts of isomers; or
  - (ii) One-fourth ounce or more, containing any dangerous drug; or
- (c) Distributes any dangerous drug in any amount [~~except for methamphetamine~~].

(2) Promoting a dangerous drug in the second degree is a class B felony.

**Comment:** The proposed amendment moves distribution of any amount of methamphetamine from Methamphetamine Trafficking in the Second Degree to Promoting a Dangerous Drug in the Second Degree. Please see the comments above for the related proposed amendment to § 712-1240.7 (Methamphetamine Trafficking in the First Degree).

### **Other Statutes Outside the Penal Code**

The following proposals address statutes that are outside of the Hawai‘i Penal Code, but which address criminal matters and/or are related to amendments proposed within the penal code. It should be noted that, if the entirety of the Committee’s proposals are set forth in one bill, the title of the bill will need to be broad enough to cover these provisions that are outside the penal code.

#### **§ 291-12 Inattention to driving**

Whoever operates any vehicle [~~without due care or in a manner~~] negligently as to cause a collision with, or injury or damage to, as the case may be, any person, vehicle or other property shall be fined not more than \$500 or imprisoned not more than thirty days, or both, and may be subject to a surcharge of up to \$100 which shall be deposited into the trauma system special fund.

**Comment:** The proposed amendment makes the statute clearly apply to situations where a vehicle is operated in a criminally negligent manner. Based on the current wording of the statute, it has been interpreted as not specifying an applicable *mens rea* (or state of mind), such that the default states of mind of “intentionally, knowingly, or recklessly” are required as to each element of the statute. See State v. Bayly, 118 Hawai‘i 1 (2008).

*Minority comment:* Committee members who were not in favor of this proposal expressed a concern about criminally punishing negligent driving.

#### **§ 291E-1 Definitions**

...

“Alcohol” means [~~the product of distillation of any fermented liquid, regardless of whether rectified, whatever may be the origin thereof, and includes ethyl alcohol, lower aliphatic alcohol, and phenol as well as synthetic ethyl alcohol, but not denatured or other alcohol that is considered not potable under the customs laws of the United States]~~ ethanol or any product containing ethanol.

...

**Comment:** This proposal clarifies the definition of “alcohol” for purposes of the statute governing operation of a vehicle under the influence of an intoxicant (OVUII). The Committee believes the current definition of “alcohol” is archaic and unnecessarily complex. It appears that the current definition of alcohol was taken, years ago, from statutes that generally regulated intoxicating liquor. It is the understanding of the Committee that the proposed change in the definition of alcohol would not affect federal funding, however, this should be further confirmed before passage.

**§ 353-22.6 Victim restitution**

The director of public safety shall enforce victim restitution orders against all moneys earned by the inmate or deposited or credited to the inmate's individual account while incarcerated. Notwithstanding any law to the contrary, [T]he amount deducted shall be twenty-five per cent of the total of all moneys earned, new deposits, and credits to the inmate's individual account. The moneys intended for victim restitution shall be deducted monthly and paid to the victim once the amount reaches \$25, or annually, whichever is sooner. This section shall not apply to moneys earned on work furlough pursuant to section 353-17.

**Comment:** The proposed amendment clarifies and ensures that restitution is to be deducted from an inmate’s account at the rate of 25% of all moneys earned or deposited or credited to the inmate’s account while incarcerated. This helps to provide clarity and to make it workable to collect restitution, where there may be various and different court orders for restitution against a defendant. A related amendment is proposed to § 706-646(3) (Victim Restitution).

**§586-1 Definitions.** As used in this chapter:

...

"Family or household member" means spouses or reciprocal beneficiaries, former spouses or former reciprocal beneficiaries, persons who have a child in common, parents, children, persons related by consanguinity, persons jointly residing or formerly residing in the same dwelling unit, and persons who have or have had a dating relationship. “Persons jointly residing or formerly residing in the same dwelling unit” shall not include adult roommates or cohabitants that are only in an economic or contractual affiliation.

...

**Comment:** Amends the definition of “family or household member” to exclude “adult roommates or cohabitants that are only in an economic or contractual affiliation.” This proposal is similar to the amendment proposed for the definition of “family or household member” in HRS § 709-906, which addresses “Abuse of family or household members.” HRS Chapter 586 provides for the issuance of protective orders in situations involving domestic abuse and ideally should align with situations covered by HRS § 709-906. Individuals who are simply roommates may still obtain protective orders from the district

court pursuant to HRS § 604-10.5 “Powers to enjoin and temporarily restrain harassment.”

**§804-7.2 Violations of conditions of release on bail, recognizance, or supervised release.**

(a) Upon verified application by the prosecuting attorney alleging that a defendant has intentionally violated the conditions of release on bail, recognizance, or supervised release, the judicial officer named in section 804-5 shall issue a warrant directing the defendant be arrested and taken forthwith before the court of record for hearing.

(b) Upon verified application by a pretrial officer of the intake service center that a defendant has intentionally violated the conditions of release on bail, recognizance, or supervised release, the court may issue an order pertaining to bail to secure the defendant’s appearance before it or a warrant directing the defendant be arrested and taken forthwith before the court of record for hearing.

(c) A law enforcement officer having reasonable grounds to believe that a released felony defendant has violated the conditions of release on bail, recognizance, or supervised release, may, where it would be impracticable to secure a warrant, arrest the defendant and take the defendant forthwith before the court of record.

**Comment:** The proposed amendment authorizes a pretrial officer of the Department of Public Safety’s Intake Service Center to submit a verified application to the court to secure a defendant’s appearance before the court or to request of the court a warrant for the defendant’s arrest and appearance in court, where the defendant has intentionally violated the conditions of bail, recognizance or supervised release. The proposed amendment also adds subsections to clarify the statute.

**§ 806-73 Duties and powers of probation officers; adult probation records**

(a) A probation officer shall investigate any case referred to the probation officer for investigation by the court in which the probation officer is serving and report thereon to the court. The probation officer shall instruct each defendant placed on probation under the probation officer’s supervision of the terms and conditions of the defendant’s probation. The probation officer shall keep informed concerning the conduct and condition of the defendant and report thereon to the court, and shall use all suitable methods to aid the defendant and bring about an improvement in the defendant’s conduct and condition. The probation officer shall keep these records and perform other duties as the court may direct. No probation officer shall be subject to civil liability or criminal culpability for any disclosure or non-disclosure, under this section, if the probation officer acts in good faith and upon reasonable belief.

(b) All adult probation records shall be confidential and shall not be deemed to be public records. As used in this section, the term “records” includes but is not limited to all records made by any adult probation officer in the course of performing the probation officer’s official duties. The records, or the content of the records, shall be divulged only as follows:

(1) A copy of any adult probation case record or of a portion of it, or the case record itself, upon request, may be provided to:

(A) An adult probation officer, court officer, social worker of a Hawaii state adult probation unit, or a family court officer who is preparing a report for the courts; or

(B) A state or federal criminal justice agency, or state or federal court program that:

(i) Is providing supervision of a defendant or offender convicted and sentenced by the courts of Hawaii; or

(ii) Is responsible for the preparation of a report for a court;

(2) The residence address, work address, home telephone number, or work telephone number of a current or former defendant shall be provided only to:

(A) A law enforcement officer as defined in section 710-1000(13) to locate the probationer for the purpose of serving a summons or bench warrant in a civil, criminal, or deportation hearing, or for the purpose of a criminal investigation; or

(B) A collection agency or licensed attorney contracted by the judiciary to collect any delinquent court-ordered penalties, fines, restitution, sanctions, and court costs pursuant to section 601-17.5;

(3) A copy of a presentence report or investigative report shall be provided only to:

(A) The persons or entities named in section 706-604;

(B) The Hawaii paroling authority;

(C) Any psychiatrist, psychologist, or other treatment practitioner who is treating the defendant pursuant to a court order or parole order for that treatment;

(D) The intake service centers;

(E) In accordance with applicable law, persons or entities doing research; and

(F) Any Hawaii state adult probation officer or adult probation officer of another state or federal jurisdiction who:

(i) Is engaged in the supervision of a defendant or offender convicted and sentenced in the courts of Hawaii; or

(ii) Is engaged in the preparation of a report for a court regarding a defendant or offender convicted and sentenced in the courts of Hawaii;

(4) Access to adult probation records by a victim, as defined in section 706-646 to enforce an order filed pursuant to section 706-647, shall be limited to the name and contact information of the defendant's adult probation officer;

(5) Upon written request, the victim, or the parent or guardian of a minor victim or incapacitated victim, of a defendant who has been placed on probation for an offense under section 580-10(d)(1), 586-4(e), 586-11(a), or 709-906 may be notified by



the defendant's probation officer when the probation officer has any information relating to the safety and welfare of the victim;

(6) Notwithstanding paragraph (3) and upon notice to the defendant, records and information relating to the defendant's risk assessment and need for treatment services; information related to the defendant's past treatment and assessments, with the prior written consent of the defendant for information from a treatment service provider; provided that for any substance abuse records such release shall be subject to Title 42 Code of Federal Regulations Part 2, relating to the confidentiality of alcohol and drug abuse patient records; and information that has therapeutic or rehabilitative benefit, may be provided to:

(A) A case management, assessment, or treatment service provider assigned by adult probation to service the defendant; provided that the information shall be given only upon the screening for admission, acceptance, or admittance of the defendant into a program;

(B) Correctional case manager, correctional unit manager, and parole officers involved with the defendant's treatment or supervision; and

(C) In accordance with applicable law, persons or entities doing research;

(7) Probation drug test results may be released with prior written consent of a defendant to the defendant's treating physician when test results indicate substance use which may be compromising the defendant's medical care or treatment;

(8) Records obtained pursuant to section 704-404(8) may be made available as provided in that section;

~~[(8)]~~ (9) Any person, agency, or entity receiving records, or contents of records, pursuant to this subsection shall be subject to the same restrictions on disclosure of the records as Hawaii state adult probation offices; and

~~[(9)]~~ (10) Any person who uses the information covered by this subsection for purposes inconsistent with the intent of this subsection or outside of the scope of the person's official duties shall be fined no more than \$ 500.

(c) Every probation officer, within the scope of the probation officer's duties, shall have the powers of a police officer.

**Comment:** The proposed amendment removes a perceived impediment, based on the current version of § 806-73, to the court granting the prosecutor and defense counsel access to records obtained by the adult probation division. A related amendment is proposed for § 704-404(8).

### **§ 806-83 Felonies for which criminal charges may be instituted by written information**

(a) Criminal charges may be instituted by written information for a felony when the charge is a class C felony under:

(1) section 19-3.5 (voter fraud);

(2) section 128D-10(knowing releases);

- (3) section 132D-14(a)(1), (2)(A), and (3) (relating to penalties for failure to comply with requirements of sections 132D-7, 132D-10, and 132D-16);
- (4) section 134-7(a) and (b) (ownership or possession prohibited);
- (5) section 134-8 (ownership, etc., of automatic firearms, silencers, etc., prohibited; penalties);
- (6) section 134-9 (licenses to carry);
- (7) section 134-17(a) (relating to false information or evidence concerning psychiatric or criminal history);
- (8) section 134-24 (place to keep unloaded firearms other than pistols and revolvers);
- (9) section 134-51 (deadly weapons);
- (10) section 134-52 (switchblade knives);
- (11) section 134-53 (butterfly knives);
- (12) section 188-23 (possession or use of explosives, electrofishing devices, and poisonous substances in state waters prohibited);
- (13) section 231-34 (attempt to evade or defeat tax);
- (14) section 231-36 (false and fraudulent statements);
- (15) section 245-37 (sale or purchase of packages of cigarettes without stamps);
- (16) section 245-38 (vending unstamped cigarettes);
- (17) section 245-51 (export and foreign cigarettes prohibited);
- (18) section 245-52 (alteration of packaging prohibited);
- (19) section 291C-12.5 (accidents involving substantial bodily injury);
- (20) section 291E-61.5 (habitually operating a vehicle under the influence of an intoxicant);
- (21) section 329-41 (prohibited acts B--penalties);
- (22) section 329-42 (prohibited acts C--penalties);
- (23) section 329-43.5 (prohibited acts related to drug paraphernalia);
- (24) section 329C-2 (manufacture, distribution, or possession with intent to distribute an imitation controlled substance to a person under eighteen years of age);
- (25) section 346-34(d)(2) and (e) (relating to fraud involving food stamps or coupons);
- (26) section 346-43.5 (medical assistance frauds; penalties);
- (27) section 383-141 (falsely obtaining benefits, etc.);
- (28) section 431:2-403(b)(2) (insurance fraud);
- (29) section 482D-7 (violation of fineness standards and stamping requirements);
- (30) section 485A-301 (securities registration requirement);
- (31) section 485A-401 (broker-dealer registration requirement and exemptions);
- (32) section 485A-402 (agent registration requirement and exemptions);
- (33) section 485A-403 (investment adviser registration requirement and exemptions);
- (34) section 485A-404 (investment adviser representative registration requirement and exemptions);
- (35) section 485A-405 (federal covered investment adviser notice filing requirement);

- (36) section 485A-501 (general fraud);
- (37) section 485A-502 (prohibited conduct in providing investment advice);
- (38) section 707-703 (negligent homicide in the second degree);
- (39) section 707-705 (negligent injury in the first degree);
- (40) section 707-711 (assault in the second degree);
- (41) section 707-713 (reckless endangering in the first degree);
- (42) section 707-721 (unlawful imprisonment in the first degree);
- (43) section 707-726 (custodial interference in the first degree);
- (44) section 707-757 (electronic enticement of a child in the second degree);
- (45) section 707-766 (extortion in the second degree);
- (46) section 708-811 (burglary in the second degree);
- (47) section 708-812.6 (unauthorized entry in a dwelling in the second degree);
- (48) section 708-821 (criminal property damage in the second degree);
- (49) section 708-831 (theft in the second degree);
- (50) section 708-833.5 (shoplifting);
- (51) section 708-835.5 (theft of livestock);
- (52) section 708-836 (unauthorized control of propelled vehicle);
- (53) section 708-836.5 (unauthorized entry into motor vehicle in the first degree);
- (54) section 708-839.5 (theft of utility services);
- (55) section 708-839.55 (unauthorized possession of confidential personal information);
- (56) section 708-839.8 (identity theft in the third degree);
- (57) section 708-852 (forgery in the second degree);
- (58) section 708-854 (criminal possession of a forgery device);
- (59) section 708-858 (suppressing a testamentary or recordable instrument);
- (60) section 708-875 (trademark counterfeiting);
- (61) section 708-891.6 (computer fraud in the third degree);
- (62) section 708-892.6 (computer damage in the third degree);
- (63) section 708-895.7 (unauthorized computer access in the third degree);
- (64) section 708-8100 (fraudulent use of a credit card);
- (65) section 708-8102 (theft, forgery, etc., of credit cards);
- (66) section 708-8103 (credit card fraud by a provider of goods or services);
- (67) section 708-8104 (possession of unauthorized credit card machinery or incomplete cards);
- (68) section 708-8200 (cable television service fraud in the first degree);
- (69) section 708-8202 (telecommunication service fraud in the first degree);
- (70) section 709-903.5 (endangering the welfare of a minor in the first degree);
- (71) section 709-906 (abuse of family or household members);
- (72) section 710-1016.3 (obtaining a government-issued identification document under false pretenses in the first degree);
- (73) section 710-1016.6 (impersonating a law enforcement officer in the first degree);
- (74) section 710-1017.5 (sale or manufacture of deceptive identification document);
- (75) section 710-1018 (securing the proceeds of an offense);

- (76) section 710-1021 (escape in the second degree);
- (77) section 710-1023 (promoting prison contraband in the second degree);
- (78) section 710-1024 (bail jumping in the first degree);
- (79) section 710-1029 (hindering prosecution in the first degree);
- (80) section 710-1060 (perjury);
- (81) section 710-1072.5 (obstruction of justice);
- (82) section 711-1103 (riot);
- (83) section 711-1109.35 (cruelty to animals by fighting dogs in the second degree);
- (84) section 711-1110.9 (violation of privacy in the first degree);
- (85) section 711-1112 (interference with the operator of a public transit vehicle);
- (86) section 712-1221 (promoting gambling in the first degree);
- (87) section 712-1222.5 (promoting gambling aboard ships);
- (88) section 712-1224 (possession of gambling records in the first degree);
- (89) section 712-1243 (promoting a dangerous drug in the third degree);
- (90) section 712-1246 (promoting a harmful drug in the third degree);
- (91) section 712-1247 (promoting a detrimental drug in the first degree);
- (92) section 712-1249.6(1)(a), (b), or (c) (promoting a controlled substance in, on, or near schools, school vehicles, public parks, or public housing projects or complexes);
- (93) section 803-42 (interception, access, and disclosure of wire, oral, or electronic communications, use of pen register, trap and trace device, and mobile tracking device prohibited); or
- (94) section 846E-9 (failure to comply with covered offender registration requirements).

(b) Criminal charges may be instituted by written information for a felony when the charge is a class B felony under:

- (1) section 134-7(b) (ownership or possession prohibited, when; penalty);
- (2) section 134-23 (place to keep loaded firearms other than pistols and revolvers; penalties);
- (3) section 134-25 (place to keep pistol or revolver; penalty);
- (4) section 134-26 (carrying or possessing a loaded firearm on a public highway; penalty);
- (5) section 329-43.5 (prohibited acts related to drug paraphernalia);
- (6) section 708-810 (burglary in the first degree);
- (7) section 708-830.5 (theft in the first degree);
- (8) section 708-839.7 (identity theft in the second degree);
- (9) section 708-851 (forgery in the first degree);
- (10) section 708-891.5 (computer fraud in the second degree);
- (11) section 708-892.5 (computer damage in the second degree);
- (12) section 712-1240.8 (methamphetamine trafficking in the second degree);
- (13) section 712-1242 (promoting a dangerous drug in the second degree);
- (14) section 712-1245 (promoting a harmful drug in the second degree); or
- (15) section 712-1249.5 (commercial promotion of marijuana in the second degree).

(c) Criminal charges may be instituted by written information for a felony when the charge is a felony under:

- (1) section 19-3 (election frauds);
- (2) section 480-4 (combinations in restraint of trade, price-fixing and limitation of production prohibited);
- (3) section 480-6 (refusal to deal); or
- (4) section 480-9 (monopolization).

(d) Criminal charges may be instituted by written information for a felony when the charge is a charge under section 329-46 (prohibited acts related to visits to more than one practitioner to obtain controlled substance prescriptions) and the comparable offense under part IV of chapter 712 as enumerated in subsection (a), (b), or (c).

(e) Criminal charges may be instituted by written information for a felony when the charge is a charge that involves section 702-221 (liability for conduct of another), section 702-222 (liability for the conduct of another; complicity), section 702-223 (liability for the conduct of another; complicity with respect to the result), section 705-500 (criminal attempt), section 705-510 (criminal solicitation), or section 705-520 (criminal conspiracy), and the underlying offense is an offense listed above in subsection (a), (b), (c), or (d).

**Comment:** The proposed amendment is to reformat this statute and provide subsection numbering for the various offenses that can be charged by information. This is a non-substantive amendment intended to make this statute easier to understand and utilize.

The Committee had initially approved adding subsection numbering *and* to list the offenses that could *not* be charged by information (rather than the current listing of offenses that *can* be charged by information). However, upon consultation with LRB, it was determined that identifying the exceptions to information charging would be a time consuming and complex endeavor that likely would involve substantive determinations. The Committee therefore opted to propose the non-substantive amendments of simply numbering the offenses that can be charged by information, which are currently set forth in the statute.

It is further noted that subsection (b) includes the offense under § 712-1240.8 (Methamphetamine Trafficking in the Second Degree). If the Committee's proposal to repeal § 712-1240.8 is approved by the Legislature, the reference to § 712-1240.8 in this information charging statute should be deleted.

### § 831-3.2 Expungement orders

(a) The attorney general, or the attorney general's duly authorized representative within the department of the attorney general, upon written application from a person arrested for, or charged with but not convicted of a crime, shall issue an expungement order annulling, canceling, and rescinding the record of arrest; provided that an expungement order shall not be issued:

- (1) In the case of an arrest for a felony or misdemeanor where conviction has not been obtained because of bail forfeiture;

- (2) For a period of five years after arrest or citation in the case of a petty misdemeanor or violation where conviction has not been obtained because of a bail forfeiture;
- (3) In the case of an arrest of any person for any offense where conviction has not been obtained because the person has rendered prosecution impossible by absenting oneself from the jurisdiction;
- (4) In the case of a person acquitted by reason of a mental or physical defect under chapter 704; and
- (5) For a period of one year upon discharge of the defendant and dismissal of the charge against the defendant in the case of a deferred acceptance of guilty plea or nolo contendere plea, in accordance with chapter 853.

Any person entitled to an expungement order hereunder may by written application also request return of all fingerprints or photographs taken in connection with the person's arrest. The attorney general or the attorney general's duly authorized representative within the department of the attorney general, within 120 days after receipt of the written application, shall, when so requested, deliver, or cause to be delivered, all fingerprints or photographs of the person, unless the person has a record of conviction or is a fugitive from justice, in which case the photographs or fingerprints may be retained by the agencies holding such records.

(b) Upon the issuance of the expungement certificate, the person applying for the order shall be treated as not having been arrested in all respects not otherwise provided for in this section.

(c) Upon the issuance of the expungement order, all arrest records pertaining to the arrest which are in the custody or control of any law enforcement agency of the state or any county government, and which are capable of being forwarded to the attorney general without affecting other records not pertaining to the arrest, shall be so forwarded for placement of the arrest records in a confidential file.

(d) Records filed under subsection (c) shall not be divulged except upon inquiry by:

- (1) A court of law or an agency thereof which is preparing a presentence investigation for the court;
- (2) An agency of the federal or state government which is considering the subject person for a position immediately and directly affecting the national or state security; or
- (3) A law enforcement agency acting within the scope of their duties.

Response to any other inquiry shall not be different from responses made about persons who have no arrest records.

(e) The attorney general or the attorney general's duly authorized representative within the department of the attorney general shall issue to the person for whom an expungement order has been entered, a certificate stating that the order has been issued and that its effect is to annul the record of a specific arrest. The certificate shall authorize the person to state, in response to any question or inquiry, whether or not under oath, that the person has no record regarding the specific arrest. Such a statement shall not make the person subject to any action for perjury, civil suit, discharge from employment, or any other adverse action.

(f) Upon the issuance of the expungement order, any person for whom an expungement order has been entered, may request in writing that the Court seal or otherwise remove all judiciary files and other information relating to the expunged offense, including from the judiciary’s electronic databases, from public access. The Court shall make good faith diligent efforts to seal or otherwise remove said files and information within a reasonable time.

~~[(f)](g)~~The meaning of the following terms as used in this section shall be as indicated:

“Arrest record” means any existing photographic and fingerprint cards relating to the arrest.

“Conviction” means a final determination of guilt whether by plea of the accused in open court, by verdict of the jury or by decision of the court.

~~[(g)](h)~~ The attorney general shall adopt rules pursuant to chapter 91 necessary for the purpose of this section.

~~[(h)](i)~~ Nothing in this section shall affect the compilation of crime statistics or information stored or disseminated as provided in chapter 846.

**Comment:** This proposed amendment would add a new subsection (f) to permit an offender to request that the court remove from public access all judiciary files and other judiciary information relating to the expunged offense, including information available via the internet.

### **[§ 846F-3] Internet crimes against children fee**

(a) The court shall order every defendant to pay an internet crimes against children fee of up to \$100 for each felony or misdemeanor conviction; provided that no fee shall be ordered when the court determines that the defendant is unable to pay the fee.

(b) When a defendant is also ordered to pay a fine, make restitution, pay a crime victim compensation fee, or pay other fees in addition to the internet crimes against children fee, payments by the defendant shall be made in the order of priority established under section ~~[706-648]~~ 706-XXX.

(c) The defendant shall pay the internet crimes against children fee to the clerk of the court. The fee shall be deposited with the director of finance who shall transmit the fee to the internet crimes against children special fund pursuant to section 846F-4.

**Comment:** Consistent with prior proposals, this amendment refers to a new section in Chapter 706, which will set forth the priority of payments a defendant is ordered to make.

### **§ 853-4 Chapter not applicable; when**

(a) This chapter shall not apply when:

- (1) The offense charged involves the intentional, knowing, reckless, or negligent killing of another person;
- (2) The offense charged is:

- (A) A felony that involves the intentional, knowing, or reckless bodily injury, substantial bodily injury, or serious bodily injury of another person;  
or
- (B) A misdemeanor or petty misdemeanor that carries a mandatory minimum sentence and that involves the intentional, knowing, or reckless bodily injury, substantial bodily injury, or serious bodily injury of another person;
- (3) The offense charged involves a conspiracy or solicitation to intentionally, knowingly, or recklessly kill another person or to cause serious bodily injury to another person;
- (4) The offense charged is a class A felony;
- (5) The offense charged is nonprobationable;
- (6) The defendant has been convicted of any offense defined as a felony by the Hawaii Penal Code or has been convicted for any conduct that if perpetrated in this State would be punishable as a felony;
- (7) The defendant is found to be a law violator or delinquent child for the commission of any offense defined as a felony by the Hawaii Penal Code or for any conduct that if perpetrated in this State would constitute a felony;
- (8) The defendant has a prior conviction for a felony committed in any state, federal, or foreign jurisdiction;
- (9) A firearm was used in the commission of the offense charged;
- (10) The defendant is charged with the distribution of a dangerous, harmful, or detrimental drug to a minor;
- (11) The defendant has been charged with a felony offense and has been previously granted deferred acceptance of guilty plea or no contest plea [status] for a prior offense, regardless of whether the period of deferral has already expired;
- (12) The defendant has been charged with a misdemeanor offense and has been previously granted deferred acceptance of guilty plea or no contest plea [status] for a prior felony, misdemeanor, or petty misdemeanor for which the period of deferral has not yet expired;
- (13) The offense charged is:
  - (A) Escape in the first degree;
  - (B) Escape in the second degree;
  - (C) Promoting prison contraband in the first degree;
  - (D) Promoting prison contraband in the second degree;
  - (E) Bail jumping in the first degree;
  - (F) Bail jumping in the second degree;
  - (G) Bribery;
  - (H) Bribery of or by a witness;
  - (I) Intimidating a witness;
  - (J) Bribery of or by a juror;
  - (K) Intimidating a juror;
  - (L) Jury tampering;
  - (M) Promoting prostitution in the second degree;
  - (N) Abuse of family or household member;



- (O) Sexual assault in the second degree;
- (P) Sexual assault in the third degree;
- (Q) A violation of an order issued pursuant to chapter 586;
- (R) Promoting child abuse in the second degree;
- (S) Promoting child abuse in the third degree;
- (T) Electronic enticement of a child in the first degree;
- (U) Electronic enticement of a child in the second degree;
- (V) Prostitution pursuant to section 712-1200(1)(b);
- (W) Street solicitation of prostitution under section 712-1207(1)(b);
- (X) Solicitation of prostitution near schools or public parks under section 712-1209;
- (Y) Habitual solicitation of prostitution under section 712-1209.5; or
- (Z) Solicitation of a minor for prostitution under section 712-1209.1;
- (14) The defendant has been charged with:
  - (A) Knowingly or intentionally falsifying any report required under chapter 11, part XIII with the intent to circumvent the law or deceive the campaign spending commission; or
  - (B) Violating section 11-352 or 11-353; or
- (15) The defendant holds a commercial driver's license and has been charged with violating a traffic control law, other than a parking law, in connection with the operation of any type of motor vehicle.
- (b) The court may adopt by rule other criteria for purposes of this section.

**Comment:** The proposed amendments to subsections (a)(11) and (a)(12) would clarify that, with regard to the circumstances addressed in those subsections, Chapter 853 would not be available for offenders who have previously been granted either a deferred acceptance of guilty plea or a deferred acceptance of no contest plea.

## **APPENDICES**

- Appendix A : House Concurrent Resolution No. 155, S.D. 1, Twenty-Eighth  
Legislature of the State of Hawai`i, 2015 Regular Session
- Appendix B : Subcommittee Rosters and Work-up

**Appendix A**

House Concurrent Resolution No. 155, S.D. 1,  
Twenty-Eighth Legislature of the State of Hawai`i,  
2015 Regular Session

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## HOUSE CONCURRENT RESOLUTION

REQUESTING THE JUDICIAL COUNCIL TO APPOINT A COMMITTEE TO REVIEW  
AND RECOMMEND REVISIONS TO THE HAWAII PENAL CODE.

1           WHEREAS, the Hawaii Penal Code, first enacted in 1972, has  
2 not been comprehensively updated since Act 314, Session Laws of  
3 Hawaii 1986, to ensure that grades of offenses warrant the level  
4 of culpability so that sentences are appropriate and  
5 proportionate to the nature of the crime; and  
6

7           WHEREAS, the Hawaii Penal Code has been amended in a  
8 piecemeal manner over the past several decades without paying  
9 attention to whether the dollar values that set threshold levels  
10 for various offenses and for restitution are appropriate and  
11 proportionate to other sentences imposed for criminal offenses;  
12 and  
13

14           WHEREAS, research by the Justice Policy Institute has  
15 indicated that the current criminal justice system has a  
16 disparate impact on low-income residents, particularly Native  
17 Hawaiians, and is not a cost-effective approach to deterring  
18 crime, reducing recidivism, or providing restitution; and  
19

20           WHEREAS, during the Regular Session of 2015, other  
21 concurrent resolutions were introduced, such as S.C.R. No. 18,  
22 as amended, relating to enhanced and extended sentencing, and  
23 H.C.R. No. 146, as amended, and S.C.R. 128, as amended, relating  
24 to smarter sentencing, which could be addressed by a review of  
25 the Hawaii Penal Code; now, therefore,  
26

27           BE IT RESOLVED by the House of Representatives of the  
28 Twenty-eighth Legislature of the State of Hawaii, Regular  
29 Session of 2015, the Senate concurring, that the Judicial  
30 Council, established pursuant to section 601-4, Hawaii Revised  
31 Statutes, is requested to appoint a committee to review the



1 Hawaii Penal Code and recommend to the Legislature revisions to  
2 the Code that the committee concludes will help ensure that  
3 sentences are fair and proportionate to the crime committed with  
4 particular attention paid to Hawaii Penal Code sections that  
5 base culpability on dollar amounts; and  
6

7 BE IT FURTHER RESOLVED that the members of the committee  
8 include:  
9

- 10 (1) A representative from the Judiciary;
- 11 (2) A member of the Senate Committee on Judiciary and  
12 Labor;
- 13 (3) A member of the House of Representatives Committee on  
14 Judiciary;
- 15 (4) The Attorney General, or the Attorney General's  
16 designee;
- 17 (5) The prosecuting attorney from each county, or each  
18 prosecuting attorney's designee;
- 19 (6) A representative from the Office of the Public  
20 Defender;
- 21 (7) A representative from the police department of each  
22 county;
- 23 (8) Public or private sector economists;
- 24 (9) Psychologists or social workers;
- 25 (10) The Administrator of the Office of Hawaiian Affairs or  
26 the Administrator's designee;
- 27 (11) Private citizens interested in criminal law and civil  
28 liberties;
- 29 (12) Hawaii attorneys in private practice who handle  
30 criminal cases;
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- 1 (13) A representative from the Intake Services Center
- 2 Division of the Corrections Division of the Department
- 3 of Public Safety;
- 4
- 5 (14) A representative from a prisoner advocacy group; and
- 6
- 7 (15) Representatives from victim advocacy groups;
- 8
- 9 provided that the committee shall include at least one member
- 10 from each county; and
- 11

12 BE IT FURTHER RESOLVED that the committee shall recommend  
13 updates to the Hawaii Penal Code by:

- 14
- 15 (1) Reviewing The American Law Institute Model Penal Code,
- 16 including recent proposals; the criminal codes of
- 17 other states; and other criminal law resources;
- 18
- 19 (2) Assessing the application of the principles of the
- 20 "Justice Reinvestment in Hawaii: Analyses & Policy
- 21 Options" report (August 2014) by the Council of State
- 22 Governments Justice Center to code sections in which
- 23 culpability is linked to a dollar value; and
- 24
- 25 (3) Analyzing whether grades and punishment are
- 26 appropriate and proportionate to other sentences
- 27 imposed for criminal or civil offenses and are cost-
- 28 effective in deterring crime, reducing recidivism, and
- 29 providing restitution to victims in a manner that
- 30 provides equal justice and punishment regardless of
- 31 socioeconomic class or ethnicity; and
- 32

33 BE IT FURTHER RESOLVED that the committee may accept  
34 grants, gifts, and other appropriations of funds to defray the  
35 costs of its work; and

36

37 BE IT FURTHER RESOLVED that the Judicial Council may  
38 request the Legislative Reference Bureau to assist the committee  
39 with research and reporting assistance, as needed; and

40

41 BE IT FURTHER RESOLVED that the Judicial Council is  
42 encouraged to use, to the greatest extent possible, the faculty  
43 and students of the University of Hawaii William S. Richardson  
44 School of Law in performing its work; and



1  
2 BE IT FURTHER RESOLVED that the members of the committee  
3 serve without compensation; provided that members of the  
4 committee may be reimbursed for the costs of mileage, parking,  
5 and transportation from the neighbor islands; and  
6  
7 BE IT FURTHER RESOLVED that no member of the committee  
8 shall be made subject to chapter 84, Hawaii Revised Statutes,  
9 solely because of that member's participation as a member of the  
10 committee; and  
11  
12 BE IT FURTHER RESOLVED that the Judicial Council is  
13 requested to submit its findings and recommendations, including  
14 any proposed legislation, to the Governor and Legislature no  
15 later than twenty days prior to the convening of the Regular  
16 Session of 2016; and  
17  
18 BE IT FURTHER RESOLVED that certified copies of this  
19 Concurrent Resolution be transmitted to the Chief Justice of the  
20 Hawaii Supreme Court, Administrator of the Office of Hawaiian  
21 Affairs, Acting Director of the Legislative Reference Bureau,  
22 Attorney General, Director of Public Safety, State Public  
23 Defender, Prosecuting Attorneys of each of the counties,  
24 President of the Senate, Speaker of the House of  
25 Representatives, and police chiefs of each of the counties.



**Appendix B:**  
**Subcommittee Rosters and Work-up**

**Chapter 704: Penal Responsibility and Fitness to Proceed**

Chair, Hon. Richard Perkins, First Circuit Court  
Douglas Chin, Attorney General  
Janice Futa, Prosecutors Office, City & County of Honolulu  
Rick Sing, Esq. (Honolulu)  
Ben Lowenthal, Esq. (Maui)

Consulted/conferred with the following

Hawaii State Bar Association, solicited via email  
Individual subcommittee members consulted with attorneys experienced in chapter 704 matters  
Employees of the Department of Health and the Hawaii State Hospital  
Director of the Legislative Reference Bureau and members of her staff

Dates of Subcommittee Meetings

June 19, 2015  
July 10, 2015  
July 24, 2015

Authorities/Reference Materials

All acts affecting chapter 704 that were passed since the last penal code review in 2006 (and the legislative committee reports concerning those acts)

Bills relating to chapter 704 introduced during the 2015 legislative session

A survey of statutes in other states pertaining to mental health examinations of criminal defendants (which was prepared by the Legislative Reference Bureau).

Comments and materials received from:

Louis Erteschik, Esq., Executive Director of the Hawaii Disability Rights Center  
Brook Hart, Esq.  
Marvin Acklin, Ph.D.

**Chapter 706: Sentencing**

Chair, Hon. Rom Trader, First Circuit Court  
Hon. Richard Pollack, Hawai'i Supreme Court  
Nolan Espinda, Director of Dept. of Public Safety  
Kat Brady, Community Alliance on Prisons  
Pam Ferguson-Brey, Crime Victim Compensation Commission



Jeff Hawk, Esq. (Honolulu)  
Dennis Dunn, Victim Witness Kokua Services,

Consulted/conferred with the following

Honolulu Prosecutor's Office  
Maui Prosecutor's Office  
Kauai Prosecutor's Office  
Hawaii Prosecutor's Office  
Attorney General  
Attorney General – Criminal Justice Division  
Adult Client Services Branch  
Public Defender's Office  
Hawaii Association of Criminal Defense Lawyers  
Hawaii Paroling Authority  
District, Family, Circuit Court Judges  
Selected Retired Judges  
Department of Public Safety  
Crime Victim Compensation Commission  
Mothers Against Drunk Driving  
Community Alliance on Prisons  
Victim/Witness Services – Honolulu Prosecutor's Office  
Selected offender treatment programs/providers  
(primarily Domestic Violence / Sex Assault)  
Selected victim treatment programs/providers  
(primarily Domestic Violence / Sex Assault)  
Selected drug treatment programs/providers  
Legislative Reference Bureau  
Other Selected Resources

Dates of Subcommittee Meetings

June 19, 2015  
July 17, 2015  
July 31, 2015  
August 14, 2015  
August 20, 2015 (also met w/ HPA Chair Masuoka & Member Matsumori-Hoshijo)  
August 26, 2015  
September 11, 2015  
September 18, 2015  
October 2, 2015  
October 16, 2015  
October 30, 2015

Note: Between meetings conferred/discussed matters via phone or email.

Authorities/Reference Materials

H.C.R. No. 155, Senate Draft 1

“2014 Annual Statistical Report”, Hawaii Paroling Authority

“Guidelines for Establishing Minimum Terms of Imprisonment”, Hawaii Paroling Authority, July 1989

“Report of the Committee to Conduct a Comprehensive Review of the Hawaii Penal Code,” December 29, 2005

“Model Penal Code: Sentencing, Tentative Draft No. 3” (April 24, 2014)

“Justice Reinvestment in Hawaii,” August 2014

“Most States Cut Imprisonment and Crime,” The PEW Charitable Trusts, Public Safety Performance Report, November 2014

“Congress Hears from States on Improvements to Public Safety,” The PEW Charitable Trusts, Public Safety Performance Report, July 17, 2015

“SAFE Justice Act Would Apply Lessons From State Reforms to Federal Sentencing and Corrections System,” The PEW Charitable Trusts, Public Safety Performance Report, June 25, 2015

“Governor Bentley Signs Historic Criminal Justice Reform Legislation into Law,” The Office of Alabama Governor, Press Release, May 21, 2015

“Mike Lee’s Guide to Convincing Republicans to Ease Mandatory Minimums,” by Evan McMorris-Santoro, posted July 27, 2015, <http://www.buzzfeed.com/evanmcsan/mike-lee-mandatory-minimums>

“HOPE Probation and the New Drug Court: A Powerful Combination,” by Judge Steven S. Alm, *Minnesota Law Review*, Vol. 99, No. 5, May 2015.

“Making Sense of Sentencing: State Systems and Policies,” National Conference of State Legislatures, June 2015’

“Indeterminate Sentencing: Time Served,” National Conference of State Legislatures, July 15, 2015

“Trends in Sentencing and Corrections – State Legislation,” National Conference of State Legislatures, July 2013

“Crime in the City & County of Honolulu,” and excerpt from “Crime in Hawaii, 2013 – A Review of Uniform Crime Reports,” Attorney General, State of Hawaii, May 2015

Honolulu Police Department, Statistics 2013

“Federal Prison System Shows Dramatic Long-Term Growth – Policy decisions contribute to steep rise in inmate population and costs,” The PEW Charitable Trusts, Public Safety Performance Report, February 2015

State Criminal Justice Reforms Build the Case for Data-Driven Federal Legislation, The PEW Charitable Trusts, Public Safety Performance Report, July 30, 2015

“Weighing Imprisonment and Crime – 9 experts explore the relationship between prisons and crime rates,” The PEW Charitable Trusts, Public Safety Performance Report, February 10, 2015

“25 Years of Uniform Crime Reports in Hawaii 1975-1999,” Crime Trend Series, Department of the Attorney General, February 2001

“Hawaii Crime and Crime Rate,” USA.com, <http://www.usa.com/Hawaii-state-crime-and-crime-rate.htm>

INCARCERATION’S FRONT DOOR: The Misuse of Jails in America, 02/11/2015 (UPDATED 7/29/15), Ram Subramanian • Ruth Delaney • Stephen Roberts • Nancy Fishman • Peggy McGarry. <http://www.vera.org/pubs/special/incarcerations-front-door-misuse-jails-america>

DRUGS AND VIOLENCE, <http://lawreview.usc.edu/wp-content/uploads/baradaran-online.pdf>

The Drug-Violence Myth, WHY LINKING DRUGS AND DANGEROUSNESS IS WRONG, Sep 23, Shima Baradaran Baughman PROFESSOR AT UNIVERSITY OF UTAH COLLEGE OF LAW

*Sentencing Overhaul Proposed in Senate With Bipartisan Backing*, By CARL HULSE and JENNIFER STEINHAUER, OCT. 1, 2015, <http://www.nytimes.com/2015/10/02/us/politics/senate-plan-to-ease-sentencing-laws.html>

The Story Behind a Breakthrough: How a Team of Senators Convinced Chuck Grassley on Justice Reform. October 1, 2015, <http://www.nationaljournal.com/s/74193/story-behind-breakthrough-how-team-senators-convinced-chuck-grassley-justice-reform>

Meet the Federal Prisoners About to be Released - A profile of the 6,000, By THE MARSHALL PROJECT, 10.09.2015, <https://www.themarshallproject.org/2015/10/09/meet-the-federal-prisoners-about-to-be-released>

*Police Leaders Join Call to Cut Prison Rosters*, By TIMOTHY WILLIAMS. OCT. 20, 2015. <http://www.nytimes.com/2015/10/21/us/police-leaders-join-call-to-cut-prison-rosters.html>

Hawaii Is Spending Tens Of Millions To Lock Up Low-Level Drug Offenders, Lawmakers approved a pilot program to divert low-risk drug offenders to treatment instead of prison. But, a year later, it's stuck in bureaucratic limbo., Rui Kaneya, <http://www.civilbeat.com/2015/11/hawaii-is-spending-tens-of-millions-to-lock-up-low-level-drug-offenders/>

### **Chapter 707, 709, and 711: Offenses Against the Person, Offenses Against Family, Public Order**

Chair, William Bagasol, Office of the Public Defender  
John Kim, Prosecutor, Maui County  
Trish Morikawa, Esq. (Honolulu)  
Major Janet Crotteau and Major Larry Lawson, Honolulu Police Department  
Kamaile Maldonado, Office of Hawaiian Affairs

Consulted/conferred with the following  
Office of the Public Defender, statewide  
Judges  
Practicing lawyers  
Prosecutors  
Law enforcement entities statewide  
Honolulu Police Department  
(including: Sex Crimes Detail, Traffic Division, Forensic Lab)  
Members of the native Hawaiian community  
Federal Aviation Administration

#### Dates of Subcommittee Meetings

July 9, 2015  
July 23, 2015  
August 4, 2015  
August 14, 2015  
August 25, 2015  
August 31, 2015  
September 8, 2015  
October 2, 2015  
October 14, 2015

#### Authorities/Reference Materials

Chapters 707, 709, 711  
Relevant case law  
Model Penal Code  
Statutes from other jurisdictions

Federal statutes

Code of Military Justice

With regard to Chapter 709, extensive research regarding state codes in other states  
(including: Ohio, Arizona, Florida, California, Delaware, Utah, Illinois, Michigan,  
Oklahoma, Mississippi, New Jersey)

### **Chapter 708 and 710: Offenses Against Property Rights, Offenses Against Public Administration**

Chair, Hon. Craig Nakamura, Intermediate Court of Appeals

Representative Karl Rhoads

Mitch Roth, Prosecutor, County of Hawai'i

Hayley Cheng, Esq. (Honolulu)

Peter Gellatly, Better Media

#### Consulted/conferred with the following

Legislative Reference Bureau

Circuit Court trial judge

Hawai'i County Police Department

Various members of the Penal Code Review Committee

#### Dates of Subcommittee Meetings

June 19, 2015

July 31, 2015

August 26, 2015

September 10, 2015

September 18, 2015

October 15, 2015

October 21, 2015

#### Authorities/Reference Materials

The subcommittee received and considered research prepared by the Legislative Reference Bureau on principles, factors, and methodologies used in other jurisdictions to set dollar value thresholds for criminal property offenses. The LRB report included information on the felony theft thresholds of all 50 states, plus the District of Columbia; information on states that have increased their felony theft thresholds since 2005; reports and studies prepared by other states relevant to the felony theft threshold issue; and the rationales used by states in increasing their felony thresholds, which included reducing the prison population and the costs of incarceration.

*Justice Reinvestment in Hawaii: Analysis & Policy Options to Reduce Spending on Corrections and Reinvest in Strategies to Increase Public Safety*, Council on State Governments Justice Center, 2014 report

## **Chapter 712: Offenses Against Public Health and Morals, Miscellaneous**

Chair, Hon. Lono Lee, District Court, First Circuit  
Senator Gilbert Keith-Agaran  
Justin Kollar, Prosecutor, County of Kauaʻi  
Bob Toyofuku, Esq. (Honolulu)  
Carmel Kwock, Esq. (Honolulu)

### Consulted/conferred with the following

Legislative Reference Bureau  
Contacts to legislative personnel  
County Prosecutors  
Hawaii State Bar Association, via email  
Concerned lobbyists with input by Tracy Ryan, Chair of the Libertarian Party of Hawaii  
Honolulu Police Department  
Department of Public Safety  
Feedback and comments from the current Hawaii Penal Code Review Committee

### Dates of Subcommittee Meetings

July 31, 2015  
Numerous email contacts were made.

### Authorities/Reference Materials

Model Penal Code  
Last report of the review of the Hawaii Penal Code and the current Hawaii Penal Code  
Data from the Department of Public Safety