



**STATE OF HAWAII
DEPARTMENT OF HEALTH**

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**Testimony SUPPORTING HB2359
Relating to Forensic Mental Health Procedures**

REPRESENTATIVE DELLA AU BELATTI, CHAIR
HOUSE COMMITTEE ON HEALTH

Hearing Date: February 5, 2016, 10:15 a.m. Room Number: 329

1 **Fiscal Implications:**

2 **Department Testimony:** The Department of Health (DOH) supports this measure which is part
3 of the Administration's package and we would like to offer comments.

4 We thank the Legislature for its continued support and, in particular, the intent of the
5 initiatives in the bills on today's committee agenda. Only through a combination of support in
6 building a new facility, support in rebuilding community programs, and fundamental policy
7 changes will Hawaii be able to effectively address the needs of its citizens, the operation of the
8 Hawaii State Hospital (HSH), and be able to provide an effective continuum of mental health
9 supports. Clearly, all three branches of government play a critical role in making this system
10 function effectively.

11 The primary purpose of this bill is to ensure the timely and relevant administration of
12 mental health examinations, support the process of expedient administration of justice, and
13 clarify the procedure for re-evaluation of fitness to proceed after a finding of unfitness and
14 attempts at restoration have been made. This may be accomplished by separating the fitness to
15 stand trial and the penal responsibility components of examinations ordered pursuant to HRS

1 §704-404 and codifying procedures for appointing examiners for re-evaluation of fitness
2 pursuant to HRS §704-406 including the involvement of a state designated examiner from within
3 the DOH in each court ordered examination.

4 Under current section HRS §704-404(4), if the defendant's fitness to proceed comes into
5 question, a court must order an examination of a criminal defendant to determine the defendant's
6 fitness to proceed and penal responsibility simultaneously. During this period of time, a pretrial
7 defendant, who may have a serious mental disease or defect, may be held in state custody for
8 more than thirty days awaiting the evaluation due to the complexity of conducting an evaluation
9 that examines both fitness to proceed and penal responsibility. It is in the best interest of the
10 defendants and the judiciary for the examination process to proceed in a timely, expedient
11 manner.

12 While evaluations of fitness to proceed are utilized by the court in each instance that they
13 are ordered, only some of the evaluations of penal responsibility are utilized. The reason for this
14 is because the evaluations of responsibility only become relevant if the affirmative defense of
15 lack of penal responsibility is found to be appropriate by the court. Pairing them together is
16 more burdensome to the examination process, lengthens the time to complete the evaluation and
17 report to the court, and generates a product that may not be utilized during adjudication.

18 Furthermore, pairing fitness to stand trial and penal responsibility in one evaluation
19 implicates ethical and legal concerns as an unfit defendant may not have sufficient capacity to
20 consult with defense counsel to determine the impact of providing information to the examiner
21 during the penal responsibility component of the examination that may be incriminating. The

1 American Bar Association’s Criminal Justice Mental Health Standards (Standard 7-4.4)
2 recommends that an evaluation of the defendant’s mental condition at the time of the alleged
3 offense and penal responsibility not be combined in any evaluation to determine fitness to stand
4 trial unless the defense requests it or unless good cause is shown.

5 Additional proposed revisions include modifying the availability of records gathered
6 pursuant to HRS §704-404 to include prosecution and defense counsel subject to conditions,
7 including a risk assessment of danger in the requirements for a fitness examination, and
8 clarifying that the court’s consideration of release on conditions is based on “substantial” danger
9 to the defendant or the person or property of others.

10 This measure provides a more efficient pretrial process leading to a decrease in the
11 amount of delays defendants experience due to the examination process and enables a more
12 expedient administration of justice. This measure should assist in shortening the lengths of stay
13 for defendants in the HSH and, to some extent, in the community correctional facilities, resulting
14 in a significant savings of public funds.

15 The DOH has met with key stakeholders including representatives of Criminal Justice
16 Division of the Department of the Attorney General, the state Office of the Public Defender, and
17 county Offices of the Prosecuting Attorney to receive their feedback on the proposals contained
18 within this bill. We will continue to work with the legislature and other key stakeholders to
19 address specific issues in this key policy area.

1 We have indicated to you previously and indicated to other stakeholders that our current
2 path is not sustainable. Policy change will be required. We have determined that adjustments in
3 statute pertaining to, in this instance, forensic exam procedures will be critical in improving the
4 efficient utilization of resources, addressing public safety and supporting the rights of
5 defendants. Consistent with this we support the measure.

6 Thank you for the opportunity to testify.

7 **Offered Amendments:** None at this time. We intend to offer an amended bill as proposed HB
8 2359 H.D. 1. that addresses several formatting errors contained in HB 2359 and revisions in
9 response to feedback received by stakeholders in the interim since the introduction of this bill.

**Testimony of the Office of the Public Defender,
State of Hawaii to the House Committee on
Health**

February 5, 2016

H.B. No. 2359: RELATING TO FORENSIC MENTAL HEALTH
PROCEDURES

Chair Belatti and Members of the Committee:

We support the intent of H.B. No. 2359. It is our position that fitness to proceed examinations and examinations for penal responsibility should be conducted separately. This is in keeping with the American Bar Association's Criminal Justice Mental Health Standards, Standard 7-4.4. If a defendant's fitness to proceed is in question, that defendant should not be forced into a decision on whether to proceed with the affirmative defense of penal responsibility. Thus, the portion of the bill which separates the fitness to proceed examination from the penal responsibility examination would allow us to meet our ethical obligations to the client.

We also support the proposed process for reevaluation of a defendant who has previously been found unfit to proceed. For persons charged with offenses other than Class A felonies and above, the bill would allow for appointment of a single independent evaluator who would determine whether the defendant has been restored to fitness. Currently, the procedure requires the appointment of a three-panel commission of evaluators to re-evaluate fitness to proceed. We believe that this change would streamline the process for the determination of restoration of fitness.

Thank you for the opportunity to provide testimony in this matter.

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**THE HONORABLE DELLA AU BELATTI, CHAIR
HOUSE COMMITTEE ON HEALTH
Twenty-Eighth State Legislature
Regular Session of 2016
State of Hawai'i**

February 5, 2016

RE: H.B. 2359; RELATING TO FORENSIC MENTAL HEALTH PROCEDURES.

Chair Au Belatti, Vice-Chair Creagan, and members of the House Committee on Health, the Department of the Prosecuting Attorney of the City and County of Honolulu submits the following testimony, in opposition to H.B. 2359.

The purpose of H.B. 2359 is to that mental health examinations are completed expeditiously and that defendants who may have mental health issues are afforded their due process rights. In addition, H.B. 2359 establishes that in cases that are not one of the following: murder in the first and second degree, attempted murder in the first and second degree, and any Class A felony cases, a three (3) panel of health evaluators would be required but would limit all of other cases to a one (1) panel review. By allowing the reduction in the amount of health professionals involved no matter what stage of the judicial proceeding would inherently decrease the reliability of the results. If this change went into law, every class B and class C felony case in which a defendant was determined to regain fitness would be decided on the opinion of 1 examiner, without the benefit of a "second (or third / 'tie-breaker') opinion." Perhaps most alarming, is that some of the more serious crimes involving class B and class C felony offenses in Hawai'i would be determined by 1 examiner.

Because assessment of one's mental condition is not a black-and-white science, and is often subject to differing opinions, it is crucial that the court and all stakeholders have the benefit of receiving multiple opinions in every felony case, to most accurately assess that defendant's mental condition. Please keep in mind that, while our criminal code categorizes offenses into class A, B and C felonies, that alone does not distinguish the "dangerousness" of an individual. In fact, there are very dangerous people coming through our court system at every level of felony crime, and limiting these mental examinations to the opinion of 1 examiner would be detrimental to accurately determining whether these individuals are fit to stand trial.

Decreasing the number of examiners from 3 down to 1 would also eliminate the additional precaution of having at least one psychiatrist and at least one psychologist per felony fitness examination. It is our understanding that psychiatrists and psychologists have different areas of

expertise, and thus provide slightly different perspectives on each defendant. In addition, there is always the concern that there is a loss of memory of facts of the event when there is a long gap between the first and second fitness and penal responsibility examination.

The Department strongly believes that the existing statutes currently contains appropriate safeguards that are crucial to ensuring the most accurate result in felony fitness proceedings, and further believes that these safeguards are warranted for all class A, B and C felony cases where the defendant's mental fitness is in question.

For all of the foregoing reasons, the Department of the Prosecuting Attorney of the City and County of Honolulu opposes H.B. 2359. Thank for you the opportunity to testify on this matter.



Hawai'i Psychological Association

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TO: Representative Della Au Belatti, Chair
Representative Richard P. Creagan, Vice Chair
Committee on Health

TESTIMONY IN SUPPORT OF HB 2359
RELATING TO FORENSIC MENTAL HEALTH PROCEDURES
Friday, February 05, 2016, 10:15 a.m., Room 329

The Hawaii Psychological Association supports the separation of fitness and penal responsibility evaluations but is opposed to changing the system of three panel exams for all felony fitness exams. The current standard practice of court ordered mental health evaluations is inefficient in that more than 1,0000 penal responsibility assessments are ordered annually and yet these evaluations are only used in a small percentage of cases. Most defendants who are found fit to proceed do not plead insanity. Evaluation of sanity is more time consuming and difficult than evaluations of fitness to proceed or dangerousness. Unnecessary sanity evaluations is an important contributor to unrealistically large examiner caseloads and unacceptable court delays. If fitness to proceed is ordered separately examiners will still need to wait for records in order to understand the context of the fitness referral and to evaluate dangerousness, if the examinee appears unfit to proceed. However, these examinations can be completed faster if penal responsibility is not ordered at the same time and then only reserved for those who plead insanity.

Currently it is also problematic to assess someone for sanity who may not be fit to proceed and may not understand the implications of discussing the instant offense(s) with the examiner. Defendants typically hold back information due to fears of self-incrimination or from the stigma of appearing mentally ill. However, the withheld information is often crucial for their insanity defense. The process will be improved substantially with the passage of HB2359.

HPA supports HB2359 only if the language to allow for one panel exams in felony fitness cases is removed. Without a three panel system, judges would lack important information. Judges strongly benefit from consensus panels (three agreements or two versus one), utilizing the consensus in almost 100% of cases in their determinations. When there are non-consensus three panels, usually when there is disagreement between two raters and a no opinion rating which occurs surprisingly often, judges at least have the benefit of seeing the three independent reports. The bottom line is that the quality of justice meted out in cases of mentally ill defendants will be sacrificed due to financial considerations if the three panel system is changed. The cost of errors in judicial decision making is highly consequential in that a non-competent defendant may go on trial and a competent defendant may be hospitalized. Fitness evaluations also contain opinions on dangerousness when examiners assess a defendant as unfit

to proceed. Therefore, one panels increase the risk that a dangerous defendant may be released or a safe defendant may be detained,

Currently there is no system in place to certify the quality of three panel examinations in Hawaii. Passage of HB1806 without implementation of quality controls means judges may be relying on just one or two evaluations of relatively low quality. Without three evaluations judges would often be lacking an adequate database to support their opinions.

Hawaii's three panel system has been held out as a national model to ensure the independence of evaluations. Dr. Dan Murrie of the University of Virginia has conclusively demonstrated systematic bias in defense/prosecutor retained evaluations. Without a three panel system, there is likely to be an increase in evaluations paid by the defense and/or prosecution which occurs frequently in other states. Evidence from other states also demonstrates that there will likely be increased court delays if SB1806 is passed. Delays can best be addressed by training and hiring more examiners. Colorado has a one panel system. Often one evaluation is considered insufficient and another exam is ordered which is time consuming. New York has a two panel system. If there is disagreement in New York, then a third evaluation is ordered which also slows the process.

Sincerely,

Ray Folen, Ph.D.
Executive Director

HLTtestimony

From: mailinglist@capitol.hawaii.gov
Sent: Wednesday, February 03, 2016 11:01 PM
To: HLTtestimony
Cc: louis@hawaiidisabilityrights.org
Subject: Submitted testimony for HB2359 on Feb 5, 2016 10:15AM

HB2359

Submitted on: 2/3/2016

Testimony for HLT on Feb 5, 2016 10:15AM in Conference Room 329

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

Comments: Separating the fitness evaluations from the penal responsibility evaluations seems like a good proposal. However, reducing the panels to one examiner as proposed in this bill, will not provide the same level of justice to the defendant or the same quality of information to the Court.

Please note that testimony submitted less than 24 hours prior to the hearing, improperly identified, or directed to the incorrect office, may not be posted online or distributed to the committee prior to the convening of the public hearing.

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