

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

April 1, 2016

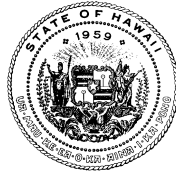
S.B. No. 2888 SD2, HD1: RELATING TO FORENSIC MENTAL HEALTH
PROCEDURES

Chair Rhoads and Members of the Committee:

We support the passage of S.B. No. 2888 SD2 HD1. 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. Our preference is that the separation requirement extend to all charged offenses, not just felony offenses, as the bill current provides. However, the bill, as it currently reads, would be an improvement to the existing statute.

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.



**STATE OF HAWAII
DEPARTMENT OF HEALTH**

P. O. Box 3378
Honolulu, HI 96801-3378
doh.testimony@doh.hawaii.gov

**Testimony SUPPORTING SB2888, S.D. 2, H.D. 1
Relating to Forensic Mental Health Procedures**

REPRESENTATIVE KARL RHOADS, CHAIR
HOUSE COMMITTEE ON JUDICIARY

Hearing Date: April 1, 2016, 2:00 p.m. Room Number: 325

1 **Fiscal Implications:** Undetermined at this time.

2 **Department Testimony:** The Department of Health (DOH) is generally supportive of this
3 measure as amended in H.D. 1, but offers comments and requests amendments. The proposed
4 amendments are offered at the end of this testimony.

5 The primary purpose of this bill is to ensure the timely and relevant administration of
6 mental health examinations, support the process of expedient administration of justice, and
7 clarify the procedure for re-evaluation of fitness to proceed after a finding of unfitness and the
8 delivery of fitness restoration services from clinical professionals and treatment teams. This may
9 be accomplished by separating the fitness to proceed and the penal responsibility components of
10 examinations ordered pursuant to HRS §704-404 and codifying procedures for the determination
11 of a defendant's regained fitness to proceed pursuant to HRS §704-406.

12 This measure, as it was proposed in SB2888, provided a more efficient pretrial process
13 leading to a decrease in the amount of delays defendants experience due to the examination
14 process and enables a more expedient administration of justice. Within the past year, a
15 complaint was lodged with the Special Litigation Section of the U.S. Department of Justice

1 (DOJ) alleging a violation of the Civil Rights of Institutionalized Persons Act (CRIPA) due to
2 lengthy delays in court-ordered examinations related to several position vacancies within the
3 DOH. This drew the attention of the Hawaii Disability Rights Center. If not remedied, the DOJ
4 could launch a full investigation leading to legal action and oversight. This measure should also
5 assist in ensuring a defendant's right to a speedy trial.

6 We have indicated to you previously and indicated to other stakeholders that our current
7 path is not sustainable. Policy change will be required. We have determined that adjustments in
8 statute pertaining to, in this instance, forensic exam procedures will be critical in improving the
9 efficient utilization of resources, addressing public safety and supporting the rights of
10 defendants. Consistent with this, we supported the earlier S.D. 1.

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

19 Furthermore, while evaluations of fitness to proceed are utilized by the court in each
20 instance that they are ordered, only some of the evaluations of penal responsibility are utilized.
21 The reason for this is because the evaluations of penal responsibility only become relevant if the

1 affirmative defense of lack of penal responsibility is argued by the defendant. We estimate that
2 penal responsibility evaluations are used in only a minor fraction of the cases for which these
3 exams are ordered and completed. Pairing them together is more burdensome to the examination
4 process, lengthens the time to complete the evaluation and report to the court, and generates a
5 product that may not be utilized during adjudication.

6 In addition, pairing fitness to proceed and penal responsibility in one evaluation creates
7 an ethical dilemma and legal concerns for the defendant. An unfit defendant may not have
8 sufficient capacity to consult with defense counsel to determine the implications of providing
9 information to the examiner during the penal responsibility component of the examination. The
10 American Bar Association's Criminal Justice Mental Health Standards (Standard 7-4.4; see
11 attachment #1) recommends that an evaluation of the defendant's mental condition at the time of
12 the alleged offense to determine penal responsibility should not be combined in any evaluation to
13 determine fitness to proceed unless the defense requests it or unless good cause is shown.
14 Examiners typically provide a warning to defendants regarding the forensic examiner's role and
15 the non-confidential nature of the examination; a sample is provided for the committee's review
16 (see attachment #2). However, the warning makes it clear that a defendant who is not fit to
17 proceed would not have the capacity to understand the ramifications and agree to the interview
18 for the penal responsibility examination.

19 We supported SB2888 S.D. 1 which separates the fitness to proceed and the penal
20 responsibility components of examinations pursuant to HRS §704-404 for examinations of all
21 defendants whether they are charged with felonies, misdemeanors or petty misdemeanors. We

1 note that SB2888 S.D. 2 H.D. 1 limits separate examinations of fitness to proceed and penal
2 responsibility unless a combined examination is ordered by the court or upon a showing of good
3 cause to defendants charged with felonies. We prefer the provisions of SB2888 S.D.1 on the
4 separation of exams, regardless of the level of charge. However, we acknowledge the
5 Judiciary's concerns regarding the impact on District Courts outlined in their testimony
6 submitted providing comments on SB2888 S.D. 2. We thank the legislature for its support of
7 changes to statute to support the timely administration of examinations and the expedient
8 administration of justice.

9 While we prefer the separation of exams regardless of level of charge, we support
10 SB2888 S.D. 2 H.D. 1 at this time. Prior to the 2017 legislative session, we will work with
11 stakeholders and partners within the DOH and Judiciary to continue to improve the efficiency of
12 administration of examinations for defendants charged with misdemeanors and petty
13 misdemeanors. These efforts will include collection of relevant data, partnering to improve
14 operational efficiencies that are adapted to the realities of District Court procedures related to
15 HRS 704-404, and related. We anticipate that we will revisit the separation of examinations of
16 fitness and penal responsibility for defendants with misdemeanor and petty misdemeanor charges
17 with potential proposed revisions to HRS in 2017.

18 Except as mentioned above, we support SB2888 S.D. 2 H.D. 1, which separates the
19 fitness to proceed and the penal responsibility components of examinations pursuant to HRS
20 §704-404 and does not change the current one panel and three panel structure of assignment to
21 examiners. With regards to the determination of a defendant's regained fitness to proceed under

1 HRS §704-406, the current statute is silent with respect to the procedure to determine a
2 defendant's regained fitness to proceed after the delivery of fitness restoration services from
3 clinical professionals and treatment teams. SB2888 S.D. 1 codifies a procedure to re-examine a
4 defendant's fitness to proceed that includes: 1) the court may appoint a one qualified examiner
5 for all petty misdemeanors, misdemeanors, class B felonies, and class C felonies to be designated
6 by the director of health from within the DOH and 2) the court shall appoint three qualified
7 examiners for charges of murder in the first and second degrees, attempted murder in the first
8 and second degrees and class A felony cases with one of the three designated by the director of
9 health from within the DOH. The proposed changes only narrowly impact the re-examination of
10 fitness for defendants with Class B and C felonies. The one examiner appointed by the director
11 of health from within the DOH for all petty misdemeanors, misdemeanors, and Class B and C
12 felonies will have access to the reports from the original three examiners appointed pursuant to
13 HRS §704-404 and the recommendations and records from the inpatient or outpatient treatment
14 teams. The proposed changes do not alter the three panel assignment in felony cases for initial
15 assessment of fitness to proceed and penal responsibility, placement into conditional release
16 status, or discharge from conditional release status.

17 The DOH has met with key stakeholders including representatives of Criminal Justice
18 Division of the Department of the Attorney General, the state Office of the Public Defender, and
19 county Department of the Prosecuting Attorney to receive their feedback on the proposals
20 contained within this bill. Feedback received during this process led to the DOH's support of
21 this measure as previously drafted in SB2888, S.D. 1. Most issues have been resolved. The

1 DOH cannot agree with the City and County of Honolulu Department of the Prosecuting
2 Attorney's Office, whose suggestions seem to be to maintain the status quo with respect to
3 combination of fitness and penal responsibility evaluations and to make three panel evaluations
4 the default for re-evaluations for fitness to proceed for all felony charges. The reasons for our
5 proposals in those two areas are sound.

6 We continue to be open to working with the legislature and other key stakeholders to
7 address any specific issues in this key policy area.

8 We thank the Legislature for its continued support for providing an effective continuum
9 of mental health services. Clearly all branches of government play a critical role in making this
10 system function effectively.

11 Thank you for the opportunity to testify.

12 **Offered Amendments to SB2888 S.D. 2, H.D. 1:**

13 On Page 6, lines 11 – 19:

14 (4) For defendants charged with felonies, the examination for fitness to proceed under
15 section 704-404 and penal responsibility under this section shall be conducted separately unless a
16 combined examination has been ordered by the court upon a request by the defendant or upon a
17 showing of good cause to combine the examinations. When the examinations are separate, [~~the~~
18 ~~court shall order~~] the examination for penal responsibility under this section [~~no later~~] shall not
19 be ordered more than thirty days after a finding of fitness to proceed.

20 On page 21, lines 4 – 6:

1 In [~~such~~] cases[;] in which the defendant has been charged with murder in the first or second
2 degree, attempted murder in the first or second degree, or a class A felony, the court shall
3 appoint at least one psychiatrist and at least one licensed psychologist.

4 On page 21, lines 10 – 13:

5 In all other cases, the one qualified examiner [~~who~~] shall be a psychiatrist or licensed
6 psychologist designated by the director of health from within the department of health.

DEPARTMENT OF THE PROSECUTING ATTORNEY
CITY AND COUNTY OF HONOLULU

LATE

ALII PLACE
1060 RICHARDS STREET • HONOLULU, HAWAII 96813
PHONE: (808) 547-7400 • FAX: (808) 547-7515

KEITH M. KANESHIRO
PROSECUTING ATTORNEY



ARMINA A. CHING
FIRST DEPUTY PROSECUTING ATTORNEY

**THE HONORABLE KARL RHOADS, CHAIR
HOUSE COMMITTEE ON JUDICIARY
Twenty-Eighth State Legislature
Regular Session of 2016
State of Hawai`i**

April 1, 2016

RE: S.B. 2888, S.D. 2, H.D. 1; RELATING TO FORENSIC MENTAL HEALTH PROCEDURES.

Chair Rhoads, Vice Chair San Buenaventura, and members of the House Committee on Judiciary, the Department of the Prosecuting Attorney of the City and County of Honolulu submits the following testimony, in opposition to S.B. 2888, S.D. 2, H.D. 1.

The purpose of S.B. 2888, S.D. 2, H.D. 1 is to ensure that mental health examinations are completed expeditiously and that defendants who may have mental health issues are afforded their due process rights. In achieving the objectives of S.B. 2888, S.D. 2, H.D. 1, three (3) distinct issues arise. First, this bill seeks to eliminate the current process of conducting a concurrent evaluation for penal responsibility and a defendant's fitness to proceed. Second, it sets to establish distinct guidelines when a court shall require a three (3) panel and one (1) panel of health evaluators when a defendant regains fitness. Third, this bill raises the danger threshold to allow for the increase in release of defendants on conditional release.

In regards to the first issue, our Department believes that the current procedure, which is to conduct an evaluation for penal responsibility and fitness concurrently serves the specific purpose of ensuring accuracy in information. When conducting an evaluation for penal responsibility, the biggest concern is to ensure accuracy and reliable information. **To ensure such accuracy, collection of information as close in time to the incident is required.** Section 1 of this bill indicates that "only some of the evaluations of penal responsibility are ever utilized...", however, the minor inconvenience of conducting both examinations concurrently and the minimal delay attributed to such procedure, is far outweighed by the necessity for accurate information. Our Department would point out that although section 1 indicates that the American Bar Association (ABA) recommends separate evaluations, as this committee is aware, this is merely a recommendation, and currently, the Department of Health does not comply with all recommendations outlined by the ABA regarding mental health. In addition, our judicial system routinely implements procedures that may be stricter than what the ABA recommends (ie. discoverable material, Tachibana colloquy, etc.). Our slight deviations from ABA

recommendations are in place to ensure that a defendant's due process rights are upheld to the highest degree. Therefore, to ensure that the information collected by health evaluators is accurate, the current procedure by which an evaluation for penal responsibility and fitness is completed together should be the preferred method.

Ensuring accurate information and providing a clear picture of the defendant's mental health as close in time to the incident is important when determining the legal ramifications of a finding of no penal responsibility. Section 704-411 of the Hawaii Revised Statutes outlines the legal effect of an acquittal on the grounds of physical or mental disease. If a determination is made that there is no penal responsibility of the defendant at the time of the alleged incident, a court may commit the defendant who is still affected by the mental disease to the director of health. However, alternatively, if the court finds that the defendant is no longer affected by the physical or mental disease, the court **SHALL** grant conditional release or discharge back to the community. Our Department believes that if an individual is going to be potentially discharged back to the community by way of mental disease, avoiding culpability for his or her actions and liability for any restitution to a victim, more information regarding a defendant's health is not just helpful, but should be a necessity.

The second issue that this bill intends to address is, when a court is to order a three (3) panel or a one (1) panel of health evaluators once a defendant has regained fitness to proceed. This bill would only require certain types of cases (murder in the first and second degree, attempted murder in the first and second degree, any Class A felony cases, or a felony for which charging by written information is not permitted by section 806-83) to utilize a three (3) panel of health evaluators, and all of other cases would be limited to a one (1) panel review. This proposal would take effect in cases in which a defendant was initially found unfit but subsequently regained fitness. To require such a 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, a number of class B and class C felony cases 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 one (1) examiner.

Lastly, S.B. 2888, S.D. 2, H.D. 1 adds the word “substantial” to the danger that the court must find is not present with regards to property prior to releasing the defendant on conditions. Our Department believes that this change from “risk of danger” to “risk of substantial danger” seeks to raise the danger threshold to allow for a more lackadaisical procedure for the court to grant a defendant conditional release. Therefore, a defendant would be allowed to be released if the defendant is not just a danger, but a “substantial” danger to the property of others. This change would effectively create unnecessary sacrifices to public safety and property.

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 S.B. 2888, S.D. 2, H.D. 1. Thank for you the opportunity to testify on this matter.

MARVIN W. ACKLIN, PH.D.

*Diplomate in Clinical & Forensic Psychology
American Board of Professional Psychology*

850 W. Hind Drive, Suite 203
Honolulu, Hawaii 96821

Voice (808) 373-3880

Fax: (808) 373-1158

TO: Committee on Judiciary
Rep. Karl Rhoads, Chair
Rep. Joy A. San Buenaventura, Vice Chair

FROM: Marvin W. Acklin, Ph.D.

DATE: March 31, 2016

RE: Notice of Hearing:

DATE: Friday, April 01, 2016

TIME: 2:00 p.m.

PLACE: Conference Room 325

State Capitol

415 South Beretania Street

Testimony pertinent to SB 2888 SD2 HD1
(HSCR1165-16)

I am a clinical and forensic psychologist in Honolulu. I have conducted over 600 court-appointed sanity panels, presented at trainings for forensic examiners, and published five peer reviewed scientific articles on Hawaii's three panel system.

I have submitted testimony on the current bill at various points, have discussed the bill's provisions at length with various parties, and applaud efforts to improve the quality and efficiency of Hawaii's unique three panel system.

Re: Testimony pertinent to SB 2888 HD1

Fm: Marvin W. Acklin, Ph.D.

March 31, 2016

Page 2

I endorse the provisions in the developing bill, including the bifurcation of fitness and criminal responsibility evaluations.

One of the strongest efficiencies would be the provision of electronic records for examiners to review. This is likely to require infrastructure changes not addressed in the bill.

My primary concern is language in the bill on the constitution of panels after fitness has been regained.

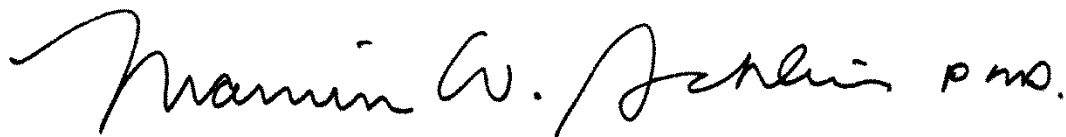
In the current version of the bill, three panels would be constituted only for a limited set of cases (murder and Class A felonies). The provisions for alternatives (non-murder, non-class A felonies) in the current bill is quite vague.

I suggest that the language should be more explicit about the appointment on a one panel in non-applicable cases, with inclusion of language for the provision that the court may exercise discretion in appointing a three panel depending on the circumstances of the case.

This provision in the proposed statute needs to be more explicit and provide the court the discretion in constituting panels after the defendant has regained fitness.

Thank you for the opportunity to provide this testimony.

It is my a plan to attend the hearing and if given the opportunity to provide oral testimony.

A handwritten signature in black ink that reads "Marvin W. Acklin PhD." The signature is written in a cursive, flowing style.

Marvin W. Acklin, PhD
Clinical & Forensic Psychologist