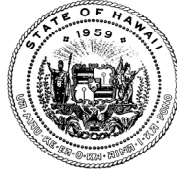


SB2888

Measure Title:	RELATING TO FORENSIC MENTAL HEALTH PROCEDURES.
Report Title:	Forensic Mental Health Procedures.
Description:	Ensures the timely administration of mental health examinations; supports the process of expedient administration of justice; and clarifies the procedure for reevaluation of fitness to proceed after a finding of unfitness and attempts at restoration.
Companion:	HB2359
Package:	Governor
Current Referral:	CPH, JDL/WAM
Introducer(s):	KOUCHI (Introduced by request of another party)



**STATE OF HAWAII
DEPARTMENT OF HEALTH**

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**Testimony SUPPORTING SB2888
Relating to Forensic Mental Health Procedures**

SENATOR ROSALYN H. BAKER, CHAIR
SENATE COMMITTEE ON COMMERCE, CONSUMER PROTECTION AND HEALTH
Hearing Date: February 9, 2016, 9:00 a.m. Room Number: 229

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

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
8 SB2888 S.D. 1. that addresses several formatting errors contained in SB2888 and revisions in
9 response to feedback received by stakeholders in the interim since the introduction of this bill.

DEPARTMENT OF THE PROSECUTING ATTORNEY
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THE HONORABLE ROSALYN H. BAKER, CHAIR
SENATE COMMITTEE ON COMMERCE, CONSUMER PROTECTION, AND HEALTH
Twenty-Eighth State Legislature
Regular Session of 2016
State of Hawai`i

February 9, 2016

RE: S.B. 2888; RELATING TO FORENSIC MENTAL HEALTH PROCEDURES.

Chair Baker, Vice-Chair Kidani, and members of the Senate Committee on Commerce, Consumer Protection, and Health, the Department of the Prosecuting Attorney of the City and County of Honolulu submits the following testimony, in opposition to S.B. 2888.

The purpose of S.B. 2888 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, two 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 in determining a defendant's penal responsibility and fitness. 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 of information. To ensure such accuracy, collection of information as close in time to the incident is required. Although an argument can be made that a court does not need to determine penal responsibility if a defendant at that time is not fit to proceed to trial, the potential for long delays in conducting an evaluation for penal responsibility compromises the accuracy of information. It is only natural for any person with the passage of time to forget certain details or maybe even an order of events. 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.

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 when determining a defendant's fitness to proceed. This bill 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 S.B. 2888. Thank for you the opportunity to testify on this matter.



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**TO: Senator Rosalyn H. Baker, Chair
Senator Michelle N. Kidani, Vice Chair
Committee on Commerce, Consumer Protection, and Health**

TESTIMONY IN **SUPPORT** OF SB 2888
RELATING TO FORENSIC MENTAL HEALTH PROCEDURES
Tuesday, February 09, 2016, 9:00 a.m., Room 229

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 felony fitness re-examinations. The current standard practice of court ordered mental health evaluations is inefficient in that more than 1,000 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 are an important contributor to unrealistically large examiner caseloads and unacceptable court delays.

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 SB 2888.

HPA supports SB 2888 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 SB 2888 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 SB 2888 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

From: mailinglist@capitol.hawaii.gov
To: [CPH Testimony](#)
Cc: louis@hawaiidisabilityrights.org
Subject: Submitted testimony for SB2888 on Feb 9, 2016 09:00AM
Date: Thursday, February 04, 2016 8:19:14 PM

SB2888

Submitted on: 2/4/2016

Testimony for CPH on Feb 9, 2016 09:00AM in Conference Room 229

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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Testimony SB 2888
February 9, 2016
Marvin W Acklin, PhD

To: Commerce, Consumer Protection, and Health Committee (CPH), hearing on Tuesday, February 9, 2016, 9:00 AM
Re: Testimony submitted for SB 2888
Bifurcation of fitness to proceed and criminal responsibility evaluations
From: Marvin W. Acklin, PhD, Independent Practice, Honolulu (Marvin W. Acklin, PhD, PC).

To the Committee:

I am a board-certified clinical and forensic psychologist practicing in Honolulu since 1989.

I have conducted approximately 500 court-appointed mental examinations (“three panels”) for fitness to proceed, criminal responsibility, conditional release, and discharge from conditional release.

My research group has undertaken research on three panels since 2004. We have published 3 peer-reviewed articles in forensic mental health journals, examining quality of forensic reports submitted to the Hawaii Judiciary. Citations to these studies are listed below.

Regrettably forensic report quality is mediocre, if not poor, based on our empirical research studies. There is a clear need for quality improvement.

Factors which contribute to poor report quality include 1) non-standardization of procedures and report formats, 2) intermittent examiner training (ideally, training should be annual; there has not been a training in Hawaii for at least two years), 3) and complexity of the forensic examiner’s task.

Today, most evaluations include both an examination of the defendant’s current mental state (fitness to proceed) and a retrospective assessment of mental state at the time of the offense (criminal responsibility).

The bill would benefit from addition of language which addresses annual training of forensic examiners.

Testimony SB 2888
February 9, 2016
Marvin W Acklin, PhD

Bifurcating fitness to proceed from criminal responsibility examinations is likely to significantly reduce task complexity, and permit a better deployment of examiner resources under pressure of scheduling, deadlines, complex evaluation procedures, and a sometimes difficult clientele.

It is hoped and likely that the whole system will function more efficiently.

For these reasons, I would urge the CPH committee to support this well-written piece of legislation.

Thank you for your attention and consideration.

Marvin W. Acklin, PhD, ABAP, ABPP
Board-certified Clinical, Assessment, & Forensic Psychologist
Associate Clinical Professor of Psychiatry, John A Burns School of Medicine
Honolulu, Hawaii

References

Fuger, K., Acklin, M.W., Gowensmith, W., & Ignacio, L. (2014). Sanity in Paradise: Quality of Criminal Responsibility Reports Submitted to the Hawaii Judiciary, *International Journal of Law and Psychiatry*, 37, 3, 272-280.

Nguyen, A., Acklin, M.W., Fuger, K., & Ignacio, L. (2011). Freedom in Paradise: Quality of Conditional Release Reports Submitted to the Hawaii Judiciary, *International Journal of Law and Psychiatry*, 34, 341-348.

Robinson, R., & Acklin, M.W. (2010). Fitness in Paradise: Quality of Forensic Reports Submitted to the Hawaii Judiciary. *International Journal of Law and Psychiatry*, 33, 3, 131-137.