

STATE OF HAWAII
DEPARTMENT OF HEALTH
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Honolulu, HI 96801-3378
doh.testimony@doh.hawaii.gov

Testimony in SUPPORT of HB553
RELATING TO CRIMINAL DEFENDANTS' FITNESS TO PROCEED

REPRESENTATIVE SCOTT Y. NISHIMOTO, CHAIR
HOUSE COMMITTEE ON JUDICIARY

Hearing Date: Tuesday, February 7, 2017 Room Number: 325

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

2 **Department Testimony:** The Department of Health (DOH) testifies in support of the
3 intent of this bill and offers comments and amendments.

4 The purpose of this bill is to provide that the court may appoint one qualified
5 examiner, rather than three, to evaluate a criminal defendant's fitness to proceed in a
6 felony case.

7 We have consistently supported simpler arrangements regarding forensic
8 evaluations. We support the concept of the present proposal. Hawaii is the only state
9 that systematically requires three evaluators in the instances of felony charges. No
10 other state requires this. How much better are our outcomes given this arrangement?
11 Are these better at all? When we have asked these questions previously, other
12 stakeholders have indicated their preferences for the present arrangement.

13 There is no evidence of which we are aware that indicates that having three
14 evaluator opinions results in more valid decisions than having one opinion. Three
15 evaluations take longer and are much more expensive in terms of both direct and
16 indirect costs. The Judiciary currently pays approximately \$1,000 for each examination
17 conducted by an independent examiner; which translates to approximately \$2,000 per
18 three panel examination ordered. In 2016, there were approximately 335 individuals

1 ordered for an evaluation of fitness, given felony charges (commitments pursuant to
2 HRS 704-404) for an estimated direct cost of at least \$670,000.00, of which 26 (felony
3 charges only) were committed to the Hawaii State Hospital (HSH).

4 We understand that in some circuit courts parties indicate to the court clerk their
5 preference regarding independent examiner assignments. This practice increases the
6 likelihood that one of those examinations will align with the interests of the parties
7 (defense or prosecution). We believe the better, and more economically efficient
8 practice would be that if the prosecution or defense wishes the assessment of a
9 particular evaluator, they could hire their preferred examiner.

10 The AMHD opposes the deletion of language requiring that the one examiner be
11 designated by the director of health for all court ordered examinations. It is critical to
12 have an examiner who is neutral and whose compensation is not tied to a particular
13 outcome.

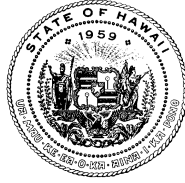
14 Please note that if section 704-404, HRS, is amended in this way, for
15 consistency, section 704-406(3) (re-examination for fitness) would also need to be
16 similarly amended. Further, sections 704-411(3) and 704-414(1), HRS, for
17 examinations determine whether a defendant on conditional release should be revoked,
18 discharged, or have the requirements of the defendant's conditional release modified,
19 could also be limited to one evaluation as designated by the director of health.

20 Thank you for the opportunity to testify.

21 **Offered Amendments:** We respectfully submit the following amendments which
22 address our concern regarding the one examiner being designated by the director of
23 health for all court ordered examinations.

24 (2) Upon suspension of further proceedings in the prosecution, the court shall appoint
25 [~~three qualified examiners in felony cases and~~] one qualified examiner [~~in nonfelony~~
26 ~~cases,~~] to examine and report upon the defendant's fitness to proceed. [~~In felony cases,~~

1 ~~the court shall appoint as examiners at least one psychiatrist and at least one licensed~~
2 ~~psychologist. The third member may be a psychiatrist, licensed psychologist, or~~
3 ~~qualified physician. One of the three examiners shall be a psychiatrist or licensed~~
4 ~~psychologist designed by the director of health. In nonfelony cases, the] [The court may~~
5 ~~appoint as examiners either a psychiatrist or a licensed psychologist [.] as an examiner.]~~
6 An examiner shall be a psychiatrist or licensed psychologist designated by the director
7 of health. [All-examiners] An examiner shall be appointed from a list of certified
8 examiners as determined by the department of health. The court, in appropriate
9 circumstances, may appoint an additional examiner or examiners. The examination
10 may be conducted while the defendant is in custody or on release or, in the court's
11 discretion, when necessary the court may order the defendant to be committed to a
12 hospital or other suitable facility for the purpose of the examination for a period not
13 exceeding thirty days, or a longer period as the court determines to be necessary for the
14 purpose. The court may direct that one or more qualified physicians or psychologists
15 retained by the defendant be permitted to witness the examination. As used in this
16 section, the term "licensed psychologist" includes psychologists exempted from
17 licensure by section 465-3(a)(3) and "qualified physician" means a physician qualified
18 by the court for the specific evaluation ordered."



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DEPARTMENT OF THE PROSECUTING ATTORNEY
CITY AND COUNTY OF HONOLULU

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CHRISTOPHER D.W. YOUNG
FIRST DEPUTY PROSECUTING ATTORNEY



**THE HONORABLE SCOTT NISHIMOTO, CHAIR
HOUSE COMMITTEE ON JUDICIARY
Twenty-Ninth State Legislature
Regular Session of 2017
State of Hawai`i**

February 7, 2017

RE: H.B. 553; RELATING TO CRIMINAL DEFENDANT'S FITNESS TO PROCEED.

Chair Nishimoto, 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 (Department) submits the following testimony in opposition of H.B. 553.

The purpose of H.B. 553 is to reduce the amount of qualified examiners appointed in felony cases from three (3) to one (1).

Due to the serious nature of felony offenses, the Department strongly believes that the current procedure, appointing three (3) qualified examiners to determine the mental competency for a felony defendant to stand trial, is warranted and should not be downgraded. The assessment of one's mental condition is not a black-and-white science, and is often subject to differing opinions, so it is crucial that the court and all stakeholders have the benefit of receiving multiple opinions in every felony case. If this proposal went into law, every felony offense, ranging from class C felony offenses to the most serious class A felony offenses would be determined by one (1) examiner. Aside from the limited information provided by one (1) examiner, decreasing the number of examiners from three (3) down to one (1) would also eliminate the additional value of having at least one psychiatrist and one psychologist per felony mental competency examination. It is our understanding that psychiatrists and psychologists have different areas of expertise, and thus provide different perspectives on each defendant. The Department strongly believes that the existing statutes currently contain 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 felony cases where a defendant's mental fitness is in question.

For all of the reasons stated above, the Department of the Prosecuting Attorney of the City and County of Honolulu opposes H.B. 553. Thank you for the opportunity to testify on this matter.



Hawai'i Psychological Association

For a Healthy Hawai'i

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Testimony in Opposition to HB 553 Relating to Criminal Defendants' Fitness to Proceed February 7, 2017

Honorable Chair Nishimoto, Honorable Vice-Chair San Buenaventura, and Members of the Committee,

My name is Dr. Raymond Folen. I am the Executive Director of the Hawaii Psychological Association and I would like to provide testimony in strong opposition to HB 553.

Research in Hawaii by Drs. Neil Gowensmith and Marvin Acklin has shown that the level of agreement between three panelists is relatively low in all areas of forensic mental health. Given this reality, the three panel system provides information of critical importance to the judge. For example, judges strongly benefit from consensus panels (three agreements or two versus one), and utilize that consensus in almost 100% of cases. 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 reviewing the three independent reports when arriving at a determination. Without a three panel system, judges will not have access to this critical information.

The bottom line is that the quality of justice meted out in cases of mentally ill defendants will be sacrificed due solely to financial considerations if HB 553 is passed into law. The costs of errors in judicial decision making are highly consequential: a dangerous defendant may be released, a safe defendant may be detained, a non-competent defendant may go on trial, a competent defendant may be hospitalized, an insane defendant may go to prison and a sane defendant may be acquitted.

Hawaii's three panel system has been held out as a national model in ensuring the independence of forensic mental health evaluations. In contrast, when evaluators are retained by the defense or prosecution, systematic bias is present, as has been conclusively demonstrated by Dr. Dan Murrie of the University of Virginia. Without a three panel system, there will be an increase in defense/prosecutor-paid evaluations and their resultant bias, something that has been observed in other states.

Evidence from other states also demonstrates that there will be increased court delays if HB 553 is passed. Colorado, for example, has a one panel system. Judges there often find the single evaluation insufficient and require a subsequent exam that consumes additional time and further delays the judicial process. Similarly, in a two panel system like New York, disagreement in the evaluations of the two experts often results in the order for a third evaluation, which further slows the process.

Forensic mental health evaluations are not a perfect science. There continues to be significant variation in the findings of forensic evaluators. Without the checks-and-balances that an independent three panel process affords, our judges will not have the opportunity to appropriately weigh the critical information needed to make the best possible decisions. Please do not pass this bill.

Raymond A. Folen, Ph.D., ABPP
Executive Director

From: mailinglist@capitol.hawaii.gov
Sent: Saturday, February 4, 2017 8:23 PM
To: JUDtestimony
Cc: louis@hawaiiidisabilityrights.org
Subject: Submitted testimony for HB553 on Feb 7, 2017 14:00PM

Categories: Blue Category

HB553

Submitted on: 2/4/2017

Testimony for JUD on Feb 7, 2017 14:00PM in Conference Room 325

Submitted By	Organization	Testifier Position	Present at Hearing
Louis Erteschik	Hawaii Disability Rights Center	Comments Only	Yes

Comments: This issue was extensively discussed last session. The impetus for that had been a complaint filed with the US Department of Justice regarding the delays experienced by pre-trial detainees awaiting examinations for competency or for fitness to proceed. During those delays, individuals with mental illness were not necessarily receiving appropriate treatment. Much of this resulted from a shortage of forensic examiners at the Department of Health. The legislature considered the same provision in this bill but properly decided that the better approach was not to lower the quality of the exams, but to ensure that more examiners would be available. Prior to last session the issue was also exhaustively considered by a Judiciary Task Force established pursuant to Legislative Resolution. The Task Force did not recommend this provision. After many hearings last session a well thought out compromise was reached, with input from all stakeholders, which left the current law in tact for the initial exams but did reduce the number of examiners required for restoration of fitness examinations. Additionally, the Department of Health has managed to fill positions within the Division that carries out this function. For those reasons, we think this issue was pretty well settled last session and that it would be better to allow the bill that was passed to have a chance to work and we do not see any reason to otherwise re-visit the issue this session.

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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Representative Scott Nishimoto, Chair, State House of Representatives, Judiciary Committee

Dear Representative Nishimoto:

Thank you for the opportunity to testify against HB553.

I am writing in opposition to HB553. It seems that every year this issue is raised, and fortunately professionals and legislatures have had the good sense to strike it down each year as well. This year should be no different. Arguments raised suggest that the 3-panel process slows down the wheels of justice and is unnecessarily expensive. These two arguments are spurious at best.

The 3-panel process does not slow down the court proceedings. Evaluators must wait on sufficient records to conduct these evaluations, as is consistent with ethical and standard practice around the country. This is the main source of delay, if delays are experienced. Making this process more efficient would solve this issue, while eliminating 2 evaluators would do little to speed up the process. An ethical evaluator will wait for the records and then conduct the evaluation quickly thereafter. Moreover, the vast majority of these evaluations are conducted in the community or in county jails; the expense incurred waiting for a third report is small given the importance of these evaluations.

These evaluations hold the keys to the highest levels of security, treatment, and cost that Hawai'i can incur. They are incredibly persuasive to the courts (research in Hawai'i shows that courts follow the recommendations of the majority of evaluators in more than 80% of cases). In short, these evaluations are *extremely* important, and having multiple opinions on felony cases is crucial. You don't want to get these decisions wrong. You'll either put a person with serious mental illness in a jail where they will be likely to be victimized, or you'll put a person without mental illness into the Hawai'i State Hospital where they will take a bed more a more deserving person and be a security threat to the patients and staff there. Cutting corners and limiting the breadth of professional opinions will prove disastrous for Hawai'i. My research in Hawai'i shows quite clearly that the 3-panel system works – it puts the right people into the right places. There have been no lawsuits or civil litigation on this point, unlike many states. Of course, sometimes even evaluators get it wrong, and of course the process can be made more efficient. However, bludgeoning the 3-panel process down to one evaluator will set Hawai'i up for serious logistical problems, expensive litigation, and – worst of all – violations of human rights when courts don't have the benefit of multiple opinions.

Sincerely,

Neil Gowensmith, PhD

Former Chief of Forensic Services, Adult Mental Health Division

From: mailinglist@capitol.hawaii.gov
Sent: Friday, February 3, 2017 7:11 PM
To: JUDtestimony
Cc: mlopes@hscadv.org
Subject: *Submitted testimony for HB553 on Feb 7, 2017 14:00PM*

Categories: Blue Category

HB553

Submitted on: 2/3/2017

Testimony for JUD on Feb 7, 2017 14:00PM in Conference Room 325

Submitted By	Organization	Testifier Position	Present at Hearing
Marci Lopes	Hawaii State Coalition Against Domestic Violence	Support	No

Comments:

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Justin F. Kollar
Prosecuting Attorney

Jennifer S. Winn
First Deputy



Rebecca Vogt Like
Second Deputy

Diana Gausepohl-White
Victim/Witness Program Director

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Victim/Witness Program 808-241-1898 or 800-668-5734

LATE

THE HONORABLE SCOTT NISHIMOTO, CHAIR
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Twenty-Ninth State Legislature
Regular Session of 2017
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For all of the reasons stated above, the Office of the Prosecuting Attorney of County of Kaua'i opposes H.B. 553. Thank you for the opportunity to testify on this matter.