



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

**Testimony COMMENTING ON SB2431  
RELATING TO QUALIFIED EXAMINERS**

SENATOR ROSALYN H. BAKER, CHAIR  
SENATE COMMITTEE ON COMMERCE, CONSUMER PROTECTION, AND HEALTH

SENATOR BRIAN T. TANIGUCHI, CHAIR  
SENATE COMMITTEE ON JUDICIARY

Hearing Date and Time: Thurs., February 22, 2018 at 9:00 a.m. Room Number: 229

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

2           **Department Testimony:** The Department of Health (DOH) supports the intent  
3 of SB2431 which eases the requirements of fitness to proceed examinations in felony  
4 cases by allowing the court to appoint at least one, but no more than three qualified  
5 examiners to evaluate a criminal defendant's fitness to proceed. Under the proposed  
6 revisions of Hawaii Revised Statutes (HRS), the court shall appoint a psychiatrist or a  
7 licensed psychologist to be the single examiner of fitness in felony cases, whereas  
8 additional examiners may be a psychiatrist, licensed psychologist, or qualified  
9 physician. This bill includes eliminating the appointment of an examiner designated by  
10 the director of health from the Adult Mental Health Division's (AMHD) Court Evaluation  
11 Branch.

1           The DOH thanks the legislature for its support of changes to statute to support  
2 the timely administration of examinations and the expedient administration of justice and  
3 offers the following comments.

4           With regards to the number of qualified examiners and the backlog as a rationale  
5 for the proposed changes included in this bill, the DOH would like to clarify the status of  
6 the AMHD's Court Evaluation Branch. In early 2015, the AMHD's Court Evaluation  
7 Branch was operating with 3.0 of 5.0 examiner full-time equivalent (FTE) staff. This  
8 staffing challenge was created by employee attrition, including retirement. As a result of  
9 40% vacancy status in this branch, backlogs were an issue at that time. The DOH  
10 addressed this issue by recruiting to fill these vacancies and reallocating resources to  
11 add two examiner positions, one office assistant position, and a branch supervisor  
12 position to address workload and efficiency. The AMHD's Court Evaluation Branch is  
13 currently 100% staffed and requests for continuance, due to workload issues, have  
14 significantly decreased by 85% since 2015. For example, during calendar year 2017,  
15 the average length of time between the AMHD's Court Evaluation Branch receiving an  
16 order for an examination pursuant to HRS 704-404 and delivering the report to the court  
17 was 44 days for felony cases. The DOH plans to contract with independent examiners  
18 to add supplementary forensic evaluative capacity as need arises.

19           Hawaii is the only state that systematically requires three evaluations in the  
20 instances of felony charges. No other state requires this. A number of important  
21 questions are raised as a result of this. For example, how much better are outcomes in

1 Hawaii given this arrangement? Are the outcomes better at all? When the AMHD  
2 asked these questions previously, stakeholders in the judicial process have indicated  
3 their preferences for the present arrangement.

4 The DOH is not aware of evidence that indicates that having three expert  
5 examiner opinions results in more valid decisions compared to having one expert  
6 examiner's opinion.

7 Hawaii's procedure for examination of fitness in felony cases generates a  
8 significant expense. The Judiciary, for example, pays approximately \$1,000 per  
9 examination conducted by an independent examiner. This amount translates to  
10 approximately \$2,000 per three panel examination ordered. In 2017, there were  
11 approximately 478 individuals with felony charges ordered for an evaluation of fitness.  
12 The direct cost of the examinations for these individuals is estimated to be \$956,000.00.

13 The DOH is concerned that this bill, as written, does not clearly identify what  
14 entity would appoint and compensate examiners under the proposed arrangement. It is  
15 our understanding that in some circuit courts, parties indicate their preference regarding  
16 independent examiner assignments to the court clerk. This practice may increase the  
17 likelihood that one of the three expert opinions will align with the interest of the parties  
18 (defense or prosecution). The current arrangement, assigning the evaluation (or one of  
19 the three) to an examiner designated by the director of health from the AMHD's Court  
20 Evaluation Branch is efficient and transparent. If the defense or prosecution seeks the  
21 assessment of an additional, specific evaluator, the parties could hire their preferred

1 examiner in support of their position. We offer the comment that if there are multiple  
2 evaluators assigned by the judiciary these might be neutrally or randomly chosen.

3         The DOH is concerned about and does not support the deletion of language  
4 requiring that the one examiner be designated by the director of health for all court  
5 ordered examinations. Again, it is critical to have an examiner who is neutral and  
6 whose compensation is not tied to a particular outcome.

7         It is in the best interest of the defendants, the judiciary, and for the State for the  
8 examination process to proceed in a timely, expedient manner. Hawaii must pursue a  
9 variety of initiatives focused on the safe, effective, and efficient delivery of mental health  
10 supports and forensic evaluations. We thank the Legislature for its continued support  
11 for providing an effective continuum of mental health services. Clearly all branches of  
12 government have critical roles in making this system function effectively. We will  
13 continue to work with the legislature and key stakeholders to address specific issues  
14 relating to this key policy area.

15         Thank you for the opportunity to testify.

DEPARTMENT OF THE PROSECUTING ATTORNEY  
**CITY AND COUNTY OF HONOLULU**

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

KEITH M. KANESHIRO  
PROSECUTING ATTORNEY

CHASID M. SAPOLU  
FIRST DEPUTY PROSECUTING ATTORNEY



**THE HONORABLE ROSALYN H. BAKER, CHAIR  
SENATE COMMITTEE ON COMMERCE,  
CONSUMER PROTECTION, AND HEALTH**

**THE HONORABLE BRIAN T. TANIGUCHI, CHAIR  
SENATE COMMITTEE ON JUDICIARY  
Twenty-Ninth State Legislature  
Regular Session of 2018  
State of Hawai`i**

February 22, 2018

**RE: S.B. 2431; RELATING TO QUALIFIED EXAMINERS.**

Chair Baker, Chair Taniguchi, Vice Chair Tokuda, Vice Chair Rhoads, and members of the Senate Committee on Commerce, Consumer Protection, and Health and, and members of the Senate Committee on Judiciary, the Department of the Prosecuting Attorney of the City and County of Honolulu (“Department”) submits the following testimony in opposition to S.B. 2431. Not only would the proposed changes present an unnecessary risk to the defendant and to the judicial process—by removing the inherent benefits of having three (3) mental health examiners assessing a person’s competency to stand trial in felony cases, but it would also run directly contrary to important considerations recognized in the passage of Act 198 (2016), which were expressly recognized and endorsed by the Department of Health (“DOH”).

In order to ensure that due process rights are upheld, our courts must have a clear picture of each defendant’s fitness to stand trial, based on reliable, comprehensive information. This is particularly true when defendants are charged with committing felony offenses, which can result in very serious penalties. Contrary to this significance, reducing the number of health professionals needed to determine mental fitness—regardless of the stage in judicial proceedings and regardless of the level of crime—would inherently decrease the reliability of the results.

As previously noted by DOH, the current requirement for three (3) examiners provides an important safeguard that is not only relevant to the current determination, but also considered in future determinations of a person’s mental fitness (or un-fitness). Act 198 (2016), Section 4 (pp.

17-27), decreased the number of mental health examiners needed to assess a re-gaining of fitness to proceed—after a felony defendant is initially found unfit—from three (3) to one (1). During the course of hearings on that matter, DOH endorsed this change, but noted that all defendants charged with class A felonies, first and second degree murder or attempted first and second degree murder, would still be examined by three (3) qualified examiners.<sup>1</sup> Moreover, DOH emphasized that:

The proposed changes only narrowly impact the re-examination of fitness for defendants with Class B and C felonies. The one examiner appointed by the director of health from within the DOH for all petty misdemeanors, misdemeanors, and Class B and C felonies **will have access to the reports from the original three examiners** appointed pursuant to HRS §704-404 and the recommendations and records from the inpatient or outpatient treatment teams. **The proposed changes do not alter the three panel assignment in felony cases for initial assessment of fitness to proceed** and penal responsibility, placement into conditional release status, or discharge from conditional release status.<sup>2</sup>

Because the examiner(s), court and other stakeholders assessing a defendant's re-gaining of fitness are able to review reports from the three (3) initial fitness examiners, DOH maintained that that was an adequate safeguard to ensure a proper assessment.

If S.B. 2431 became law, this crucial safeguard would no longer be in place, and determination of a defendant's mental fitness to stand trial in every felony case including any murder in the first or second degree, attempted murder in the first or second degree and all class A felonies could be based on the opinion of one (1) examiner from the very beginning, without the benefit of a second (or third / 'tie-breaker') opinion. This also disregards the heightened seriousness of determining the mental fitness (or un-fitness) of someone charged with class A felonies or murder, which are the highest level of crime recognized by our State.

In the Department's experience, assessment of one's mental condition is not a black-and-white science, and is often subject to differing opinions. Thus, it is crucial that the court and all stakeholders have the benefit of receiving multiple opinions in all felony cases, to most accurately assess that defendant's fitness to stand trial. In addition, decreasing the required number of examiners from three (3) down to one (1) in all felony cases would eliminate the 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

---

<sup>1</sup> See pg. 4, written testimony to the Senate Committee on Ways and Means, submitted by the State of Hawaii, Department of Health, dated February 24, 2016; available online at [https://www.capitol.hawaii.gov/Session2016/Testimony/SB2888\\_SD1\\_TESTIMONY\\_JDL-WAM\\_02-24-16.PDF](https://www.capitol.hawaii.gov/Session2016/Testimony/SB2888_SD1_TESTIMONY_JDL-WAM_02-24-16.PDF) (last accessed February 21, 2018) (emphasis added). See also pg. 5, written testimony to the House Committee on Health, submitted by the State of Hawaii, Department of Health, dated March 16, 2016; available online at [https://www.capitol.hawaii.gov/Session2016/Testimony/SB2888\\_SD2\\_TESTIMONY\\_HLT\\_03-16-16\\_.PDF](https://www.capitol.hawaii.gov/Session2016/Testimony/SB2888_SD2_TESTIMONY_HLT_03-16-16_.PDF) (last accessed February 21, 2018) (emphasis added). See also pg. 5, written testimony to the House Committee on Judiciary, submitted by the State of Hawaii, Department of Health, dated April 1, 2016; available online at [https://www.capitol.hawaii.gov/Session2016/Testimony/SB2888\\_HD1\\_TESTIMONY\\_JUD\\_04-01-16\\_.PDF](https://www.capitol.hawaii.gov/Session2016/Testimony/SB2888_HD1_TESTIMONY_JUD_04-01-16_.PDF) (last accessed February 21, 2018) (emphasis added).

<sup>2</sup> *Id.*

expertise, and thus provide slightly different perspectives on each defendant and their mental state. Without a doubt, our courts are better equipped to render an informed decision on a defendant's competency when provided with opinions and recommendations from both disciplines.

Ultimately, limiting fitness examinations to one (1) examiner in all felony cases would nullify the safeguards endorsed by the Department of Health in Act 198, and further dilute the existing statutes by removing crucial and appropriate safeguards that are necessary to ensure the most accurate result in felony-level mental fitness proceedings.

For all of the foregoing reasons, the Department of the Prosecuting Attorney of the City and County of Honolulu opposes the passage of S.B. 2431. Thank you for the opportunity to testify on this matter.



**Office of the Public Defender  
State of Hawaii**



**Testimony of the Office of the Public Defender  
to the Committee on Commerce, Consumer Protection,  
and Health and to the Committee on Judiciary**

February 21, 2018

S.B. No. 2431: RELATING TO QUALIFIED EXAMINERS.

Chair Rosalyn H. Baker, Chair Brian T. Taniguchi and Members of the Committee:

The Office of the Public Defender strongly opposes passage of S.B. No. 2431. Our office is concerned that the data or statistics being relied upon for support of this bill are outdated and fail to reflect some of the recent changes in the processing of fitness hearings with the Courts. First, there was a time when the Courts and Corrections Division of the Department of Health was not fully staffed with doctors able to conduct fitness examinations on defendant's pending court hearings or trials. Their office was unable to get examinations done in a timely manner for some time and this did result in delays. However, they are now fully staffed and the backlog appears to have been dealt with. Examinations were postponed to accommodate the needs of the Courts and Corrections Division but they are no longer a matter of course. Four month delays are not common place in the Circuit Courts where felony cases are handled. Fitness examinations take 6-8 weeks as a matter of course. We are also concerned that statistics relating to misdemeanor cases are being used to justify a change in how felony cases are handled. Misdemeanors are subject to one panel examinations and all of these examinations are conducted by the Courts and Corrections Division. Our office is very concerned that Class A felonies and crimes involving violence will no longer have the benefit of a three panel as a matter of course which we consider valuable, necessary, and critical in helping people through the criminal justice system.

While we are mindful of a person's right to a speedy trial, we are also mindful that we need accurate insight into the mental state of a person and that person's right to fully understand the proceedings, to meaningfully participate in their case, and to help make decisions. A three panel examination is necessary and essential to protecting a person's due process rights for felony cases. In many cases, the desire to push a person through the system quickly, under the guise of protecting the speedy processing of a case, is counter-productive. Our office has seen many cases where the three panel of examiners disagree on whether or not a person is fit to proceed or whether they will likely regain fitness or whether they are in need of additional care and treatment to stabilize that person in need of mental health treatment. In these situations, it is invaluable to have the input of a three panel to provide guidance to the court, especially for Class A felony cases



and for crimes involving violence. The views of all three examiners are considered valuable and are taken into account by the Courts in deciding whether a person charged with a felony offense should remain in custody in a detention facility, be sent to the Hawaii State Hospital for care and treatment, or, be released into the community for care and treatment if deemed appropriate.

We do acknowledge that fitness exams require time and effort and we have seen an increase in person with mental health issues entering the criminal justice system as community resources struggle with funding and manpower issues. We submit that the three panel is necessary and important now more than ever in light of this increase.

For these reasons, we strongly oppose S.B. No. 2431.

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



**TESTIMONY OF  
THE DEPARTMENT OF THE ATTORNEY GENERAL  
TWENTY-NINTH LEGISLATURE, 2018**

---

**ON THE FOLLOWING MEASURE:**

S.B. NO. 2431, RELATING TO QUALIFIED EXAMINERS.

**BEFORE THE:**

SENATE COMMITTEES ON JUDICIARY AND  
COMMERCE, CONSUMER PROTECTION, AND HEALTH

**DATE:** Thursday, February 22, 2018      **TIME:** 9:00 a.m.

**LOCATION:** State Capitol, Room 229

**TESTIFIER(S):** Russell A. Suzuki, Acting Attorney General, or  
Lance Goto, Deputy Attorney General.

---

Chairs Taniguchi and Baker and Members of the Committees:

The Department of the Attorney General ("the Department") opposes this bill.

The purpose of this bill is to allow a court to appoint from one to three qualified examiners in felony cases to determine a defendant's fitness to proceed with the criminal case. The fitness determination is done at a critical stage in the prosecution of a case, when the alleged defendant has been apprehended and charged, and relying on one examiner to make such an important decision would not ensure that the public is protected.

Respectfully, the Department believes that this bill is intended to address a concern that is based on a misunderstanding or inaccurate information.

On page 1, lines 4-9, the bill sets out the concern it is intended to address:

There are currently many legal proceedings that are not being completed in a timely manner due to the high number of cases that require examiners and the lack of qualified examiners in the State. Due to the backlog of fitness examinations, persons spend an average of four months in custody while awaiting examinations.

It appears that the main concern is the extended period of time that defendants are being held in custody and taking up bed space at the Hawaii State Hospital while awaiting fitness examinations. The concern appears to be based on a misunderstanding or on inaccurate information. There is no backlog of fitness

examinations that has resulted in persons spending "an average of four months in custody while awaiting examinations." The Department has confirmed this with representatives of the Department of Health and Hawaii State Hospital. Fitness examinations conducted by three-member panels are being completed in far shorter time periods.

State laws regarding fitness examinations have been evaluated and amended several times since 2014. In 2016, Act 198 addressed forensic mental health procedures and made extensive revisions to chapter 704, Hawaii Revised Statutes (HRS). Starting on page 3, line 16, Act 198 states:

The purpose of this Act is to decrease the time defendants spend in state custody waiting for forensic mental health examinations and shorten the time to reach rulings on fitness to proceed and penal responsibility. This Act establishes evaluations for determining initial fitness to proceed and capacity for penal responsibility by one examiner for certain defendants, separates evaluation for fitness to proceed and for penal responsibility, and codifies procedures for reevaluation of fitness to proceed.

Act 198 was passed to address the very concern being raised in this bill. A key part of the Act was the separation of fitness evaluations from examinations for penal responsibility. Examinations for penal responsibility are much more involved and time consuming than fitness evaluations, which do not require examiners to review reports and records related to the alleged crime. As a result, the time to conduct just the fitness examinations is expected to be much shorter.

It should be noted that in felony cases, fitness examinations are currently done by three qualified examiners. In nonfelony or misdemeanor cases, fitness examinations are currently done by one qualified examiner. This distinction was established in the law because felony cases are the more serious crimes, and the disposition of those cases can have significant impacts on the defendant, the criminal proceeding, and public safety. For these reasons, it is important to get an accurate determination of fitness, and the opinions of three examiners, including at least one psychologist and one psychiatrist, should result in a more accurate determination than the opinion of just one examiner.

It should also be noted that fitness examinations may be conducted while the defendant is in custody, out of custody, or committed to the hospital or other suitable facility.

The Department respectfully recommends that this measure be held.



# Hawai'i Psychological Association

## *For a Healthy Hawai'i*

---

P.O. Box 833  
Honolulu, HI 96808

[www.hawaiipsychology.org](http://www.hawaiipsychology.org)

Email: [hpaexec@gmail.com](mailto:hpaexec@gmail.com)  
Phone: (808) 521-8995

Committee on Judiciary  
Senator Brian T. Taniguchi, Chair  
Senator Karl Rhoads, Vice Chair

Committee on Commerce, Consumer Protection and Health  
Senator Rosalyn H. Baker, Chair  
Senator Jill N. Tokuda, Vice Chair

Thursday, Wednesday February 22, 2018, 9:00AM  
Conference Room 229

### **Testimony in STRONG OPPOSITION to SB 2431**

SB 2431 is a poorly thought out proposal that will very likely increase the length of time it takes to complete court ordered fitness to proceed evaluations. The bill does not understand or adequately address the relevant issues. At a time when referrals for fitness to proceed evaluations have doubled nationally, the State's Court Evaluation Branch has been chronically understaffed and there has been no effort to train and certify forensic examiners in the last six years. This has resulted in unacceptably long wait times. To further compound the problem, a shortage of psychiatric beds is resulting in criminal charges against persons who could otherwise be civilly committed, without costly evaluations, if only hospitals beds in the community were available. The current laws governing fitness evaluations have been in place for over three decades. The wait times were within acceptable limits until six years ago. The average wait time for completion of fitness evaluations is currently two to three months (not four months as stated in the bill's introduction).

If SB 2431 is passed in its present form, we can expect even longer delays. If the bill is interpreted literally as only applying to fitness exams, then three panels for dangerousness and State Hospital commitment would also need to be ordered when the one panel examiner assesses the defendant as unfit to proceed. Typically, orders to evaluate both fitness to proceed and penal responsibility are ordered at the same time; under the provisions of this bill, the required three panel examination will in many cases be delayed while awaiting the one panel results. This doesn't make any sense.

When an examiner is unable to reach an opinion or when a one panel examination contains insufficient information – situations that are not uncommon - more examinations will be ordered, needlessly adding to the length of time to reach a decision on fitness.

SB 2431 was drafted without input from judges, defense attorneys, prosecutors, patient rights advocates and the mental health professionals who perform the exams, all of whom have historically opposed one panel evaluations of fitness to proceed in felony cases. In contrast to this bill, the existing law was drafted by a task force of stakeholders who designed the three panel system in order to remediate common flaws found in other states. For example, the examiner inter-rater reliability for initial fitness to proceed evaluations averages around 70%. It is as low as 60% for penal responsibility and 50% for dangerousness evaluations. This bill reduces a judge's ability to make an informed decision as it requires judges to rely on the opinion of only one examiner when another examiner would provide a different opinion at least 30% of the time. In many cases, reliance on a single evaluator's opinion will result in the judge inappropriately sending a fit individual to the State Hospital or inappropriately putting an unfit person on trial.

This bill will also increase the likelihood that the defense or the prosecution will hire additional evaluators, resulting in further delays. These 'hired guns' have also been found to exhibit bias. Research conducted by the University of Virginia has conclusively demonstrated a systematic bias in defense/prosecutor retained evaluations. In contrast, the current three-panel system hires independent evaluators who serve as 'friends of the court'; the likelihood of systematic bias is significantly less.

This bill would also allow non-licensed psychologists to evaluate fitness to proceed. It is inconceivable that someone who understands the complexity of fitness to proceed evaluations would allow them to be done by unqualified people.

The rationale for SB 2431 is wrong when it implies that Hawaii is somehow "backward" or behind the curve in having a unique system. The trend nationally is towards increasing the number of examiners due to problems with inter-rater reliability, systemic bias and delays. National experts who have reviewed our system have recommended it as a model for other states. We believe that the courts in Hawaii do a better job of achieving justice than most states in the continental U.S., where it is relatively common to find severely mentally ill persons inappropriately placed in jails and prisons, and people without severe mental illness committed to state psychiatric hospitals. Proponents of SB 2431 have not adequately assessed the negative impact of this bill. The Hawaii Psychological Association strongly urges you to defeat SB 2431.

Thank you for your consideration.

Tanya Gamby, Ph.D.  
President



Groundswell Services, Inc.

---

Committee on Judiciary  
Senator Brian T. Taniguchi, Chair  
Senator Karl Rhoads, Vice Chair

Committee on Commerce, Consumer Protection and Health  
Senator Rosalyn H. Baker, Chair  
Senator Jill N. Tokuda, Vice Chair

Thursday, Wednesday February 22, 2018, 9:00AM  
Conference Room 229

**Testimony in STRONG OPPOSITION to SB 2431**

I am writing in **strong opposition to SB 2431** for several reasons. I believe this poorly crafted bill will do more disservice to the citizens, judiciary, and mental health systems in Hawaii than good.

There are several misconceptions about the current three-panel process. Some believe it to be unnecessary and cumbersome, stating that one psycholegal opinion can function in the place of three opinions. This is inaccurate. Good research, based entirely upon real reports submitted to the Hawaii judiciary on real cases, shows conclusively that multiple opinions are critical to “get it right.” The goal of mental health expert testimony in cases of fitness to stand trial or criminal responsibility is to provide reliable and valid information for the court’s consideration. These cases are often difficult. In spite of some “black and white” cases, a large number of cases fall into a “grey” area in which experts disagree. Disagreement among evaluators in Hawaii has shown to range from 29% - 49%. These disagreement rates indicate that multiple opinions are needed in order to advise the court properly – **having the court make an inaccurate decision can lead to dire consequences such as massive taxpayer expenses for inappropriate hospitalizations, prolonged judicial appeals, and civil**

**liberty lawsuits.** When the court has multiple opinions, they are more likely to make a correct decision about hospitalization or community release.

Critics also state that the process is unnecessarily expensive. The amount of money Hawaii spends on the three-panel process is a drop in the bucket compared to the massive increase in inappropriate hospitalizations that would occur in a one-panel process. Again, research on cases from Hawaii shows that the three-panel process results in many appropriate diversions from the Hawaii State Hospital. If only one evaluator is used, that case has a much greater likelihood of being recommended for hospitalization. The three-panel process resulted in a diversion rate of more than 20% of all cases. The hospitalization rate for one-panel evaluations (67%) is substantially higher than the hospitalization rate for three-panel evaluations (52%). Some of this difference is accounted for by clinical factors, but much of it is also accounted by the reality that a single evaluator, left on their own to advise the court about dangerousness, is more likely to “err on the side of caution” and recommend hospitalization than those evaluators that are part of a larger process of multiple opinions. If the three-panel process is eliminated, **hospitalization rates and numbers will increase significantly – costing far more money than would be saved with the change.**

Critics also maintain that Hawaii’s unique three-panel system is somehow antiquated or backwards compared to other states. It is true that Hawaii is the only state with a three-panel system. But this is one of those instances in which Hawaii is ahead of the curve. I consult with state forensic mental health systems in many states, several of which have one-panel systems, and I routinely recommend multiple evaluators and opinions be used based solely on the data collected from the Hawaii system. The three-panel system was well-thought out by previous legislators. They got it right, and many states look to Hawaii as a model system. New York, for example, recently increased the number of evaluators required to opine on fitness and criminal responsibility cases. **Hawaii’s three-panel process is a national exemplar.**

**Costs and delays can be better addressed through other, cheaper, simpler fixes.** Trainings for evaluators are critical and have not regularly occurred in Hawaii for several years. Helping evaluators understand how to arrive at reliable and valid opinions is the most important piece of this puzzle, so that courts have accurate information on which to act. The DOH is tasked with this mandate but to my knowledge has not maintained trainings or a list of certified examiners. Also, truly bifurcating evaluations



will shorten the time needed to conduct evaluations. Evaluations of criminal responsibility are far more in-depth and time-consuming than fitness evaluations, and they require much more background information. Requiring less comprehensive background information for fitness-only evaluations will dramatically reduce the amount of time it take to conduct most evaluations. A 30-day turnaround period for fitness evaluations is absolutely realistic in Hawaii if there are enough evaluators, if the background information is readily available, and if the defendants are accessible. All of these conditions can easily be met in Hawaii, and none require a change to the current three-panel system.

Thank you for the opportunity to submit testimony in this matter. I am submitting this testimony as an individual, despite my former affiliation with the State of Hawaii's Adult Mental Health Division.



---

Neil Gowensmith, PhD  
President, Groundswell Services Inc.  
Former Chief of Forensic Services, Adult Mental Health Division, State of Hawaii

**SB-2431**

Submitted on: 2/20/2018 6:27:24 PM

Testimony for JDC on 2/22/2018 9:00:00 AM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Louis Erteschik	Testifying for Hawaii Disability Rights Center	Oppose	No

## Comments:

This issue was extensively discussed during the past few sessions. 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. 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 two sessions ago 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, to our knowledge, the Department of Health has managed to fill positions within the Division that carries out this function. For those reasons, we think this issue has been pretty well settled and that it would be better to allow the bill that was passed two years ago to have a chance to work and we do not see any reason to otherwise re-visit the issue this session.

**SB-2431**

Submitted on: 2/20/2018 9:16:29 PM

Testimony for JDC on 2/22/2018 9:00:00 AM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Marvin W Acklin PhD	Individual	Oppose	No

Comments:

[COMMITTEE ON COMMERCE, CONSUMER PROTECTION, AND HEALTH](#)

Senator Rosalyn H. Baker, Chair

Senator Jill N. Tokuda, Vice Chair

[COMMITTEE ON JUDICIARY](#)

Senator Brian T. Taniguchi, Chair

Senator Karl Rhoads, Vice Chair

Testimony submitted regarding SB2431 for hearing scheduled on 08/22/2018, 9:00 AM

The undersigned has conducted over 600 forensic examinations of defendants under HRS 704-404.

The undersigned has published 5 peer reviewed articles on Hawaii's three panel system for the adjudication of fitness to proceed, criminal responsibility, and conditional release. These references are listed at the end of this testimony. Of special interest of these studies is the a) quality of the reports submitted to the judiciary and b) levels of agreement (that is, reliability) between independent examiners and the judicial determinations.

It is incumbent upon the legislature that sound public policy should be based on empirical evidence. The bill makes the following unsubstantiated assumptions:

1. examinations are not being completed in a timely fashion (p. 1, line 5).

Response: before changing the current system, there should be an examination of the truthfulness of this claim and a better understanding of the cause of the delay if there actually is one. The infrastructure for the adjudication of fitness to stand trial involves a complex system of stake holders with a lot of moving parts.

2. there is a "lack of qualified examiners" (p.1, line 7).

Response: What is the basis for the claim that there is a lack of qualified examiners? What is the definition of a qualified examiner? The DOH is responsible for qualifying examiners but has not provided any training or continuing education for many years. Furthermore, the DOH has never completed the process of certification that ensures qualifications of examiners. Finally, the bill purports to solve the problem of lack of timeliness, and lack of qualified examiners with the replacement of three independent examiners with one. It is not clear how this is supposed to improve the quality of the reports and the process for adjudicating fitness.

3. “reducing the number of qualified examiners” (p. 1, line 14).

Response: Peer-reviewed research on Hawaii’s three panel system has consistently demonstrated that reports from three independent examiners significantly improves the accuracy of judicial decision-making. Modeling agreement using two and one panel examinations significantly reduces the accuracy of judicial determinations. The costs of errors is significant, whether wrongly determining a fit individual unfit, or an unfit individual fit. The quality and reliability of examiner professional work, and quality of judicial determinations is currently a national scandal that has captured to the attention of the National Science Foundation and others (National Research Council, 2009).

4. “...qualified examiners in felony cases, and one qualified examiner in non-felony cases...” (p. 2, lines 7-8).

Response: there is no explanation for what constitutes necessary qualifications. This has never been defined in statute or court regulations.

5. “or qualified physician” (p. 2, line 13).

Response: As above, there is no definition of what constitutes a “qualification,” nor is there any justification of the appointment of a “physician,” since only mental health professionals would ordinarily possess the basis education, training, and experience to qualify as experts.

6. Removal of the language: “One of the three examiners shall be a psychiatrist or licensed psychologist designated by the director of health” (p. 2, lines 13-14).

Response: It is certainly possible to shift to an all-community examiner pool. However, past research has shown the “state designates” typically produced higher quality reports than community-based examiners.

7. “...the term “licensed psychologist” includes psychologists exempted from licensure by sections 465-3 (a) (3)...”

Response: the meaning of this sentence is vague. A fundamental qualification to serve as an expert is based on education, training, and experiences, and licensure should be considered a necessary if not sufficient condition for appointment. Since the reduction of

panels from one to three is likely to aggravate problems with quality of examinations, approval of less qualified mental health professionals is only likely to degrade the process further.

8. "all examiners shall be appointed from a list of certified examiners as determined by the department of health" (p. 2, lines 17-1).

Response: There is no list of certified examiners. Although there is a legislative mandate for the certification of examiners in order to insure the quality of work which is consistent with best practices in the field of forensic mental health, efforts to train and certify examiners have faltered. There has not been a DOH sponsored annual training program in over 5 years. In the absence of regular and ongoing training, research in best practices has consistently demonstrated that the quality of examiners' work degrades over time. The net effect of this bill will be to appoint a lesser number of examiners to the panels, where the overall qualification of examiners is degraded. The net effect of this is predictable, poorer quality work going to judges, and poorer quality judicial determinations. To its credit the three panel system as it currently exists has the merit of three independent reports which judges can use to determine the quality of the examinations and the resulting opinions.

Summary: The net effect of this legislation will be to degrade the already marginal quality of the forensic mental health examinations conducted for the Hawaii judiciary. The proposed bill does not address the root causes of the alleged problem. It shifts the focus away from where the proper amelioration is required, namely, definition of qualification of examiners, certification of examiners in according with statutory mandates, mandates for annual training of examiners, including a peer review system, and active efforts to train and recruit qualified examiners. Poor training, failure to maintain qualifications according to best practices cause a downhill cascade of poor quality with predictable results for both judges and defendants, and the quality of justice administered in the State of Hawaii.

For these reasons, I recommend that the committee kill this poorly thought out bill and establish a government and community-based task force to address the issue of timeliness, quality, and training for forensic examiners serving the Hawaii judiciary.

Disclaimer: The testimony provided here does not represent the State of Hawaii or any official agency, but is the opinion of the undersigned as a private citizen and licensed mental health professional.

Thank you for the opportunity to present this testimony in opposition to SB2431.

Marvin W. Acklin, PhD, ABAP, ABPP Sunday, February 19, 2018

Licensed Psychologist - 394

Board-certified Clinical, Assessment, & Forensic Psychologist

Associate Clinical Professor of Psychiatry

Department of Psychiatry

John A. Burns School of Medicine

University of Hawaii at Manoa

## References

Acklin, M.W., & Fuger, K. (2016). Assessing field reliability of forensic decision-making. *Journal of Forensic Psychology Practice, 16, 2, 74-93.*

Acklin, M.W., Fuger, K., & Gowensmith, N. (2015). Examiner agreement and judicial consensus in forensic mental health evaluations. *Journal of Forensic Psychology Practice, 15, 4, 318-343.*

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.*

Acklin, M.W. (2012). The Forensic Clinician's Toolbox I: Review of Competency to Stand Trial (CST) Instruments. *Journal of Personality Assessment, March; 94(2): 220-2.*

National Research Council. (2009). *Strengthening Forensic Science in the United States: A Path Forward*. Washington, DC: The National Academies Press.  
<https://doi.org/10.17226/12589>.

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.*

**SB-2431**

Submitted on: 2/16/2018 3:27:52 PM

Testimony for JDC on 2/22/2018 9:00:00 AM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Javier Mendez-Alvarez	Individual	Support	No

Comments: