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

SENATOR GILBERT S. C. KEITH-AGARAN, CHAIR
SENATE COMMITTEE ON JUDICIARY AND LABOR

SENATOR JILL N. TOKUDA, CHAIR
SENATE COMMITTEE ON WAYS AND MEANS
Hearing Date: February 24, 2016, 10:00 a.m. Room Number: 211

Fiscal Implications: Undetermined at this time.

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

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

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

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

Furthermore, while evaluations of fitness to proceed are utilized by the court in each instance that they are ordered, only some of the evaluations of penal responsibility are utilized. The reason for this is because the evaluations of responsibility only become relevant if the affirmative defense of lack of penal responsibility is argued by the defendant. We estimate that penal responsibility evaluations are used in only a minor fraction of the cases for which these exams are ordered and completed. Pairing them together is more burdensome to the examination process, lengthens the time to complete the evaluation and report to the court, and generates a product that may not be utilized during adjudication.

In addition, pairing fitness to proceed and penal responsibility in one evaluation creates an ethical dilemma for the examiners and legal concerns for the defendant. An unfit defendant may not have sufficient capacity to consult with defense counsel to determine the implications of providing information to the examiner during the penal responsibility component of the examination. The American Bar Association's Criminal Justice Mental Health Standards

(Standard 7-4.4; see attachment #1) recommends that an evaluation of the defendant's mental condition at the time of the alleged offense to determine penal responsibility should not be combined in any evaluation to determine fitness to proceed unless the defense requests it or unless good cause is shown. Examiners typically provide a warning to defendants regarding the forensic examiner's role and the non-confidential nature of the examination; a sample is provided for the committee's review (see attachment #2). However, the warning makes it clear that a defendant who is not fit to proceed would not have the capacity to understand the ramifications and agree to the interview for the penal responsibility examination. Proposed revisions also include modifying the availability of records gathered pursuant to HRS §704-404 to include prosecution and defense counsel, including a risk assessment of danger in the requirements for a fitness examination, and clarifying that the court's consideration of release on conditions is to be based on "substantial" danger to the defendant or the person or property of others.

The changes proposed in SB 2888 S.D. 1 separate the fitness to proceed and the penal responsibility components of examinations pursuant to HRS §704-4 and **does not change the current one panel and three panel structure of assignment to examiners**. With regards to the determination of a defendant's regained fitness to proceed under HRS §704-406, the current statute is **silent** with respect to the procedure to determine a defendant's regained fitness to proceed after the delivery of fitness restoration services from clinical professionals and treatment teams. The proposed changes in SB 2888 S.D. 1 codify a procedure to re-examine a defendant's fitness to proceed that includes: 1) the court may appoint a one qualified examiner for all petty

misdemeanors, misdemeanors, class B felonies, and class C felonies to be designated by the director of health from within the DOH and 2) the court shall appoint three qualified examiners for charges of murder in the first and second degrees, attempted murder in the first and second degrees and class A felony cases with one of the three designated by the director of health from within the DOH. 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.

Accordingly, this measure as drafted in SB 2888 S.D. 1 provides a more efficient pretrial process leading to a decrease in the amount of delays defendants experience due to the examination process and enables a more expedient administration of justice. Within the past year, a complaint was lodged with the Special Litigation Section of the U.S. Department of Justice (DOJ) alleging a violation of the Civil Rights of Institutionalized Persons Act (CRIPA) due to lengthy delays in court-ordered examinations related to **several** position vacancies within the DOH. This drew the attention of the Hawaii Disability Rights Center. If not remedied, the DOJ could launch a full investigation leading to legal action and oversight. This measure should also assist in ensuring a defendant's right to a speedy trial.

The DOH has met with key stakeholders including representatives of Criminal Justice Division of the Department of the Attorney General, the state Office of the Public Defender, and county Department of the Prosecuting Attorney to receive their feedback on the proposals contained within this bill. Feedback received during this process led to the DOH's support of SB 2888 S.D. 1. Most issues have been resolved. We recently received suggested revisions from the City and County of Honolulu Department of the Prosecuting Attorney. The DOH does not agree with its suggestions to weaken the provisions with respect to the separation of fitness to proceed evaluations from penal responsibility evaluations, and to make three panel evaluations the default for re-evaluations for fitness to proceed for all felony charges. We believe the reasons for those two proposals are sound. However, we do agree that the addition of the word "substantial" to describe the type of risk of danger required to order a defendant to receive fitness restoration services in the Hawaii State Hosptial rather than in the community, should be limited to the risk of danger to property only. We suggest that the language on page 17, lines 17 and 18 be changed to, "If the court is satisfied that the defendant may be released on conditions without danger to the defendant or to [~~the person~~] another, or risk of substantial danger to property of others, the court shall order the defendant's release…"

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

We have indicated to you previously and indicated to other stakeholders that **our current path is not sustainable**. Policy change will be required. We have determined that adjustments in statute pertaining to, in this instance, forensic exam procedures will be critical in improving the

efficient utilization of resources, addressing public safety and supporting the rights of defendants. Consistent with this we support the measure.

Thank you for the opportunity to testify.

Offered Amendments: None at this time.

PART I.

MENTAL HEALTH, MENTAL RETARDATION, AND CRIMINAL JUSTICE: GENERAL PROFESSIONAL OBLIGATIONS

Standard 7-4.4. Judicial order for competence evaluation

(a) Whenever, at any stage of the proceedings, a good faith doubt is raised as to the defendant's competence to stand trial, the court should order an evaluation and conduct a hearing into the competence of the defendant to stand trial. The court should follow this procedure whether the doubt arises from a motion of counsel, from information supplied by counsel, from the court's own observation of the defendant, or from any information otherwise known to the court.

(i) An evaluation of defendant's competence to stand trial should not be ordered by the court before there has been a judicial determination of probable cause for criminal prosecution unless the early evaluation is requested by defense counsel. If the court finds that the requisite probable cause for criminal prosecution does not exist, there should be no further inquiry into the defendant's competence to stand trial.

(ii) An evaluation to determine competence to stand trial should not be ordered before the defendant is represented by counsel who has had an opportunity to consult with the defendant and to be heard by the court.

(iii) The evaluator(s) appointed to perform the evaluation of the defendant's competence to stand trial should be persons qualified by training and experience to offer testimony to the court on matters affecting competence. A mental health or mental retardation professional who is appointed as an evaluator should have the qualifications set forth in standard 7-3.10.

(b) The order for evaluation should specify the nature of the evaluation to be conducted and should specify the legal criteria to be addressed by the evaluator in accordance with the requirements set forth in standard 7-3.5(d). Unless a joint evaluation has been requested by the defendant or for good cause shown in accordance with standard 7-3.5(c), the evaluation should not include an evaluation into the defendant's sanity at the time of the offense, civil commitment, or other matters collateral to the issues of competence to stand trial.

(c) Each jurisdiction should establish time periods by which the evaluation should be concluded and a report returned to the court. Such periods normally should not exceed [seven] days in the case of a defendant in custody nor [fourteen] days in the case of a defendant at liberty. For good cause, the time periods might be extended but should never exceed [thirty] days.

Sample Statement
Regarding Forensic Examiner's Role and Non-Confidential Nature of Examination

I am a psychologist/psychiatrist who has been ordered by the court to answer the following questions:

1. Do you understand the legal proceedings you are facing and can you assist your attorney in your defense?
2. What was your mental state at the time of the crimes you have been charged with committing?
3. Did you have a mental disorder?
4. At the time of the crime you are charged with committing, were you so mentally ill that the court should find you not criminally responsible?

Although I am a psychologist/psychiatrist, I will not be treating you. My purpose is to provide an honest evaluation, which you or your attorney may or may not find helpful.

You should know that anything you tell me is not confidential, as I have to prepare a report to submit to the court that the judge, the prosecutor, and your attorney will read. I may be asked to testify about the results of this evaluation and my opinion. It is important for you to be honest with me.

You don't have to answer every question, but if you choose not to answer one or do no cooperate, your refusal will be noted in my report.

Do you have any questions? Do you agree to continue with the interview?

Examiner Practice:

This "limits of confidentiality" warning is not the same thing as "informed consent" in that the defendants are not asked for permission for reports to be sent to the court as they have no legal right to prevent the court from receiving information from the examination. However, the defendant may refuse to participate in the examination.

The examination and subsequent report should include a brief assessment of the defendant's understanding of the information provided. When the warning is given, it is standard practice to assess the degree to which the defendant seems to have understood the warning. The report may include brief quotes from the defendant that suggest his or her understanding or confusion. Alternatively, the examiner may simply provide an opinion regarding whether the defendant appeared to comprehend the warning, if it is very clear that he or she did, for example by stating that "the defendant was able to accurately paraphrase the elements of this warning."

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THE HONORABLE JILL N. TOKUDA, CHAIR
SENATE COMMITTEE ON WAYS AND MEANS
Twenty-Eighth State Legislature
Regular Session of 2016
State of Hawai`i

February 24, 2016

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

Chair Keith-Agaran, Chair Tokuda, Vice-Chair Shimabukuro, Vice-Chair Dela Cruz, and members of the Senate Committee on Judiciary and Labor and the Senate Committee on Ways and Means, 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. 1.

The purpose of S.B. 2888, S.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. 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 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. Our judicial system routinely implements procedures that may be stricter then

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.

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, and any Class A felony cases,) 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, 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 <u>not</u> a black-and-white science, and is often subject to differing opinions, it is <u>crucial</u> 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. It is our understanding that psychiatrists and psychologists have different areas of expertise, and thus provide slightly different perspectives on each defendant. To reduce the panel would limit the overall picture of the defendant's fitness to either a psychiatrist or a psychologist point of view. 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 fitness proceedings to the opinion of one (1) examiner on initial or subsequent testing of fitness would be detrimental to accurately determining whether these individuals are fit to stand trial.

Lastly, S.B. 2888, S.D. 1 adds the word "substantial" to the danger that the court must find is not present prior to releasing the defendant on conditions. Our Department believes that this change from "risk of danger" to "risk of <u>substantial</u> 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 "<u>substantial</u>" danger. Public safety should be the highest concern when courts are determining conditional release for a defendant who has been subject to mental health examinations. This change would effectively create unnecessary sacrifices to public safety.

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. 1. Thank for you the opportunity to testify on this matter.

From: mailinglist@capitol.hawaii.gov
To: JDLTestimony
Cc:
Subject: Submitted testimony for SB2888 on Feb 24, 2016 10:00AM
Date: Monday, February 22, 2016 2:51:03 PM

SB2888
Submitted on: 2/22/2016
Testimony for JDL/WAM on Feb 24, 2016 10:00AM in Conference Room 211

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. We are keeping an open mind on the issue of reducing the panels to one examiner as proposed in this bill.In general,we feel that one panels will not provide the same level of justice to the defendant or the same quality of information to the Court as would three panels.However, in the case of re-evaluations of fitness to proceed, the concept may be worth further discussion.

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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To: Committee on the Judiciary and Ways and Means Committee (JDL/WAM), hearing on 02/24/2016.

Re: Testimony submitted for HB 2888 SD1
Proposal to use one examiner in re-evaluation for fitness to proceed.

From: Marvin W. Acklin, PhD, ABPP, ABAP, Independent Practice, Honolulu

To the Committee:

Thank you for the opportunity to offer testimony on this bill.

I am a board-certified clinical and forensic psychologist practicing in Honolulu since 1989. I have conducted approximately 600 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 5 peer-reviewed articles in forensic mental health journals. Citations to these studies are listed below. These studies were conducted against a background of national concerns about the quality of forensic evidence submitted to courts (National Research Council, 2009), including concern about methods, bias, and errors in forensic decision-making.

The first three studies examined forensic report quality for fitness, criminal responsibility, and conditional release reports submitted to the Hawaii Judiciary.

Regrettably, forensic report quality for fitness, criminal responsibility, and conditional release is mediocre to poor. 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.

We conclude that regular training of examiners is likely to significantly improve quality of forensic reports submitted to the courts.

Our most recent research examined panel agreement and how judges utilize three panel opinions in their determinations.

We applied statistical techniques which model judicial consensus using one, two, and three examiner opinions in the case of fitness to proceed, criminal responsibility, and post-acquittal conditional release.

Levels of agreement for fitness to proceed meet barely acceptable scientific criteria for inter-rater reliability (agreement coefficients in the .60 range).

These findings indicate that the findings submitted to judges are inconsistent. They indicate that examiners are not interchangeable. When you have poor agreement in the panel, it means the judge is not getting good information.

Poor examiner limits the reliability of information provided to the judge and introduces error into the determinations. The costs of errors are significant to defendants, the legal system, and society. The three panel system is a powerful antidote to this problem, since the judge has three independent examinations at his or her disposal.

In our research, judges clearly relied on panel consensus in their determinations. In cases where the was a consensus of three or two examiner opinions, judges tended to agree with the panel upward of 90% of the time.

Until three panels achieve acceptable levels of agreement, examiners are not interchangeable, and under the proposed legislation judges will be getting only one opinion for non-class A felonies.

For this reason, I would urge the committee to reconsider the language of this bill and restore a three panel in re-evaluations of fitness to proceed.

It may be argued that use of a one panel for re-evaluations of fitness may be more efficient for reducing the census at Hawaii State Hospital, but I would

suggest that this proposed legislation is the wrong solution for the right problem (HSH overcrowding).

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

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