

# **HAWAI'I CORRECTIONAL SYSTEM OVERSIGHT COMMISSION**

**2021 ANNUAL REPORT  
Submitted APRIL 2022**

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**COMMISSION MEMBERS**

Mark Patterson, Chair

Ted Sakai  
Martha Torney

Judge Mike Town (Ret.)  
Judge Ronald Ibarra (Ret.)

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## **INTRODUCTION**

The Hawaii Correctional System Oversight Commission (the Commission) was created by Act 179, Session Laws of Hawaii 2019, to “ensure transparency, support safe conditions for employees, inmates, and detainees, and provides positive reform towards a rehabilitative and therapeutic correctional system.” The establishment of the Commission was a result of recommendations provided by the Task Force on Prison Reform to the Hawaii State Legislature.

Part I of Act 179, SLH 2019 (codified in Chapter 353L, HRS), established the Hawaii Correctional System Oversight Commission and consolidated into it two existing commissions: the Reentry Commission and the Corrections Population Management Commission. Its five members are appointed by the Governor, the President of the Senate, the Speaker of the House, the Chief Justice, and the Office of Hawaiian Affairs Board of Trustees Chairperson.

The Commission's mandate includes:

1. Investigating complaints at correctional facilities;
2. Facilitating a correctional system transition to a rehabilitative and therapeutic model;
3. Establishing maximum inmate population limits for each correctional facility and formulate policies and procedures to prevent the inmate population from exceeding the capacity of each correctional facility;
4. Monitoring and reviewing the Comprehensive Offender Reentry Program; and
5. Ensuring that the Comprehensive Offender Reentry Program is working to properly provide programs and services.

In addition to the Commission members, Act 179 created an Oversight Coordinator to “administer” the Commission and empowered that position to investigate allegations of State law or rule violations, with expansive authority to obtain information, enter correctional facilities, and hold private hearings in accordance with Chapter 91, HRS. Similar authority was not granted to the Commission members.

## **LACK OF STAFF HAS IMPEDED THE COMMISSION'S WORK**

Fiscal Biennium 2019-2021 funds appropriated for the Commission were not released by the Department of Budget and Finance, precluding the Commission's ability to hire staff and greatly impeding progress in achieving its mandate. Much of the work of the Commission is delegated by Act 179 to the Oversight Coordinator.

The lack of staff did not deter the Commission from meeting regularly since its inception in January 2020. Members of the public, family members of those incarcerated, inmate advocates, criminal justice reformers, and others are active participants in the work of the Commission. Their participation has greatly contributed to what has been accomplished in the past two years. Public Safety Director Max Otani and Corrections

Deputy Director Tommy Johnson also attend our meetings, providing updates on COVID-19 in the correctional facilities and responding to questions raised by the Commission.

Under its mandate the Commission is responsible for establishing maximum inmate population limits for each State operated correctional facility. This was last done in 2001 under the auspices of the former Correctional Population Management Commission and those designated operational capacities continued to be used by the Department of Public Safety, with some deviation. During the pandemic, the Commission did establish Infectious Disease Emergency Capacities, which are discussed in the next section.

To the degree possible, the Commission responded to complaints submitted but were severely limited in our ability to investigate these complaints. Instead, the Commissioners relied on their knowledge of the judicial and correctional systems and brought the complaints and suggested resolutions to the attention of the Director of the Department of Public Safety.

Due to restrictions placed on access to correctional facilities during the pandemic, the Commission was less successful in monitoring and reviewing the comprehensive offender reentry program and ensuring that the comprehensive offender reentry system under Chapter 353H, HRS, is working properly. This will change with the appointment of staff and renewed access to correctional facilities.

Funds appropriated for Fiscal Year 2022 were released which allowed the Commission to move forward with hiring the Oversight Coordinator. The position was advertised on October 4, 2021, interviews conducted November 9 to 10, 2021, and three names forwarded to the Governor on November 19, 2021 as required by Act 179. No selection had been made by the end of Calendar Year 2021.

## **IMPACT OF COVID-19 ON HAWAII'S CORRECTIONAL SYSTEM**

Despite not having staff, during Calendar Year 2020 the Commission developed Infectious Disease Emergency Capacities in response to the outbreak of COVID-19. These capacities were utilized in March 2020 by the Hawaii Supreme Court's Special Master in addressing lawsuits concerning COVID-19 filed on behalf of incarcerated persons. Through these lawsuits, a significant number of pretrial and sentenced jail inmates were identified and released through a collaborative effort which included lower courts, prosecutors, defense attorneys, and the Department of Public Safety.

Once the lawsuits were resolved, the jail inmate population did increase but not to the level experienced prior to the law suit. In February 2020 the various Community Correctional Centers held 2,417 inmates, in April 2020 that number had been reduced to 1,672. Once the oversight by the Hawaii Supreme Court ended, the numbers did begin to creep back up to 1,879 as of December 31, 2021.

At no time were the Infectious Disease Emergency Capacities achieved.

## POSITION ON OCCC REPLACEMENT FACILITY

In December 2020, the Commission recommended that the planning for the new OCCC be paused and that the Department of Public Safety appoint a Community Advisory Committee to help explore programs, services and processes that can provide alternatives to detention, lessen the time from arrest to case disposition; and help facilitate the safe and effective release of convicted offenders into the community at large. The Department declined to appoint the recommended Committee and opted instead to proceed with the planning and development of the new OCCC.

In December 2021, the Commission affirmed its position that any planning and development of the new OCCC should be paused. This position was based on three factors. First, a report by the Department's own consultant that the size of the facility could be reduced; second, the Commission's concerns that the department's re-entry program needs to be more closely examined to determine how many pre-release beds will be required; and third, the projected high cost of the facility.

Reducing the Size of the Facility: In June 2021, the Department released a report entitled "Oahu Community Correctional Center Population Forecast Pre-Final Report". (Forecast) The Forecast projected that there will be a slow decline in the OCCC population by 2032. (See Forecast, pp 32; 34) Moreover, the Forecast projected that the projected population could be further reduced by 235 with appropriate diversion opportunities. (id, 39-40) The report concluded, there "would naturally result in a lower bed need . . ." (id, 40)

Need for Pre-Release Beds: The Department's plan included 388 new beds for the pre-release sentenced felon population. This would be in addition to the 96 pre-release beds already available at the Laumaka Work Release Center. The Commission was concerned that already available minimum security beds at the Waiawa Correctional Facility and the Kulani Correctional Facility were significantly under-utilized. These facilities serve as natural feeders to the pre-release program. As such, a closer assessment of the efficacy of the Department's re-entry program should be conducted before a commitment should be made to such a large expansion of pre-release beds.

High Cost: The proposed new OCCC was projected to cost in excess of \$500,000,000. The Department planned that it would be privately financing, and perhaps leased back to the State. The lease would be paid with operating funds, which would have to be appropriated by future Legislatures.

During our December 2021 meeting, local attorney Robert K. Merce, former vice-chair of the House Concurrent Resolution 85 Task Force on Prison Reform, presented a monograph he authored, entitled *Getting It Right: Better Ideas for a New Jail*, in which he argues the new jail planning process was flawed from the beginning. The Commission agreed with his findings and submitted notes and comments along with a copy of the report to the House Committee on Finance asking the Hawaii State

Legislature to consider our shared concerns about the planning of the new facility. The letter and the Merce report are attached (see Attachment 1).

## **BAIL REFORM**

In 2020 the Hawaii Correctional System Oversight Commission (HCSOC) urged the legislature to reconsider pretrial reform proposals including legislation originally recommended in 2019 by House Concurrent Resolution 134 Task Force on Pretrial Reform. These recommendations addressed, among other issues, the jails overcrowded population which substantially consisted of pretrial detainees. A draft bill to amend Chapter 804, HRS, Bail Bond to Keep the Peace was included in this Commission's 2020 Annual Report. The gist of the proposed bill as recommended by the Task Force would eliminate money bail for defendants accused of low-level, non-violent offenses. This would reduce unnecessary and costly pretrial incarcerations thus reducing the jail overcrowding without increasing the risk to public safety. Unfortunately, there were no bills passed relating to the elimination of monetary bail for certain low-level, non-violent offenses during the 2020 legislative session.

In the 2021 legislative session, SB 1260 Relating to Criminal Pretrial Reform was introduced. The bill is substantially similar to the bill suggested in HCSOC 2020 Annual Report. This bill "Eliminates the use of monetary bail and requires defendants to be released on their own recognizance for traffic offenses, violations, and non-violent petty misdemeanors and misdemeanor offenses, with certain exceptions. Creates rebuttable presumptions regarding release and detention for certain offenses and specific circumstances in which these presumptions apply."

This bill was heard in the Senate Committee on Judiciary. The HCSOC submitted testimony dated March 1, 2021 supporting SB 1260 Relating to Criminal Pretrial Reform (See attached testimony). The bill passed with revision and was referred to the House Committee on Judiciary and Hawaiian Affairs as SB 1260 SD1 Relating to Criminal Pretrial Reform. The HCSOC submitted testimony dated March 16, 2021 strongly supporting the bill. (See attached testimony) The bill was then revised and referred to the House Committee on Finance as SB1260 SD1 HD1. Although SB1260 was revised twice it still retained the gist of SB 1260 relating to eliminating the requirement of monetary bail in certain low-level, non-violent offenses with certain exceptions. The HCSOC again submitted testimony dated March 31, 2021 strongly supporting SB1260 SD1 HD1 Relating to Criminal Pretrial Reform (see Attachment 2). Although there were numerous support of the bill in committee hearings, unfortunately the bill did not pass.

In addition to supporting legislation, this Commission has discussed jail and prison populations with the Department of Public Safety at Commission meetings. Public testimonies were also received at these meetings. These discussions raise public awareness of the issues involving jail overcrowding. Some of these issues include bail reform such as cash bail, public safety, etc.



Act 179 (2019) Session Laws of Hawaii 2019 established the Hawaii Correctional System Oversight Commission (HCSOC). The Act charged the Commission to "(2) Establish maximum inmate population limits for each correctional facility and formulate policies and procedures to prevent the inmate population from exceeding the capacity of each correctional facility." Unfortunately, notwithstanding the Commission's support of legislation, and educating the public, jail overcrowding remains. Defendants accused of low-level, non-violent crimes who do not have the money to post bail pending trial remain in jail. This contributes to overpopulation. Other consequences include loss of jobs, housing, education, and family conflicts.

The HCSOC is hopeful that the 2022 Legislative session will bring meaningful bail reform. HB1567 HD1 Bail, Release; Detention; Bail Report Interview; Videoconference eliminates the use of monetary bail and requires defendant to be released on their own recognizance for certain non-violent offenses, subject to exceptions, has been moving through the House and Senate Committees. This bill contains the gist of SB1260 which was introduced in the 2021 session. The Hawaii Corrective System Oversight Commission intends to continue its strong support of the proposed bill. Should this bill pass, it would alleviate jail overcrowding.

## **SUMMARY**

The Commission was informed on April 4, 2022 that Governor David Ige offered the Oversight Coordinator position to one of the three candidates forwarded to his office in November 2021 and the offer was accepted. Now the important work of the Commission can begin in earnest.

Investigating and responding to complaints submitted to the Commission will be of the highest priority. We will continue to: monitor and review the Comprehensive Offender Reentry Program to determine its effectiveness and recommend methods to improve the program; pursue enactment of bail reform; advocate for reducing the size of the proposed Oahu Community Correctional Center replacement facility; and begin the process establishing maximum inmate population limits for each correctional facility.

The Commission is dedicated to educating the public, elected officials and state administrators about introducing correctional system reforms designed to reduce recidivism and strengthen public safety. We believe an informed public will support our efforts.

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**ATTACHMENT 1**

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DAVID Y. IGE  
GOVERNOR



MARK PATTERSON  
CHAIR

COMMISSIONERS  
JUDGE MICHAEL A. TOWN  
(ret.)  
JUDGE RONALD IBARRA  
(ret.)  
TED SAKAI  
MARTHA TORNEY

**STATE OF HAWAII  
HAWAII CORRECTIONAL SYSTEM OVERSIGHT COMMISSION**

January 3, 2022

The Honorable Sylvia Luke, Chair  
House Committee on Finance

The Honorable Ty J.K. Cullen, Vice Chair  
House Committee on Finance

The Honorable Donovan M. Dela Cruz, Chair  
Senate Committee on Ways and Means

The Honorable Gilbert S.C. Keith-Agaran, Vice Chair  
Senate Committee on Ways and Means

Dear Chair Luke, Vice Chair Cullen, Chair Dela Cruz, Vice Chair Keith-Agaran, and  
Members of the Committees:

We, the members of the Hawaii Correctional Systems Oversight Commission, continue to be concerned about the planning and development of a new Oahu Community Correctional Center (OCCC) on Oahu. We find a replacement facility is much needed but disagree with the size and scope of the new facility as promoted by the Department of Public Safety and Department of Accounting and General Services.

For the past two years the plans for the OCCC replacement have been an agenda item during our monthly meetings and is an item that always generates considerable questions and discussion among those who regularly attend. Most share the concerns of the Commissioners.

A regular attendee is local attorney Robert K. Merce, the vice-chair of the House Concurrent Resolution 85 Task Force on Prison Reform and principal author of the group's final report to the 2019 Legislature. During our December 2021 meeting Mr. Merce presented a monograph he authored, entitled *Getting It Right: Better Ideas for a New Jail*, in which he argues the new jail planning process was flawed from the beginning. We agree with his findings and ask that the Hawaii State Legislature consider the matters so well-articulated in Mr. Merce's document (attached with the permission of the author). Our notes and comments are below.

HAWAII CORRECTIONAL SYSTEMS OVERSIGHT COMMISSION  
NOTES AND COMMENTS ON  
*GETTING IT RIGHT: BETTER IDEAS FOR A NEW JAIL*  
BY ROBERT MERCE, ESQ.

The Hawaii Corrections Systems Oversight Commission (the "Commission") concurs with the conclusions and recommendations offered by Robert Merce in his paper, "Getting It Right", as presented to the Commission on December 16, 2021. Merce argues that the State should stop "issuing an RFP for the new jail (Oahu Community Correctional Center, or OCCC), and start planning a jail that we can afford and that reflects our values." [p. 22]

The Commission continues to believe that a new OCCC is needed. OCCC is overcrowded and poorly designed and has been poorly maintained for decades. It has served the community beyond its useful life. We commend the Department of Public Safety for its focus on providing improved living conditions for inmates in its custody and working conditions for the employees who work in correctional facilities. However, we are disappointed by the manner in which the proposed new OCCC has been planned, and the Department's lack of response to the recommendations of members of the community, including this Commission. We are concerned that the planned facility will be significantly larger and cost far more than is necessary, and that it will perpetuate a punitive model of our criminal justice system. Therefore, we agree with Merce that the State of Hawaii stop the planned issuance of a Request for Qualifications and a Request for Proposals to build the new OCCC.

Merce's argument for stopping the planning is compelling:

The new jail will be a financial disaster and produce bad outcomes for decades, but it doesn't have to be that way. If we work together we can build a jail that will make our community safer at a fraction of the cost of the jail now being planned. Working together we can build an innovative and transformative jail that will address the inequities of our criminal justice system, save lives, and meet the ever-evolving needs of our community. [p. 2]

The Commission agrees that there needs to be a more careful examination of "the policies and practices driving the jail population and address them as part of a comprehensive plan to manage both the jail population and the larger justice system more effectively and efficiently." [p. 3]

The Commission's Prior Recommendation

At its December 17, 2020, meeting, this Commission recommended that the State pause its planning for the new OCCC and establish a community advisory group to help explore policies, practices and programs that can provide alternatives to detention in a

secure jail. As Merce illustrates, several other jurisdictions in the United States have been able to reduce their jail populations after engaging in such a process. Before committing to a project that was estimated to cost over \$500,000,000 before the COVID pandemic, Hawaii needs to embark on a similar process that actively involves a broad range of stakeholders, including community agencies that provide health services (mental health, substance use disorders, medical support), housing, and employment; formerly incarcerated individuals; representatives of cultural groups that reflect the justice-involved population; victim advocates; persons with knowledge and expertise in the various aspects of the criminal justice system; and agencies directly involved with the criminal justice system. Such broad representation is necessary.

The Need for a Collaborative Process: The National Institute of Corrections advises:

Community participation in planning is important because the jail belongs to the community it serves; it is not solely the concern of the sheriff or director of corrections. The type of facility a community builds and the way it is used are as much a reflection of community values as they are of local, state, and federal laws.

The collaboration needs to be with the broader Oahu community. OCCC detains individuals from the entire island, so the relevant community for planning the new OCCC must be Oahu-wide. Our community's policies in mental health, substance abuse, housing and other areas have had a major impact on the justice system. Decision makers from these areas need to be at the table. In Hawaii, there is strong interplay between probation and parole and correctional facilities. There needs to be collaboration among these entities. The courts, the prosecutors and the defense bar need to work together to examine processes that can contribute to jail crowding.

Concerns Relating to the Number of Planned Pre-Release Beds

"Oahu Community Correctional Center Pre-Final Forecast Report" of June 15, 2021 (OCCC Forecast), projects a need for 911 detention beds and 358 pre-release beds in 2032, for a total of 1269 beds at the redeveloped OCCC, if current policies and practices remain in place.. It is also our understanding that the 96-bed Laumaka facility will be retained. To justify the need for this large number of new pre-release beds the authors state, "Housing the re-entry population on Oahu has long been constrained by capacity limitations at the Waiawa Correctional Facility and Module 20 at OCCC. Simply put, the number of candidates for the re-entry program exceed the number of available beds". [p. 4]

This finding is inconsistent with the data. Hawaii's correctional system features two minimum security facilities that should play a prominent role in preparing inmates for reentry. For many months before the onset of the pandemic, both of these facilities - the Waiawa Correctional Facility and the Kulani Correctional Facility - have been and continue to be substantially underutilized. On December 15, 2021, Waiawa's head

count was 182, or 46% below its operating capacity of 334. Kulani's population was only 104, or 48% below its operating capacity. On the same day, OCCC held only 74 Sentenced Felons and 4 Parole Violators, which we presume would be the primary target groups for pre-release programming. If there were a robust reentry program, we would expect that the 96 beds at Laumaka facility would operate near capacity. We believe that further exploration is needed to determine if these repressed headcounts are reflective of the actual need for reentry beds or reflect issues in the reentry process utilized by the Department.<sup>1</sup>

We fully support pre-release programming, as it is an essential element of the correctional process. However, the data indicates that housing for the re-entry population has not been constrained by bed capacity. It can be concluded that there is either an over-capacity of minimum or community beds, or that they have not been sufficiently utilized. Either way, it would seem difficult to justify 358 additional pre-release beds.

### The Long-Term Operating Costs Must Be Carefully Examined

Commitment to the construction of a new OCCC is a commitment to decades of operating costs. The following must be considered:

- Operating costs are driven by design. OCCC has a high per capita cost because of its poor design. The design drives the number of Adult Correctional Officer (ACO) posts that must be filled three shifts per day, 365 days per year. Often these posts must be filled by ACOs working overtime. We don't know what the design of the new facility will be like, so we don't know how many posts will be required in the new OCCC.
- The per capita cost will not be significantly reduced just if the population is reduced. The relationship between posts and inmates is significantly less than 1:1. Because the number of posts is a primary driver, a reduction in population will not cause a noticeable reduction in costs unless the reduction is significant enough to warrant the closure of entire housing units, thus eliminating corresponding posts.
- Third, the question of lease rent is critical. Generally, construction in Hawaii is funded through GO bonds. Bonds issued by entities like State governments (assuming a good bond rating) attract more attractive interest rates than privately issued bonds. We may have to pay a premium if we opt for private financing through a P3 contract. The real issue, however, is that we will have to pay for the lease rent through the Department's operating funds. We don't know how much this will be, though we know it will be expensive, and we don't know for how long. Will it be twenty years? Thirty? What's the impact on the Department during this period? Moreover, will the P3 contract include a maintenance agreement? The State has a poor track record with facility maintenance., so a maintenance agreement makes sense. However, we can then expect to add to the expense.

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<sup>1</sup> It is noted that while there were a combined 250 unused beds at Waiawa and Kulani, 1114 inmates were housed in a contract facility in Arizona. PSD pays the contractor on a set rate per inmate/day.



The Department's Own Reports Show that Reforms Will Impact the Size of the New OCCC

The OCCC Forecast included projections of the potential impacts of some specific reforms, as noted on page 5:

The analysis also indicated that **there are opportunities to reduce the OCCC average daily population**. Using a combination of offense, case status, and classification data, the findings suggest that there are four main segments of the population that may be reduced, ultimately resulting in a possible ADP reduction of 235 based on 2019 data.

**Our analysis also provides indications that there are other opportunities to reduce the OCCC population**. As of this writing, the Hawaii legislature is considering legislation to reduce or eliminate monetary bail (SB1260).<sup>2</sup> While the exact impact of SB1260 on future populations is unclear, such legislation is a good first step toward reducing the future OCCC population level. Clearly, the intent of the bill is to divert defendants from detention along very similar lines to what we employed in our diversion analysis. If this piece of legislation (or one like it) were to become law, future public policy initiatives should focus on expanding the reach of the legislation to also include certain low-level non-violent felonies as well as technical probation violations. This would mirror the approach we used in our diversion analyses. **Unless population reduction (such as the diversion estimates that we have detailed) can be implemented through policy and legal reforms, the new OCCC will still be a large facility with a large detention and pre-release population.**

Moreover, we note that it is critically important for the system to ensure that bail/risk information is available to all parties as early as possible in the judicial process in order to speed up case processing beyond the improvements we have noted in our analysis. **Such a practice would establish a strong foundation for a more robust pretrial services approach to divert and monitor appropriate defendants in the future, further suppressing correctional populations.** [p. 41- 42]

(Emphases added.)

These conclusions - from the State's own consultant - supports the need for a full exploration of policies and practices that can reduce the projected OCCC population without unduly risking community safety. Such an endeavor requires the participation of a broad range of community stakeholders.

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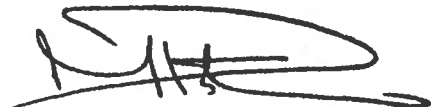
<sup>2</sup> Senate Bill 1260, Relating to Criminal Pretrial Reform, was introduced in the 2021 Session. It passed Third Reading in both houses and was referred to conference committee. SB 1260, SD1, HD1, will carry over to the 2022 legislative session.

## Conclusions and Recommendations

The Hawaii Corrections Systems Oversight Commission affirms its position that the planning for the new OCCC should be paused and that an Advisory Committee be convened to review and, if necessary, revise the planning that has been done to date, and to actively participate in the planning process going forward.

We appreciate your attention to these matters and are available to discuss our position with members of the Committees and their staff.

Sincerely,

A handwritten signature in black ink, appearing to read 'M. Patterson', with a long horizontal flourish extending to the right.

Mark K. Patterson, Chair  
Correctional System Oversight Commission

- c: The Honorable Scott Saiki, Speaker of the House
- The Honorable Ronald D. Kouchi, President of the Senate
- The Honorable Takashi Ohno, Chair, House Committee on Corrections, Military, & Veterans
- The Honorable Clarence K. Nishihara, Chair, Senate Committee on Public Safety, Intergovernmental, and Military Affairs
- The Honorable David Y. Ige, Governor
- The Honorable Mark Recktenwald, Chief Justice
- The Honorable Carmen "Hulu" Lindsey, Chair, Office of Hawaiian Affairs
- Max Otani, Public Safety Director



# Getting It Right: Better Ideas for a New Jail

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by Robert K. Merce

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# BETTER IDEAS FOR A NEW JAIL\*

## INTRODUCTION

Within the next few months the State plans to issue a Request for Proposals (RFP) for a public-private partnership (P3) to design, construct, finance, and partially maintain a new jail to replace the Oahu Community Correctional Center (OCCC). The new jail will have approximately 1,300 beds, and will probably cost closer to \$1 billion than the \$525 million estimate that was made three years ago.

The new jail will be one of the most expensive, if not *the* most expensive, public works projects ever undertaken by the State, and it will have a major impact on criminal justice outcomes in Hawaii for decades.

There is a right way and a wrong way to plan a new jail, and unfortunately, Hawaii chose the wrong way. The Departments of Public Safety (DPS) and Accounting and General Services (DAGS) turned to a New Jersey-based consulting firm with very little knowledge of Hawaii to lead the planning effort. The planners ignored best practices, shut the community out of the planning process, focused on bricks and mortar rather than people and programs, and failed to address critical questions about who should be in the jail, and how the State could reduce the jail population and build a smaller and less expensive jail without compromising public safety.

In 2017 the House Concurrent Resolution (HCR) 85 Task Force on Prison Reform warned that planning for the new jail was on the wrong track, and in their final report to the 2019 legislature they sounded the alarm, saying that despite spending millions on planning, the new jail incorporated all of the problems and bad ideas of the old jail and that it would be “a relic of the past the moment it is completed, because no matter how modern it looks from the outside, it will be based on outmoded and obsolete ideas and a failed planning process.” The Task Force found that the new jail was so poorly thought out that the State should convene a group of government and community stakeholders to *start the jail planning process over again* and focus on building “a smart, small, and humane 21<sup>st</sup> century jail instead of the monolithic 19th century jail that is now on the drawing boards.”<sup>1</sup>

More recently the Hawaii Correctional Systems Oversight Commission, whose five members collectively have more than 100 years of experience with Hawaii’s criminal justice system,

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\* Portions of this paper previously appeared in the Ideas section of *Honolulu Civil Beat* on September 20, 2020 and February 21, 2021.

expressed deep concerns about the new jail and called for the creation of an advisory committee of community stakeholders to review, *and if necessary revise*, the planning that has been done to date.

The new jail will be a financial disaster and produce bad outcomes for decades, but it doesn't have to be that way. If we work together we can build a jail that will make our community safer at a fraction of the cost of the jail now being planned. Working together we can build an innovative and transformative jail that will address the inequities of our criminal justice system, save lives, and meet the ever-evolving needs of our community.

But we must act quickly. If we don't stop the procurement process now, we will soon be irrevocably committed to a jail the people of Honolulu had no say in planning, and that is too big, too expensive, and will cause harm to our community as long as it exists.

### **THE JAIL PLANNING PROCESS WAS FLAWED FROM THE VERY BEGINNING**

To understand how the jail planning process went off the rails we have to go back to 2015 when then DPS Director Nolan Espinda announced that the Honolulu Authority for Rapid Transit (HART) had decided to put an elevated rail station near the current OCCC, which meant that the land the jail occupies had become very valuable: "Now that the city plans to run Oahu's elevated rail line past the OCCC site, it is obvious the Kalihi land under OCCC could be put to much more valuable use as a new development rather than a jail site," Espinda said, adding that the idea of moving the facility had support in the House and Senate and that "there are a lot of stars aligning here."<sup>2</sup>

The City and County of Honolulu's 2018 Plan Review Use Permit for the new jail echoed Espinda's comments: "The replacement OCCC frees up important urban land in the populated Kalihi area; the existing OCCC is located within one-quarter-mile from the future Kalihi rail station."<sup>3</sup>

The decision to build a new jail on Oahu was not driven by the fact that the existing OCCC is falling apart and essentially unfit for human habitation: From the very beginning, the idea was to relocate the old jail as quickly as possible so that the land it occupies could be redeveloped.

In their effort to streamline the planning process DPS, DAGS, and their consultants focused almost exclusively on site-selection and the physical features of the jail and gave little or no thought to who should be in the jail, or how it should function within the context of the broader criminal justice system. While Honolulu was focused on building a huge new jail, other cities were focused on reducing their jail populations. A Commission in New York City set a goal of reducing their jail population by more than 50 percent by closing the infamous Rikers Island Jail and replacing it with smaller jails in the city's boroughs.<sup>4</sup> Philadelphia was developing a plan to

cut its jail population in half and address racial, ethnic, and economic disparities in its criminal justice system.<sup>5</sup> New Orleans was working on an initiative to reduce its jail population by 38 percent,<sup>6</sup> and Akron, Ohio was developing a plan to divert low-level offenders from its jail.<sup>7</sup> Similar reform efforts were being undertaken in at least 50 cities, both large and small, across the United States.<sup>8</sup>

## **A CRITICAL MISTAKE SENT THE PLANNING PROCESS IN THE WRONG DIRECTION**

DPS and its consultants made many planning mistakes, but the biggest one by far was to decide that they did not need to examine the policies and practices driving the jail population and address them as part of a comprehensive plan to manage both the jail population and the larger justice system more effectively and efficiently. The magnitude of that error cannot be overstated because it affected every aspect of the planning process, and like taking a wrong turn at the beginning of a journey, it led the planners, and now the entire State, down the wrong path and to the wrong destination.

## **THE STATE DELIBERATELY IGNORED BEST PRACTICES IN THE PLANNING PROCESS**

Virtually all of the problems with the new jail stem from fact that the planners decided not to follow best practice in jail planning, many of which are clearly set out in the National Institute of Correction's *Jail Capacity Planning Guide: A Systems Approach* (2009).<sup>9</sup>

The systems approach views jails as one of many parts of a criminal justice system whose policies and practices determine how the jail is used and how many beds are needed to avoid overcrowding. The systems approach stresses that *the key to long term management of the jail population is directly tied to management of other aspects of the justice system:*

Jails are part of a complex criminal justice system whose policies and practices directly influence total bed need. As such, jail planning cannot be done in a vacuum. Any consideration of future jail bed need must take place within the context of a discussion about how to manage the larger criminal justice system more effectively. *Jail planning and system planning are one and the same.*<sup>10</sup>

The systems approach shifts the nature of jail planning from simply making population forecasts based on past trends and the assumption that the policies driving the jail population will remain unchanged—the approach used in Hawaii—to developing a continuum of options for law enforcement and judges in which jails are only one option among many, and one to be used sparingly and as a last resort. The systems approach calls on planners to “plan as much for programs as they do for [jail] beds.”<sup>11</sup>

Research has shown that the traditional way we use jails does nothing to reduce future offending. Accordingly, jail planning must move beyond the simplistic formula-based approach that builds beds based on past demands to a results-based paradigm that addresses the many factors that drive the demand for beds.<sup>12</sup>

The systems approach is based on a body of research that challenges the notion that locking people up is the only way, or the best way, to protect the public.<sup>13</sup> It makes the case for a new conceptual framework that “reasserts the primacy of treatment and redefines the system’s response to failure.”<sup>14</sup> It is a new way of thinking about the criminal justice system that makes reducing future crime a central goal and manages the jail population long-term by:

1. Reserving jail for the highest risk defendants;
2. Making available a full continuum of alternatives to jail;
3. Relying on high quality treatment and evidence-based sanctions;
4. Creating strong and effective pretrial and reentry services; and
5. Adopting a positive emphasis on collaboration and systemic change.<sup>15</sup>

Population management strategies that focus on alternatives to jail significantly reduce the jail population, which in turn allows communities to build smaller and less expensive jails. That is important for three reasons.

First, construction cost for new jails are outrageously high. If, as projected, the new jail will cost \$525 million and have approximately 1,300 total new beds, each bed would cost a whopping \$404,000, which is probably the highest per bed cost in the country, if not the world.

Second, although construction costs for a new jail are incredibly high, on average, *they represent only 10% of the overall operating costs of a jail over a 30-year period.*<sup>16</sup> Thus, the key to reducing correctional costs long-term lies in reducing the jail population by providing alternatives to jail, or “off ramps,” at each at each of the key decision points in the criminal justice system.

Third, the Vera Institute of Justice studied counties that built new jails between 1999 and 2005 as a solution to old or overcrowded facilities and found that building a new jail *without addressing the policies driving the jail population* resulted in a vicious cycle in which the new jails that were supposed to reduce overcrowding rapidly filled to capacity, creating a demand for more capacity, and precipitating a costly building cycle.<sup>17</sup> For example:



- In Salt Lake County, Utah, a new 2000 bed jail filled to capacity within 21 days of opening;
- In Tipton County, Tennessee, a newly expanded jail that increased capacity from 122 beds to 201 beds became overcrowded the month it opened.;
- In Jefferson County, Colorado, a 480- bed jail that that was supposed to serve the county for 19 years filled up within five years; and
- In Adams County Colorado a jail that was intended to serve the county for 14 years filled to capacity in two years.<sup>18</sup>

We can only speculate on why the State decided to ignore best practices and use an old and discredited planning process for one of the biggest and most important public works projects in the history of the State, but that is what it has done. The misguided planning process will result in the continued misuse of the jail, a jail that is bigger and more expensive than it needs to be, and a jail that will not reduce future crime or keep our community safe.

## **THE PUBLIC WAS COMPLETELY SHUT OUT OF THE JAIL PLANNING PROCESS**

*“The best solutions are driven by those who experience and are familiar with the local culture and environment.” –Center for Policing Equity*

Engaging the community in the jail planning process is universally recognized as a best practice and an absolutely essential element of the jail planning process. Community stakeholders bring the aggregated knowledge, skills, intuition, and insights of local residents to solving a collective challenge.<sup>19</sup> This is often called “the wisdom of the community.” Tapping into this wisdom can shape the type of questions that are asked, challenge prevailing norms, and bring about unexpected insights that lead to innovative and transformative solutions.



The National Institute of Corrections (NIC) has said:

Community participation in planning is important because the jail belongs to the community it serves; it is not solely the concern of the sheriff or director of corrections. The type of facility a community builds and the way it is used are as much a reflection of community values as they are of local, state, and federal

laws. It is common for stakeholders such as victim advocates, business leaders, the clergy, educators, and elected officials to actively participate on the community advisory committee.<sup>20</sup>

The MacArthur Foundation also emphasizes the importance of a collaborative process in jail planning:

**COLLABORATE.** The first step is to ensure that the local justice system is truly functioning as a system. Policymakers must step out of their silos and consider how the different elements of the system interrelate, and how each contributes to public safety outcomes. This can take time and energy but reap rewards in the form of trust and collaboration, so that organizations have a shared understanding of the system, both as it exists now and what it can be in the future.

...

Affected groups must be on board to advance the new way of doing business, and to move forward despite barriers and setbacks. Engaging the community, the workforce, and other interested groups doesn't happen on its own. As motivation for change starts to build, conversations can begin with affected parties. Transparency and genuine opportunities for input by constituent's support engagement.<sup>21</sup>

The Justice Management Institute has found that a "culture of collaboration is one of the shared characteristics of successful justice systems," and in this context collaboration means more than just having meetings: it means "working together toward a common purpose—sharing a vision, preparing a plan, and implementing the plan to achieve agreed upon outcomes."<sup>22</sup>



The OCCC Planning Team does not include any community stakeholders or representatives. (DPS photo).

The planners at CGL/Ricci Greene Associates, one of the country's leading justice architectural firms, likewise stress the need for a collaborative approach to jail planning: "Successful jurisdictions use a collaborative approach to planning that include representation of *all actors in the criminal justice system and the community* including advocates, judges, administrators, legislators, prosecutors, the defense bar, correctional officers, program operators, and community members. The "buy in" from key stakeholders is *absolutely essential*.<sup>23</sup>

The HCR 85 Task Force specifically found that the State and its consultants did not engage the community in the jail planning process in a meaningful way,<sup>24</sup> and that is surely a prescription for failure.

## **WE SHOULD NOT COMMIT TO BUILDING A NEW JAIL UNTIL WE KNOW HOW MUCH IT WILL COST**

DAGS has said the jail will cost \$525 million,<sup>25</sup> but that was back in 2018, before construction costs started to rise. Since then they have increased dramatically due to a steep rise in the cost of materials, snarled supply chains, tariffs on steel and aluminum, and producer staffing shortages due to the pandemic.

The leading association for the construction industry, Associated General Contractors of America (AGC), recently reported that the producer price index (PPI), which measures the average changes in prices received by domestic producers for their output, increased 26.3% from June 2020 to June 2021, and even that steep increase understates the severity of the problems facing the construction industry which has seen the index for lumber and plywood increase 101%, the index for steel increased 88%, for copper and brass 61%; and for aluminum 33%.<sup>26</sup> The high prices are expected to persist well into the future.<sup>27</sup>

The AGC warns that in addition to significant price increases, contractors are experiencing completely unreliable delivery times and that owners should start their projects with realistic expectations about current costs and the likelihood of increases.<sup>28</sup>

## **THE UTAH STATE PRISON: A CAUTIONARY TALE**

In 2017 Utah broke ground on a new, 4,000-bed state prison outside of Salt Lake City. The new prison was considered state of the art and was projected to cost \$550 million.<sup>29</sup> After years of planning, state legislators were pleased that construction was finally underway and Salt Lake City leaders were satisfied with the project despite their initial opposition to building the prison near their city.<sup>30</sup>

But beneath the buoyant optimism there was an undercurrent of concern. As the new prison broke ground, the city's nearby airport expansion project was \$350 million over budget and construction costs in the area were up 12%.<sup>31</sup> Jim Russell, the state official overseeing the new prison said he was concerned about the cost increases but confident they could be managed. State Senator Jerry Stevenson, who co-chaired the legislature's Prison Development Commission, acknowledged that higher construction costs were "very possible" but said it was an issue the legislature would address when and if it arose.<sup>32</sup>

By April of 2019 the cost of the new prison had risen from \$550 million to \$800 million<sup>33</sup> and construction costs were running 18% to 20% higher than anticipated, but by that time it was too late to do anything about it. Senator Stevenson said that the legislature did not want to come up with the additional funds but “we’re way past the point of no return on this. We’re going to have to finish it now.”<sup>34</sup>

Utah’s new prison is now almost complete. The final cost has not been tabulated but it is expected to come in at about \$1 billion, depending on the final procurement process.<sup>35</sup> That’s an 80% increase over the original cost estimate.

Officials blame the high cost on tariffs on China, the pandemic, labor shortages, and supply chain issues. “We’ve had now 42% escalation [in construction costs] since 2015 when it [the prison] was first funded until now,” Russell said. “All in all, I think we’ve done a fantastic job with where we’re at. The budget could have been much more . . . *it should have been \$1.3 billion.*”<sup>36</sup>

The Utah State Prison is the canary in the coal mine. DAGS’ \$525 million cost estimate for the new jail is three years old and has never been updated to account for the increased cost of materials, delivery delays, and overall price increases in the construction industry. The 2018 estimate is undoubtedly too low, but we do not know how low. We simply don’t know how much the new jail will cost, so there is no way to determine if it will be worth the price, or if a P3 is a better financing option than the traditional procurement process.

## **THE NEW JAIL WILL MAKE HAWAII’S LONG-TERM FISCAL PROBLEMS WORSE**

In 2019 a committee of economists, scholars, and fiscal experts from the Hawaii Executive Council issued a report, *Troubled Waters: Charting a New Fiscal Course for Hawaii*, that documents the enormous fiscal challenges facing Hawaii’s State and local governments in the next 30 years.<sup>37</sup> The Committee found that future costs in three critical areas—mitigating the impact of climate change, developing and maintaining infrastructure, and honoring public employee retirement benefits—will exceed \$88 billion, and that revenues will not be sufficient to meet those needs.

Today, the cost of operating government is getting more expensive while Hawaii’s economy has not kept pace with the rest of the nation. Between 2012 and 2018, the cost of State government increased 41% despite the number of employees remaining relatively flat. During this same period, Hawaii’s economy grew 9.8% or 1.6% annually compared to the national rate of 2.4%. DBEDT forecasts GDP growth of 1.1% in 2019 and 1.2% in 2020. Faced with these economic conditions, State and county governments cannot continue to operate in such a manner. *Government will simply be too expensive to conduct business as usual.*<sup>38</sup>

The report calls for government and the private sector to collaborate, innovate, and create a strategic vision to address the serious fiscal challenges facing the State.<sup>39</sup>

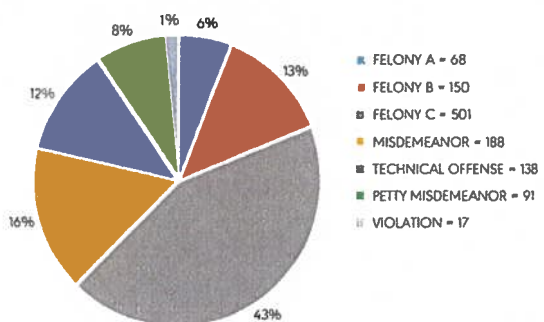
Honolulu has a wealth of innovators and thought-leaders from business, labor academia, non-profits, and other interest groups who are ready to share their knowledge, experience and insights in a collaborative effort to improve our criminal justice system and plan and design a jail that will meet the needs of our State *without putting a huge financial burden to the next generation*. It would be foolish not to tap into this reservoir of knowledge, experience, and insight in planning the new jail.

### THE OPERATING COSTS OF THE NEW JAIL ARE NOT SUSTAINABLE

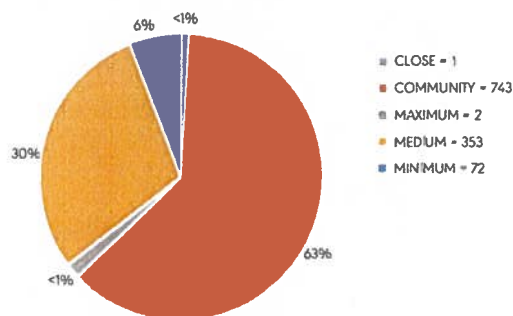
In June, 2021, the DPS and DAGS received a report from one of their consultants that said “assuming there are no changes in our criminal justice or correctional policies,” by 2024 the average daily population (ADP) of the new jail will be 1,237 inmates, and that the ADP would decrease to 918 inmates by 2032.<sup>40</sup>

It now costs \$219 a day to house an inmate in Hawaii.<sup>41</sup> That cost will almost certainly increase, but using the current figure, by 2024 the OCCC population will cost the State, on average, \$271,000 a day (\$99 million a year) decreasing to \$201,000 a day (\$73 million a year) by 2032 (assuming current costs). The lease rent on the new jail –which will include the private partner’s profit–will also have to be factored into the cost of operating the new jail.

Eighty-one percent of the men in OCCC are charged with low-level (class C) felonies or lesser offenses—misdemeanors, petty misdemeanors, technical offenses, or violations. Nearly 70% are in one of the two lowest security classifications—community custody (63%) and minimum security (6%),<sup>42</sup> and 23% are men who violated a condition of probation but did not commit a new crime.<sup>43</sup>



Severity Classification by Gender (Men)



Security Classification by Gender (Men)

There is no rational reason for keeping so many non-dangerous, low-level offenders in jail at such a high cost. We can't afford it, and it simply doesn't make sense. We should reduce our jail population as other jurisdictions across the country have been doing for years.

## CREATING "OFF RAMPS" TO REDUCE THE JAIL POPULATION

The key to reducing the jail population is to have alternatives to jail, or "off ramps," at key decision points in the criminal justice process. A full discussion of this topic is beyond the scope of this paper, but what follows are a few "off ramps" that have been discussed in Hawaii and should be carefully considered before the State builds a costly 1,300-bed jail.

### ■ *Issue Citations Lieu of Arrest*

Police officers currently have discretion to issue a citation in lieu of arrest for misdemeanors, petty misdemeanors and violations.<sup>44</sup> In 2018 the HCR 134 Task Force on Criminal Pretrial Reform recommended that the legislature expand police officer's discretion to include issuing citations for non-violent, class C felonies.<sup>45</sup>

Expanding the use of citations to non-violent class C felonies will reduce the number of people who are taken into custody and ultimately reduce the number of people who end up in jail.

### ■ *Establish A 24/7 Island-Wide Crisis Response Team*

Honolulu is one of many cities whose health care and criminal justice systems are challenged by a high volume of people experiencing a behavioral health crisis . In most cases the police and fire departments are called on to responded to these people, and in many cases the person in crisis ends up at the cell block and then in jail.

To address this problem the City and County of Honolulu recently launched a Crisis Outreach Response and Engagement (CORE) program that will use a team of emergency medical technicians and community health workers to respond to non-violent emergency calls about people in crisis.<sup>46</sup>

That is a good idea, but unfortunately the program has been scaled back from the original concept. Instead of operating 24/7 it will operate only 12 hours a day, instead of operating island-wide it will only operate in Waikiki and Chinatown, and the response team will not include a social worker as originally planned.<sup>47</sup>

Honolulu needs an effective, island-wide, 24/7 crisis response team. The goal should be a program that is as effective as the CAHOOTS (Crisis Assistance Helping Out On The Streets) program in Eugene Oregon that keeps people in crisis out of jail and saves the city millions of dollars every year.<sup>48</sup>

### ■ *Expand Diversion Programs*

Diversion is one of the most important strategies for improving the lives people who need help, and at the same time reducing the jail population. Honolulu should have at least two types of diversion programs:

**1. A Triage Center for People in Crisis.** Triage centers are for people who are experiencing a mental health or drug-related crisis. They are open 24/7 and are staffed by mental health professionals. The primary function of the center is to provide stabilization and case management services. The best centers accept walk-in patients and patients brought in by emergency medical personnel, mobile crisis intervention units, law enforcement, and family members or friends. Triage centers are characterized by a streamlined admission process (less than 15 minutes) and a “no wrong door” policy (patients are not turned away). Triage centers are designed for stabilization rather than extended care.

**2. Diversion Centers.** Diversion centers provide case management services to people who are not in crisis but have chronic social, economic and medical needs, and people who have engaged in criminal activity related to poverty, addiction, mental illness, and homelessness. Pre-arrest diversion centers help people get back on their feet and reduce the chances that they will reoffend. They are effective in reducing the jail population and making communities safer.

A triage center and effective island-wide prearrest diversion centers would address the needs of the thousands of Oahu residents who are not getting the care and services they need, and significantly reduce our jail population.

### ■ *Enact Bail Reform*

A key decision point in the criminal justice system occurs when a person who has been arrested appears before a judge who determines whether the person should be released pending trial, or remain in custody until their case has been resolved. The pretrial release/detention decision is critically important to the defendant because studies have shown that “[j]ust a few days in jail can increase the likelihood of a sentence of incarceration and the harshness of that sentence, reduce economic viability, promote future criminal behavior, and worsen the health of those who

enter—making jail a gateway to deeper and more lasting involvement in the criminal justice system at considerable costs to the people involved and to society at large.”<sup>49</sup>

For the disproportionately high number of people who enter jails from minority communities or who suffer from mental illness, addiction, and homelessness “time spent in jail exacerbates already difficult conditions and puts many on a cycle of incarceration from which it is extremely difficult to break free.”<sup>50</sup> Defendants who cannot make bail are at risk of losing their jobs, and with it the income that supports their children, pays their rent and utilities and puts food on the table. In the long run they can also lose their house or apartment, health insurance and custody of their children. After maxing out their credit cards, a family may end up deep in debt or even homeless.

In our society liberty is supposed to be the norm and detention prior to trial the exception, but in practice, just the opposite is true. A 2018 study by the ACLU-Hawaii found that overall judges in Hawaii required bail as a condition of release in 88% of cases, and in the majority of those cases it was set at a level the defendant could not afford.<sup>51</sup>

Almost half the people in OCCC are there because they cannot afford bail. In the six month period from April 1 to September 30 , 2021 pretrial detainees at OCCC cost the State, on average, \$113,000 a day. If we include the pretrial detainees in neighbor island jails the cost goes up to \$200,000 a day.

The use of money bail is often justified on the grounds that it makes us safer by keeping dangerous people in jail, but a report from the 2018 Criminal Pretrial Task Force chaired by Hawaii circuit judge (now U.S. magistrate) Rom A Trader found that “[t]here is virtually no correlation between the setting of a particular bail amount and whether the defendant will commit further crime or engage in violent behavior when released from custody. *Thus, money bail is a poor method of assessing and managing a defendant’s risks.*”<sup>52</sup>

To create a truly just pretrial system, we must end money bail. That is not a radical idea. The federal government did it, and many jurisdictions have moved in that direction:

- The District of Columbia releases 94% of the people who are arrested without bail. Of those released, 91% make their scheduled court dates and 98% are not arrested for a violent crime while awaiting trial.
- Since 2017 New Jersey has rarely imposed money bail as a requirement of release. Last year the Chief Justice of the New Jersey Supreme Court reported that bail reform in the state was working “admirably and well,” court appearance rates exceeded 90%, and the percentage of defendants on pretrial release who are charged with indictable criminal activity remained “consistently low.”<sup>53</sup>



- In February, 2021 Illinois completely eliminated money bail as part of a sweeping criminal justice reform bill that includes changes to every part of the justice system, from police accountability to sentencing.<sup>54</sup> The no bail law will not go into effect until 2023 to allow time for challenges to the bill and to train judges on how the new law should be applied.

It is time to quit tinkering with our money bail system in the hope that it will somehow become fair, equitable and just. It won't. If we want a truly just pretrial system, we have to end money bail.

We should eliminate money bail completely, but at the very least we should eliminate it for select non-violent class C felonies, misdemeanors, petty misdemeanors, and violations.

Judges should also be encouraged to release pretrial defendants on unsecured bail pursuant to HRS § 804-9.5 (2019). To our knowledge very few defendants have ever been released under this statute even though it has been the law for more than two years.

### ■ *Make Possession of 2 Grams Or Less of a Dangerous Drugs a Misdemeanor*

HRS §712-1243, Promoting a Dangerous Drug in the Third Degree (commonly referred to as "PDD3"), makes possession of "any dangerous drug *in any amount*" a class C felony punishable by up to five years in prison and a \$10,000 fine. The term "any amount" in HRS §712-1243 includes amounts as small as the residue found in a pipe.<sup>55</sup>

PDD3 is one of the most commonly charged drug crimes. In 2020 the Hawaii Paroling Authority set more than twice as many minimum sentences for PDD3 than for all other drug crimes combined.<sup>56</sup> The average minimum sentence was 2.72 years, with sentences ranging from 1 year to 4.3 years.<sup>57</sup> PDD3 is often charged when an individual with a substance use disorder is arrested on a minor charge, and during the custodial search police find a small amount of a dangerous drug in the defendant's possession.

The Legislature should enact SB 527, Thirty-First Legislature, 2021, that establishes a new misdemeanor offense of Promoting a Dangerous drug in the Fourth Degree for possession of small amounts of a dangerous drug, and limits the class C felony of PDD3 to possession of two grams or more of a dangerous drug.

Moreover, we should recognize that addiction is a complex, multifactorial health disorder that is preventable and treatable *and "not the result of moral failure or a criminal behavior."*<sup>58</sup> We should treat substance use disorders as a public health rather than a criminal justice problem, implement evidence-based prevention and treatment programs, engage scientific experts and diverse stakeholders in coordinated policy making, support drug-related research, and ensure access to scheduled medications for therapeutic use.<sup>59</sup>

## ■ *Stop Housing Probation Violators in the Jail*

In the six months prior to the outbreak of the coronavirus pandemic in Hawaii (November 30, 2019 - April 30, 2020) there were, on average, 312 male probation violators at OCCC. The average daily cost to house the male probation violators was \$68,000 a day. Almost all of the men were in the HOPE probation program and were serving short sentences for violating program rules, *not because they committed a new offenses.*

In 2018 the HCR 85 Task Force on Prison Reform recommended that the State consider housing probation violators in dormitories or assigning them to community-based facilities where the reasons they violated the conditions of their probation could be addressed by mental health and/or addiction treatment professionals and hopefully remedied.”<sup>60</sup>

Before building 300 or more beds in the new jail for probation violators at a cost that would probably be in the neighborhood of \$120 million,<sup>61</sup> the State should follow the recommendation of the HRC 85 Task Force and explore other housing arrangements for HOPE probation violators.

## ———— P3s Are Not Suitable For Planning Jails ————

P3s may be suitable for projects like toll roads, bridges, and sewage treatment plants, but they are not appropriate for jails because jails require system planning. Before an architect picks up a pencil or puts a single mark on a piece of paper, a planning team that includes government officials *and community stakeholders* must arrive at a shared vision of a successful criminal justice system and define the function of the jail within that system. Architects sometimes describe this process with the maxim “Define Before You Design.”

In defining the role of the jail, the planning team must drill down on criminal justice data, identify the policies and practices driving the jail population, and plan for the expansion of alternatives to incarceration.<sup>62</sup> Jail planning decisions have a broad impact and in many ways define the community of which the jail is a part—its values, vision, goals and aspirations. As such, jail planning can and must be done by the community, and the community alone: It cannot be outsourced to a corporation under a P3 contract.

The best way to design and build a successful jail is for the planning team to work closely with a good architect. In 2020 the American Institute of Architects (AIA) amended its Code of Ethics and Professional Conduct to include prohibitions against designing spaces intended for torture and indefinite or prolonged solitary confinement,<sup>63</sup> and in 2021 the New York Chapter of the AIA went a step farther and called on all architects to stop designing “inherently unjust, cruel,

and harmful spaces” and to shift to the creation of “new systems, processes, and typologies based on prison reform, alternatives to imprisonment, and restorative justice.”<sup>64</sup>

The State should work with architects who have a track record of designing smart and humane spaces and who adhere to the ethical principles of the New York Chapter of the AIA. The architect who designs the jail should be willing to work closely with the community to ensure that the design of the jail aligns with community values and promotes the outcomes the community wants. P3s do not allow that to happen and *they should never be used to plan or design jails.*

Three other reasons why P3s are not a good idea for designing and building jails are:

- There is no reliable way to test whether a private sector proposal to deliver public infrastructure offers value for money compared to delivery of the same project by the public sector using conventional public procurement. Tools that purport to make such comparisons, called Public Sector Comparators (PSCs) tend to be unreliable due to: (a) lack of data on which to base cost estimates; (b) the difficulty of quantifying risks; (3) a lack of consensus on what discount rate to use for payments spread out over time; (4) the use of subjective judgments that can have a dramatic effect on cost estimates; and (5) the high cost of the modeling process.<sup>65</sup>
- The contract between the private company and the State would likely last 30 or more years during which time the State’s correctional needs will undoubtedly change. P3s typically restrict how their facilities can be used, and that severely limits a government’s ability to respond to changing conditions.<sup>66</sup> If the State owned the facility it could modify it to meet its changing needs, or it could even repurpose or dispose of the facility entirely.
- Jails must be carefully maintained to protect the health and safety of inmates and staff, but there is a tendency for corporate owners to save money by ignoring problems or deferring maintenance at the public partner’s expense.<sup>67</sup>

**P3s Lack Transparency.** In addition to the forgoing, one of the most troubling aspects of P3s is their lack of transparency and accountability. Alabama’s ill-fated partnership with CoreCivic\* highlights the problem.

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\* CoreCivic (formerly known as Corrections Corporation of America) owns and operates the Saguaro Correctional Center in Eloy, Arizona, that houses approximately 1,100 Hawaii prisoners. The State of Hawaii has maintained a business relationship with CoreCivic or more than 20 years.

In 2019, Alabama Governor Kay Ivey announced that to reduce prison overcrowding she was seeking proposals from private corporations to design, finance, build and maintain two new prisons and lease them to the Alabama Department of Corrections (ADC) which would operate them with State employees. In soliciting and screening potential private partners, the Ivey administration promised that “any information received in response to the solicitation/request will not be publicly available until final contract(s) has received all approvals.”<sup>68</sup> In other words, there would be no public scrutiny of the partnership agreement until it was signed, sealed and delivered and it was too late for the legislature or anyone else to change it.

In the ensuing months the Ivey administration selected CoreCivic as the private partner and entered into confidential negotiations on the cost of the new prisons.

State representative Rich Ringo, a Republican like Governor Ivey, complained about the secret negotiations and said that at the very least the legislature was entitled to know the developer’s profit margin.<sup>69</sup>

Representative Arnold Mooney, another Republican, said that lawmakers were being kept in the dark and asked rhetorically how they could carry out their fiduciary responsibilities to protect taxpayers without knowing anything about the P3 contracts or the cost of the prisons.<sup>70</sup>

Student and community groups sought information about the project but the State rejected their open records requests and insisted that secrecy was necessary to protect the integrity of the P3 process.<sup>71</sup>

On February 1, 2021 Governor Ivey announced that her administration had reached an agreement with CoreCivic and signed contracts that obligated the State to pay approximately \$3 billion to lease two prisons for 30 years.<sup>72</sup> Under the agreement the prisons would be financed, constructed, maintained and owned by CoreCivic, staffed by the Alabama Department of Corrections, and would be ready for occupancy by 2025.<sup>73</sup>

The version of the contracts that were released to the public on February 1 contained scant information about the terms of the agreement or the responsibilities of the parties. In a press release the Ivey administration said that “trade secrets and security-related information would not be disclosed” and that final lease costs would become available only when “financial close is achieved with CoreCivic.”<sup>74</sup> A Fact Sheet said that “[a]s is common in a project of this size, the parties will continue to engage in confidential negotiations during the Financial Phase designed to refine the scope and price of the project.”<sup>75</sup> An entire Exhibit to the contract that was supposed to contain information on how CoreCivic would obtain financing for the project was marked “Confidential.”<sup>76</sup>

Perhaps worst of all, the agreements had virtually no information on critical elements of the project such as the design of the prisons, maintenance and utilities management, environmental and sustainability services, plant services, and roads, grounds, and landscaping services.<sup>77</sup>

Alabama State auditor Jim Zeigler said the contracts would “make a handful of developers multi-millionaires at the expense of Alabama taxpayers” and said he would try to stop construction of the new prisons.<sup>78</sup>

In early April, 2021, Barclays, the London financial services firm that was the primary underwriter for the prison project, tested the waters and found that there was weak support for municipal bonds to fund new prisons in Alabama. Barclay’s also experienced a wave of criticism from the financial community and the public because it had previously agreed that it would not participate in bond offering to build prisons.<sup>79</sup>

On April 12, 2021, 43 business leaders, investors and activists signed a letter urging banks and investors to refuse to purchase bonds for the new prisons on the grounds that they would “perpetuate mass incarceration.”<sup>80</sup> Signers included AllianceBernstein, a firm with \$700 billion in assets under management, which announced that they would not participate in the offering because it contravened their policy against “modern slavery.”<sup>81</sup>

And in an unprecedented move, the American Sustainable Business Council and its partner, Social Venture Circle, which together represent over 250,000 businesses, returned Barclay’s membership dues and sponsorship to protest the deal.<sup>82</sup> MaryAnne Howland, the American Sustainable Business Council’s board chair announced the move, saying “We abhor the hypocrisy represented here and renounce the continued investment in the broken, unjust system of incarceration of this country.”<sup>83</sup>

On April 19 Barclays announced: “We have advised our client that we are no longer participating in the transaction.”<sup>84</sup> A short time later KeyBanc Capital Markets, Inc. a co-manager on the deal also announced its withdrawal, and the whole P3 collapsed.<sup>85</sup>

Hawaii is heading down the same treacherous and misguided path as Alabama. It is seeking a similar P3 and it is managing the P3 process with the same degree of secrecy that plagued the Alabama project. In October DPS and DAGS announced that had issued a Request for Information (RFI) to obtain feedback on the new jail. It received responses from 22 contractors, designers, financiers, equity investors, and others *but it has not released the names of any of the respondents or what they said about the project.*<sup>86</sup>

The State is now preparing to issue a Request for Qualifications (RFQ) to determine which companies will be allowed to participate in the RFP next year. We can expect that the RFQ, will

be cloaked in the same secrecy as the RFI, and that DPS and DAGS will continue to plan the new jail in secret.

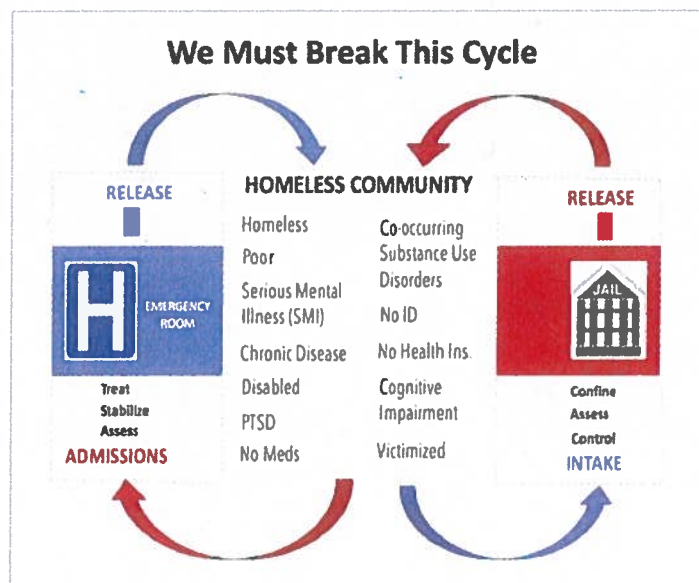
It is time for legislators and the public to step up and demand transparency in the planning of the new jail and *put an end to the secret P3 process.*

## 21<sup>ST</sup> CENTURY JAIL DESIGN

Architect Louis Sullivan’s adage “form follows function” raises the question “What should be the function of a jail in the 21<sup>st</sup> century, and what form should it take?”

The way jails are used today has been shaped by two major events. The first was the closing of state mental health hospitals or “asylums” as they were known, in favor of community-based treatment for the mentally ill. The “deinstitutionalization” of the mentally ill was a well-intentioned policy given the deplorable conditions in state mental hospitals, but it didn’t work. There was not enough money for the community-based centers, so they never materialized, mental health professionals underestimated the difficulty of coordinating care for the mentally ill, and court decisions made it difficult to commit very sick people against their will.

As a result of deinstitutionalization, many mentally ill people went untreated and ended up living on the street, a situation that exists to this day. In 2016 the Honolulu Police Department reported that 43% of all arrests were homeless people and that 72% of the homeless people in the police cellblock were mentally ill or on drugs.<sup>87</sup> Eighteen percent of the homeless population of Oahu say they have mental health issues,<sup>88</sup> and about 700 individuals diagnosed with Severe and Persistent Mental Illness (SPMI) are admitted to OCCC each year.<sup>89</sup> DPS estimates that between 9.5 % and 12% of the OCCC population are mentally ill, and on average these people cycle through the jail about once every four months, with some cycling through *every six weeks.*<sup>90</sup>



The second major event was the passage of highly punitive state and federal laws beginning in the 1970s in response to rising crime rates and a period of tumultuous political and social change.<sup>91</sup> From 1970 to 2000 Hawaii's combined jail and prison population increased 670 percent, and the incarceration rate increased 400 percent.<sup>92</sup> "Hawai'i didn't just follow mainland 'tough on crime' trends, it led them."<sup>93</sup> In the 1980s the average annual increase in Hawaii's prison population was the second highest in the nation.<sup>94</sup>

Today our jails function as *de facto* mental hospitals and temporary shelters for people who are homeless, too poor to make bail, and have chronic illnesses and substance use disorders.

### ■ *Modern Jails Should Have a Problem-Solving Function*

There are emerging paradigms in the criminal justice system that focus on problem solving and reducing recidivism rather than punishment.<sup>95</sup> A few examples are:

- Treatment Courts that offer alternatives to incarceration for offenses related to drug use, mental illness, domestic violence, and issues that specifically affect veterans and youth.
- Community Courts that provide alternatives to jail for low-level offenses;
- Equity Centers that support, health, arts, education and job training for those leaving prison and re-entering society;
- Restorative Justice programs that focus on rehabilitation through reconciliation with victims, family members, and the community at large;
- Peacemaking Programs modeled on Native American practices that seek to resolve disputes, heal relationships, and restore balance to the community; and
- Parent Support Programs that help non-custodial parents find employment, increase child support payments and engage with their children.

Jails in the 21<sup>st</sup> century should have a problem-solving function and be part of the problem-solving continuum, though positioned at the far end of the spectrum and used as a last resort.

Assuming that Hawaii enacts reasonable bail reform, pretrial detainees, who make up between 40% to 50% of the jail population, will not remain in jail more than a few days, and certainly no longer that it takes for a pretrial report and risk assessment to be prepared for a judge. During that time detainees' physical, mental, and economic needs should be assessed by case managers at the jail. The case managers should ensure that prior to release detainees have a discharge plan that, at a minimum, includes a place to live, health insurance, a primary care physician,

medication, a cell phone to stay in contact with court personnel, and access to drug or mental health programs if appropriate.

Hawaii's jails house a relatively small number of felons, misdemeanants and felony probationers who are sentenced to incarceration for a period of less than one year. Their needs should also be assessed, and treatment should begin while they are serving their sentence. They should also have a comprehensive discharge and reentry plan to ensure continuity of care when they are released.

#### ■ *Intensive Reentry Support – The Queens Care Coalition Model*

Some of the people who are released from jail can access services on their own, but some will need extra help which should be provided by a program modeled on the work of the highly successful Queen Care Coalition (QCC). QCC uses community health workers as “navigators” to link high utilizers of the Queens Medical Center’s Emergency Department (ED), many of whom are chronically ill and unsheltered, to services in the community with the goal of improving their health and well-being and reducing their use of the ED.<sup>96</sup>

The QCC navigators have strong communication skills. They carry a small case load of 10 to 12 clients and adhere to harm reduction principles. They meet their clients “where they are at,” build trust, create an agreed upon action plan, and work on overcoming challenges incrementally. They help their clients navigate the complex benefits system, connect them to a primary care physician, and find housing for them if they are ready for it. They sometimes attend doctors’ appointments with the client, take them shopping, and even show them how to prepare simple meals—whatever is needed.

The program works. In the period January 2018 to September 2019 QCC served 322 individuals. In this group, utilization of the ED decreased by 53% and the number ambulance transports to the hospital dropped 54%.<sup>97</sup>

The manager of the QCC program has said that the model of small caseloads, frequent contact, harm reduction, and goals driven by the patient rather than those assisting them, can be adapted to reduce recidivism by people who repeatedly cycle through our jails without ever getting care they need.<sup>98</sup> Navigators should be part of the reentry process for those who need extra help.

#### *Some Design Elements of a 21<sup>st</sup> Century Jail*

For many architects, designers and planners, Halden prison in Norway is the model of good correctional planning. Although it is a prison, not a jail, its design principles and many of its design features are applicable to both types of facilities.



The aim of the design is an environment that supports rehabilitation. Safety and order are maintained through “dynamic security” in which staff and inmates interact constantly and staff serve as role models for inmates. Activities are scheduled to avoid monotony and boredom. The facility is designed to mirror life on the outside to the greatest extent possible so that prisoners do not become institutionalized. The government agencies that provide employment, health, housing, vocational rehabilitation and other services to the general public, provide their services people who are incarcerated.

Interior features include spacious single-occupancy cells with tall vertical windows to admit natural light; wooden furniture (bed, desk, chair, bookcase, storage area); safety glass windows (no bars); the use of materials that dampen sound and provide good acoustics; modules limited to 10 inmates who share a common living area or day room furnished with normal furniture and a television; spaces specifically designed for education, leisure and worship; indoor and outdoor exercise areas; a library; and comfortable areas for contact visits with family and attorneys.



Single Occupancy Cell, Halden Prison

Prisoners should have access to thoughtfully landscaped outdoor spaces. A recent study has shown that prisons with a higher presence of green space have lower levels of self-harm, and lower level of prisoner-on-prisoner and prisoner-on-guard violence.<sup>99</sup>

The jail should have a courtroom for hearings and bench trials. That would reduce transportation costs, the security risks associated with prisoner transportation, and would expedite case processing and reduce length of stay in the jail.



Open space, Halden Prison

Severely mentally ill people should *not be housed in a jail*. They should be housed in a facility specifically designed for the mentally ill and staffed by mental health professionals.

In general, the 21<sup>st</sup> century jail is designed to respect the physical needs, health, dignity, and human potential of all who come in contact with it, including staff, visitors, service providers, and detainees.<sup>100</sup>

## CONCLUSION

Planning a new jail provides a unique opportunity to rethink and improve important elements of our criminal justice system in ways that will reduce our jail population and recidivism rate, save money, improve the well-being of people struggling with physical, mental and economic issues, and make our community safer. We should not squander that opportunity by rushing to build a jail that looks backward rather than forward and leaves in place the many antiquated and misguided policies and practices that perpetuate our overreliance on incarceration as a means of dealing with complex social and economic issues.

Planning a new jail must be part of a larger process of planning alternatives to jail. We must increase our capacity to help people while making every effort to reduce the harm that jails cause.

The collective wisdom of community stakeholders must be an integral part of the planning process because the best solutions come from people who know the local culture and environment. The people who have been planning the new jail thus far have underestimated and devalued the wisdom of Hawaii's people and their ability to collaborate and find innovative and transformative solutions to the problems facing our community.

Jails define who we are, what we believe in, and how we treat each other. We should never outsource our values to a corporation or let a corporation define who we are.

Decisions about the type of jail we build, who is in it, and how it is used, are not political or financial decisions, they are moral decisions, and it is clearly immoral to build a jail we know will cause harm, when we can just as easily, and far less expensively, build a jail that will mitigate harm and improve the well-being of members of our community.

We must join together now to stop the State from issuing an RFP for the new jail, and start planning a jail that we can afford and that reflects our values.

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<sup>98</sup> Shearer, *Queen’s Medical Center Program Is Improving Lives*.

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**ATTACHMENT 2**



STATE OF HAWAII  
HAWAII CORRECTIONAL SYSTEM OVERSIGHT COMMISSION

March 16, 2021

TO: Honorable Representative Mark M. Nakashima, Chair  
House Committee on Judiciary and Hawaiian Affairs

FROM: Ronald Ibarra, Commissioner  
Hawaii Correctional System Oversight Commission

SUBJECT: SB 1260 SD1 RELATING TO CRIMINAL PRETRIAL REFORM

POSITION: The HCSOC **Strongly Supports** SB1260 SD1

PUPOSE: Eliminates the use of monetary bail and requires defendants to be released on their own recognizance for traffic offenses, violations, and nonviolent petty misdemeanor and misdemeanor offenses, with certain exceptions. Creates rebuttable presumptions regarding release and detention for certain offenses and specifics circumstances in which these presumptions apply.

The Hawai'i Correctional System Oversight Commission (HCSOC) urges the legislature to revisit pretrial reform efforts, as presented in SB1260 SD1, to help realize the important goals of the HCR 134 Task Force on Pretrial Reform to reduce unnecessary, costly, and dangerous pretrial incarceration.

This bill was originally proposed by the HCSOC, in its 2020 report to the Legislature. Its intent is to incorporate two additional recommendations of the HCR 134 Task Force on Pretrial Reform that were not implemented in Act 179 (2019). This measure will help Hawai'i realize the more complete pretrial reform vision of the HCR134 Task Force and help reduce costly and unnecessary pretrial incarceration. Ensuring the safety of those in state custody as well as envisioning potential change for the future depends on responsible population reduction and fair and reasonable bail reform.

Therefore, the Hawai'i Correctional System Oversight Commission continues to support SB1260 SD1. Mahalo nui loa for the opportunity to testify on this measure.



**STATE OF HAWAII  
HAWAII CORRECTIONAL SYSTEM OVERSIGHT COMMISSION**

March 31, 2021

**TO:** Honorable Representative Sylvia Luke, Chair  
House Committee on Finance

**FROM:** Ronald Ibarra, Commissioner  
Hawaii Correctional System Oversight Commission

**SUBJECT:** SB 1260 SD1 HD1 RELATING TO CRIMINAL PRETRIAL REFORM

**POSITION:** The HCSOC Strongly Supports SB1260 SD1 HD1

**PUPOSE:** Eliminates the use of monetary bail and requires defendants to be released on their own recognizance for nonviolent traffic offenses, violations, petty misdemeanor, misdemeanor, and felony c offenses, with certain exceptions.

The Hawai'i Correctional System Oversight Commission (HCSOC) urges the legislature to revisit pretrial reform efforts, as presented in SB1260 SD1 HD1, to help realize the important goals of the HCR 134 Task Force on Pretrial Reform to reduce unnecessary, costly, and dangerous pretrial incarceration.

This bill was originally proposed by the HCSOC, in its 2020 report to the Legislature. Its intent is to incorporate two additional recommendations of the HCR 134 Task Force on Pretrial Reform that were not implemented in Act 179 (2019). The present HD1 draft of this measure represents a prudent and balanced approach, with a narrower focus than the bill originally offered. This measure will help Hawai'i realize a more complete pretrial reform vision of the HCR134 Task Force and help reduce costly and unnecessary pretrial incarceration. Ensuring the safety of those in state custody as well as envisioning potential change for the future depends on responsible population reduction and fair and reasonable bail reform.

Therefore, the Hawai'i Correctional System Oversight Commission continues to support SB1260 SD1 HD1. Mahalo nui loa for the opportunity to testify on this measure.



MARK PATTERSON  
CHAIR  
COMMISSIONERS  
JUDGE MICHAEL A. TOWN  
(ret.)  
JUDGE RONALD IBARRA  
(ret.)  
TED SAKAI  
MARTHA TORNEY

**STATE OF HAWAII  
HAWAII CORRECTIONAL SYSTEM OVERSIGHT COMMISSION**

March 1, 2021

**TO:** Honorable Senator Karl Rhoads  
Senate Committee on Judiciary

**FROM:** Ronald Ibarra, Commissioner Hawaii Correctional System Oversight  
Commission.

**SUBJECT:** SB 1260 RELATING TO CRIMINAL PRETRIAL REFORM

**POSITION:** The Hawaii Correctional System Oversight Commission Strongly Supports  
SB1260.

**PUPOSE:** Eliminates the use of monetary bail and requires defendants to be  
released on their own recognizance for traffic offenses, violations, and  
nonviolent petty misdemeanor and misdemeanor offenses, with certain  
exceptions. Creates rebuttable presumptions regarding release and  
detention for certain offenses and specifics circumstances in which these  
presumptions apply.

The Hawai'i Correctional System Oversight Commission urges the legislature to revisit pretrial reform efforts, as presented in SB1260, to help realize the important goals of the HCR 134 Task Force to reduce unnecessary, costly, and dangerous pretrial incarceration.

This is a bill proposed by the Oversight Commission to incorporate the language suggested by the HCR134 Task Force, as well as two amendments (to the HCR134 Task Force recommendations) which were previously proposed by House Committees during the 2019 session and are described below:

- The new HRS Section proposed in Section 2 of the bill, Subsection (b)(2) includes a list of exclusions from eligibility for application of the proposed process favoring release on recognizance. As indicated in Part (B) of this Subsection, (page 4, line 19), the Commission elected to impose a 10-year time limit upon the exclusion for defendants with prior convictions for crimes of violence. Although the House Judiciary Committee originally proposed a 20-year time limit for this exclusion,<sup>3</sup> the Commission hopes that a 10-year time restriction will limit this exclusion to the most recent and relevant violent

crimes, while expanding the pool of defendants eligible for release on recognizance under the proposed new section.

- Also, in the new HRS Section proposed in Section 2 of this bill, in Subsection (c) (page 5, lines 10-13), the Commission added language to authorize the Director of Public Safety to release any defendant detained for the inability to post a bail amount of less than \$99. This language was originally added to this subsection by the House Committee on Public Safety, Military, and Intergovernmental Affairs,<sup>4</sup> including a requirement that electronic monitoring equipment be used. The Commission agrees that the Director of Public Safety should maintain and nimbly exercise authority to help reduce overcrowding and unnecessary pretrial incarceration. However, the Commission declined to include the electronic monitoring requirement due to concerns about the availability and affordability of electronic monitoring devices for defendants who could not afford even very low bail amounts. Such a requirement would likely obstruct the use of the proposed administrative release authority.

This measure will help Hawai'i realize a more complete pretrial reform vision of the HCR134 Task Force, and help reduce costly and unnecessary pretrial incarceration. Ensuring the safety of those in state custody as well as envisioning potential change for the future depends on responsible population reduction and fair and reasonable bail reform.

Therefore, the Hawai'i Correctional System Oversight Commission supports SB1260. Mahalo nui loa.

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