

# Hawai'i HCR 23 Task Force

Task Force Second Meeting  
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**Justice Center**  
THE COUNCIL OF STATE GOVERNMENTS

# The HCR 23 Mandate

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- 1. Examine and make recommendations** regarding existing procedures of the Hawai'i Paroling Authority setting the **minimum terms of imprisonment** to increase efficiency of the procedures.
- 2. Study whether parole system models** used by other states might be suited for Hawai'i.
- 3. Examine and compare the minimum sentences** issued by the Hawai'i Paroling Authority and the courts to determine whether there are significant differences.
- 4. Recommend** whether the administration of justice may be better served by removing the **responsibility of setting minimum sentences** from the Hawai'i Paroling Authority.

# Presentation Outline

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- I. Victim rights when a crime is committed**
- II. Judicial role in sentencing by statute**
  - Overall framework
  - PSIs
  - Roles of prosecution and defense
  - Data points
- III. HPA role in setting minimum by statute and policy**
  - Rights of victims and accused
  - Hawai'i rules of professional conduct of prosecution and defense
  - Sample of data on mins
  - More detail in policy
- IV. Corrections role in preparing people for release**
- V. Office of Hawaiian Affairs perspective**
- VI. Oversight Commission perspective**

# Victims have statutory rights in the judicial process (and beyond).

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## H.R.S. Chapter 801D Rights of Victims & Witnesses in Criminal Proceedings

801D-1 Legislative intent

801D-2 Definitions

801D-3 Eligibility of victims

**801D-4 Basic bill of rights for victims and witnesses**

801D-5 Responsibility for rights and services

801D-6 Intergovernmental cooperation

801D-7 Televised testimony

# The victim bill of rights stresses notification and information, supported by the AVIN system.

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## § 801D-4 Basic bill of rights for victims and witnesses

Victims and surviving immediate family members of crime have the right to be:

- ✓ **Notified** of major developments
- ✓ **Consulted and advised** about plea bargaining
- ✓ **Informed** of final disposition
- ✓ **Notified** of hearing cancellation
- ✓ **Protected** from threats or harm
- ✓ **Informed** of financial assistance and other social services available
- ✓ **Informed** of changes to custodial status that allows or results in release into the community

## Chapter 353 Corrections. Part VII Automated Victim Information and Notification System

# The accused also has constitutional and statutory rights in the judicial process.

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## Hawai'i Constitution

### Article I. Bill of Rights

SECTION 10. INDICTMENT; PRELIMINARY HEARING; INFORMATION; DOUBLE JEOPARDY; SELF-INCRIMINATION

SECTION 12. BAIL; EXCESSIVE PUNISHMENT

SECTION 14. RIGHTS OF ACCUSED

SECTION 25. SEXUAL ASSAULT CRIMES AGAINST MINORS

## Article V. The Executive

### SECTION 5. EXECUTIVE POWERS

... The governor may grant reprieves, commutations and pardons, after conviction, for all offenses, subject to regulation by law as to the manner of applying for the same. .

..

## Hawai'i Revised Statutes

### Rights of Accused

801-1 Indictment or information

801-2 Witnesses; defense

801-3 Jury list, witnesses

801-4 Fees not payable by defendant

# Victims have specific rights related to sentencing.

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## §706-601 Pre-sentence diagnosis and report

“ . . . [I]n felony cases, the prosecuting attorney shall inform, or make reasonable efforts to inform, the victim or the victim’s surviving immediate family members of their rights to be present at the sentencing hearing and to provide information relating to the impact of the crime, including any requested restitution.”

## §706-602 Pre-sentence diagnosis, notice to victims, and report

PSI court staff to provide notice of the Crime Victim Compensation Act

## §706-604 Opportunity to be heard with respect to sentence; notice of pre-sentence report; opportunity to controvert or supplement; transmission of report to department

“In all circuit court cases, regardless of whether a pre-sentence report has been prepared or waived, the court shall afford a fair opportunity to the victim to be heard on the issue of the defendant’s disposition, before imposing sentence.”

# Discussion

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- **What is the victim experience from the criminal event through the judicial process?**
  - ✓ Law enforcement
  - ✓ Victim advocate
  - ✓ Prosecutor
  - ✓ Judicial hearings
- **How do prosecutors engage with victims and how do they use victim input?**
- **How do judges engage with victims and use victim input in decision-making?**

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# In Hawai'i, the judicial role in sentencing is minimized and paroling authority is maximized.

## Legislative

- Hawai'i statutes establish:
- Offenses and sentencing options
  - Maximum sentence length by felony class
  - Parole board's authority to set minimum and then to release
  - Mandatory minimums

## Judicial

- Determines offense committed
- Determines sentencing disposition: probation or prison
- Pronounces maximum based on statute
- May mitigate mandatory minimum

## Executive

- HPA:
- Standards for minimum
  - Hearings for minimum
  - Changing the minimum
  - Parole release
  - Parole revocation
- DOC:
- No good time authority

# Statutory Framework for Judicial Sentencing

**§706-605 Authorized disposition of convicted defendants.** Main options are probation, prison, fine, community service; compensation fee and restitution are mandatory

**§706-606.5 Sentencing of repeat offenders. Sub. (6)** allows reduced minimum for “strong mitigating circumstances.”

**§706-620 Authority to withhold sentence of imprisonment.** Probation not allowed for murder, most Class A crime, etc.

**§§ 706-656 - 706.660.** [Terms of imprisonment — see table.]

<b>Felony Grade</b>	<b>Mandatory Stat. Max.</b>
2nd Degree Murder	Life w/ Parole
Class A	20 years
Class B	10 years
Class C	5 years

# Statutory Framework for Pre-sentence Investigations (PSIs)

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## §706-601 Pre-sentence diagnosis and report

Court shall order for felony case unless waived by agreement of the parties or by the judge in an accepted plea.

## §706-602 Pre-sentence diagnosis, notice to victims, and report

“ . . . circumstances attending the commission of the crime . . . history of delinquency or criminality, physical and mental condition . . . the effect that the crime committed by the defendant has had upon [the] victim, including but not limited to, any physical or psychological harm or financial loss suffered. . . .”

## §706-604 Opportunity to be heard with respect to sentence

“ . . . [court shall furnish to the parties a] copy of the report of any pre-sentence diagnosis or psychological, psychiatric, or other medical examination and afford fair opportunity . . to controvert or supplement them. . . .”

# Hawai'i Rules of Professional Conduct for Prosecution and Defense

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## Rules of Professional Conduct

### Preamble: A Lawyer's Responsibilities

“These principles include the lawyer’s obligation zealously to protect and pursue a client’s legitimate interests.”

### Rule 1.2. Scope of Representation and Allocation of Authority between Client and Lawyer

“In a criminal case, the lawyer shall abide by the client’s decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial, and whether the client will testify.”

### Rule 3.8. Performing the Duty of Public Prosecutor

“A public prosecutor or other government lawyer . . .shall not [prosecute when] charges are not supported by probable cause; . . . Shall make timely disclosure of new, credible, and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted . . . .”

# Data Points for the Criminal Judicial Process

## Excerpts of Table 7 Caseload Activity, FY 2021–22, Circuit Courts Proper—All Circuits

Criminal Cases Pending = 14,661		Criminal Cases Terminated = 4,011	Clearance rate = 104%
Type of Termination	Guilty/No Contest	Acquitted/Dismissed/ Nolle Prosequi	Other
	1,634	1,600	777

*\*Termination Types for Criminal Cases: Guilty Pleas include deferred plea agreements; Others includes Change of Venue, Remand to District Court, Conditional Release, and “Others.”*

# Data Points for the Criminal Judicial Process

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## Excerpts of Table 12 Sentences Imposed in Criminal Cases, FY 2021–22, Circuit Courts Proper—All Circuits

Fine/ Restitution	Incarceration	Community Service	Counseling/ Treatment	Other	Total
5,639	2,509	77	415	2,953	11,593

*\*Sentences were imposed on 3,051 defendants in 2,972 cases statewide.*

# Discussion

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- **What information do judges have at sentencing?**
  - Is the information different for plea bargaining versus cases that go to trial?
- **What information are prosecutors using to recommend sentence dispositions?**
  - How prevalent is charge bargaining that would change the offense class?
  - How are aggravating and mitigating factors considered?
- **What information are defense attorneys using to recommend sentence lengths?**
  - How are decisions made to waive a PSI?
  - In what percentage of cases are PSIs waived?
- **How are victims involved in the PSI and sentencing process?**

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# Summary of the Scope of the HPA's Authority

## Legislative

- Hawai'i statutes establish:
- Offenses and sentencing options
  - Maximum sentence length by felony class
  - Parole board's authority to set minimum and then to release
  - Mandatory minimums

## Judicial

- Determines offense committed
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## Executive

- HPA:
- Standards for minimum
  - Hearings for minimum
  - Changing the minimum
  
  - Parole release
  - Parole revocation
  - Parole discharge
  - Clemency

# General Statutory Framework for the HPA

## §353-62 Hawai'i paroling authority; responsibilities and duties; operations; records, reports, staff

### (a) . . . [T]he paroling authority shall:

- (1) Serve as the central paroling authority for the State;
- (2) Consider for parole all committed persons;
- (3) Determine the time at which parole shall be granted to any eligible individual as that time at which maximum benefits of the correctional institutions to the individual have been reached and the element of risk to the community is minimal;
- (4) Establish rules of operation to determine conditions of parole applicable to any individual granted parole;
- (5) Provide continuing custody, control, and supervision of paroled individuals;

# General Statutory Framework for the HPA

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**(cont.) (8) Interpret the parole program to the public in order to develop a broad base of public understanding and support;**

**(9) Recommend to the legislature sound parole legislation and recommend to the governor sound parole administration; . . . .**

**(b) In its operations, the paroling authority shall:**

**(1) Keep and maintain a record of all meetings and proceedings;**

**(2) Make public no more than thirty days after a parole release hearing the following information: (A) The prisoner's name; and (B) Whether the parole request was approved or denied;**

**(3) Send a detailed report of its operations to the governor every three months.**

# Minimum Setting Statutory Framework for HPA

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## § 706.669 Procedure for determining minimum term of imprisonment

“ . . . no later than six months after commitment . . . hold a hearing, and on the basis of the hearing make an order **fixing the minimum term of imprisonment** . . .

. . . obtain a complete report regarding the prisoner's life before entering the institution and a full report of the prisoner's progress in the institution . . . .

. . . may, in any particular case and at any time, impose a special condition that the prisoner will not be considered for parole unless and until the prisoner has a record of continuous exemplary behavior. . . .

. . . After sixty days notice to the prosecuting attorney, the authority in its discretion may reduce the minimum term fixed by its order . . . .”

# HPA's Hawaii Administrative Rules, Chapter 23-700, adopted in 1991

HAWAII PAROLING AUTHORITY	
CHAPTER 700	
Subchapter 1 Hawaii Paroling Authority	
23-700-1	Definitions
23-700-2	General
Subchapter 2 Minimum Sentence	
23-700-21	Jurisdiction
23-700-22	Procedure for fixing of minimum term
23-700-23	Factors to be considered in fixing a minimum sentence
23-700-24	Mitigating Factors to be considered in setting a minimum sentence
23-700-25	Aggravating factors to be considered in setting a minimum sentence
23-700-26	Request for reduction of minimum term(s) of imprisonment; submission guidelines
23-700-27	Request for reduction of minimum term of imprisonment; procedure
23-700-28	Issuance of decision on reduction of minimum term of imprisonment
23-700-29	Reducing previously established minimum terms of imprisonment; guidelines

# HPA Minimum Term Guidelines, Adopted in 1989

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## H.R.S. § 706.669

“[E]stablish guidelines for the uniform determination of minimum sentences which shall take into account both the nature and degree of the offense of the prisoner and the prisoner's criminal history and character. . . .”

### Guidelines levels of severity:

- ❖ Level I (mitigated)
- ❖ Level II
- ❖ Level III (aggravated)

### Seven Areas of Focus, Three in Particular:

- ❖ Nature of the offense
- ❖ Degree of injury or loss
- ❖ Criminal history
  
- ❖ Character and attitude with respect to criminal activity or lifestyle
- ❖ Efforts made to live prosocial life prior to prison
- ❖ Probation revocation
- ❖ Youth adult offender (HRS Sec. 706-667)
- ❖ Involvement in instant offense

# HPA Guideline Minimum Ranges by Offense Class and Level

<b>Felony Grade</b>	<b>Mandatory Stat. Max.</b>	<b>Level I</b>	<b>Level II</b>	<b>Level III</b>
2nd Degree Murder	Life w/ Parole	5–10	10–20	20–50
Class A	20 years	2–5	5–10	10–20
Class B	10 years	1.5–3	3–5	5–10
Class C	5 years	1–2	2–3	3–5

# Roles and Rights in the HPA Minimum Process

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## Defense and Prisoner

". . . Be given reasonable **notice** of the hearing . . . Be permitted to be heard by the [HPA]. . . . Be permitted to **consult** with any persons the prisoner reasonably desires, including the prisoner's own legal counsel, in preparing for the hearing . . . Be permitted to be **represented** and assisted by counsel at the hearing . . . Have **counsel appointed** to represent and assist the prisoner if the prisoner so requests and cannot afford to retain counsel . . . [and]

"Be informed of the prisoner's rights [above]"

## Prosecution and Victim

"The State shall have the right to be represented at the hearing by the prosecuting attorney who may **present written testimony and make oral comments** and the authority shall consider such testimony and comments in reaching its decision. The authority shall notify the prosecuting attorney of the hearing at the time the prisoner is given notice of the hearing. The **hearing shall be opened to victims** or their designees or surviving immediate family members who may **present a written statement or make oral comments.**"

# HPA minimums have survived a constitutional question under the 6th Amendment.

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## Supreme Court of the United States

“[I]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed.” —*Apprendi*

“Elevating the low-end of a sentencing range heightens the loss of liberty associated with the crime: the defendant’s “*expected punishment*” has increased as a result of the narrowed range.” —*Alleyne*

## Hawai‘i Intermediate Court of Appeals

“[T]his court has noted that the HPA Guidelines do not set an initial starting point and increase (or decrease) the minimum term based upon certain criteria, but rather, “[a]ll relevant criteria are evaluated and a *level of punishment is determined*[.]”

—*Draizen* [and other unpublished opinions]

# Data Points for the HPA Process

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**All case types peaked at over 4,000 in FY2019 and were about 3,000 in FY2022.**

- Parole release considerations outnumber all other decision types combined.
- Minimum term hearings in FY2022 were 16 percent of HPA's caseload, but anecdotally about twice that much of their workload.

**Average minimum sentences across major offense categories and from FY2018 to 2022:**

Class A **10.2 yrs** (Manslaughter, Robbery, Sexual Assault 1st, PDD 1st )

Class B **5.8 yrs** (Assault 1st, Burglary 1st, Sexual Assault 2nd, PDD 2nd )

Class C **3.3 yrs** (Assault 2nd, Burglary 2nd, Sexual Assault 3rd, PDD 3rd )

# Discussion

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- **What information does HPA have available for minimum setting?**
  - How does HPA weigh the information when setting minimums?
  - Do certain factors have more weight than others?
- **How are victims engaged in minimum setting?**
- **How are defense attorneys engaged in minimum setting?**
- **Are prosecutors providing input into minimum setting?**
  - How does HPA setting minimums impact plea bargaining?
- **What are the effects when HPA sets the minimum higher than a judge recommends?**

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# Samples from the Statutory Framework for PSD Corrections

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## **Chapter 353 Corrections and Rehabilitation (after 1/1/2024)**

Covering health care, community centers, conditional release centers, mental health testing, substance use testing, community partnering, furlough, employment, etc.

## **Chapter 353E Statewide Integrated Sex Offender Treatment Program**

## **Chapter 353G Criminal Offender Treatment Act**

## **Chapter 353H Comprehensive Offender Reentry System**

## **Chapter 354D Hawai'i Correctional Industries**

# Discussion

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- How do minimum hearings impact staffing and workload of PSD?
- What is the process for a person to request a reduction in their minimum sentence?
- What factors does HPA consider for a reduction in minimum sentences?
- How does PSD use the reduction of minimums as incentives for behavior management?
  - How does PSD incentivize behavior if a minimum reduction is denied or if minimum time has passed?
- How do minimums and reductions in minimums impact programming placements?
- How are defense attorneys engaged in the minimum reduction hearings?
- How are victims impacted by reductions in minimums?

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# Statutory Mission for the Office of Hawaiian Affairs

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1. Betterment of conditions of native Hawaiians
2. Betterment of conditions of Hawaiians
3. Coordination of programs and activities relating to native Hawaiians and Hawaiians
4. Assessing the policies and practices of other agencies . . . and conducting advocacy efforts
5. Applying for, receiving, and disbursing grants and donations
6. Serving as a receptacle for reparations

# Discussion

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- What has been the historical context of native Hawaiians' interactions with the judiciary (judges and prosecutors)?
- What has been the historical context of native Hawaiians' interactions with HPA?
- What has been the historical context of native Hawaiians' interactions with PSD?
- What comes to mind from a native Hawaiian perspective that the task force should be aware of or consider moving forward regarding sentencing and minimum setting?

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# Statutory Duties of the Correctional System Oversight Commission

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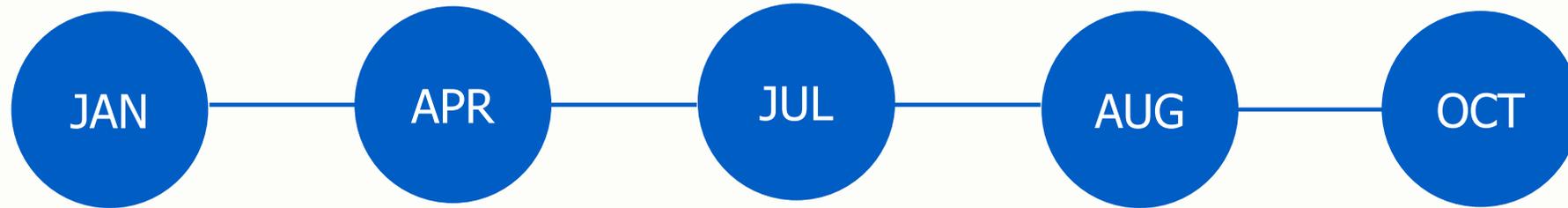
1. **Oversee . . . Investigate complaints . . . facilitate a correctional system transition to a rehabilitative and therapeutic model;**
2. **. . . inmate population limits . . . policies and procedures**
3. **. . . monitor and review the comprehensive offender reentry program, including facility educational and treatment programs, rehabilitative services, work furloughs, and the Hawaii paroling authority's oversight of parolees . . .**
4. **Ensure . . . programs and services that result in the timely release of inmates on parole when the minimum terms have been served . . . .**

# Discussion

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- How does HCSOC's statutory mission affect or inform the issue of minimum setting?
- What observations and community input has HCSOC experienced related to the issue of minimum sentences?

# Task Force Meeting Planning for 2024



What information do task force members want to hear about to inform findings and recommendations?

What voices do task force members want to hear from to inform findings and recommendations?

What data do task force members want to see analyzed?

**August 1**  
Legislative  
Recs Due

**October 21**  
Report Due

# Activities the Justice Center Can Pursue to Inform the Task Force Deliberations

## Review and Feedback

- PSI content and policies
- Assessment policies and practices for judicial and corrections (criminogenic risk, mental health, substance use, and sex offense)
- HPA minimum setting and reduction policies
- PSD policies on assessment, programming placement, case planning, and minimum reductions

## Observations

- PSI
- Assessments
- Judicial sentencing hearings
- HPA minimum setting hearings

## Focus Groups/Interviews

- Incarcerated people to understand their knowledge of processes and experiences with sentencing and minimum setting

## Stakeholder Engagement

- Judges
- Prosecutors
- Defense attorneys
- Victims
- Institutional case managers
- Associations
- Legislators
- People with lived experience in Hawai'i's system
- Advocates

# Data analysis—What else should we be analyzing?

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## Judicial Dispositions

- By offense class
- Probation vs. prison

## Minimums by HPA

- By offense class
- Compared to the guidelines
- Compared to judicial minimums
- Minimum hearings proportion of HPA caseload
- Breakdown by race, ethnicity, and gender

## Prison population over time

- By offense
- By race, ethnicity, and gender

## Reductions in Minimums

- By offense class
- Breakdown by race, ethnicity, and gender
- Number requested versus number approved
- By facility

## Releases from Prison

- Length of time served
- Minimum versus actual time served
- By offense class
- Breakdown by race, ethnicity, and gender

# Thank You!

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