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STATE OF HAWAII | KA MOKU'ĀINA 'O HAWAII'  
**HAWAII PAROLING AUTHORITY**  
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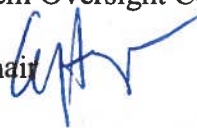
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No. \_\_\_\_\_

TO: Hawaii Correctional System Oversight Commission

FROM: Edmund "Fred" Hyun, Chair 

SUBJECT: HAWAII PAROLING AUTHORITY'S RECOMMENDATIONS  
CONCERNING ITS MINIMUM TERM PROCEDURES

The 2023 Legislature created the House Concurrent Resolution No. 23 Task Force "to examine and make recommendations regarding existing procedures of the Hawaii Paroling Authority setting the minimum terms of imprisonment to increase efficiency of the procedures[.]" "study whether parole system models utilized by other states might be utilized be suited for Hawaii[.]" "examine and compare the minimum sentences issued by the Hawaii Paroling Authority and the courts to determine whether there are significant differences[.]" and "recommend whether the administration of justice may be better served by removing the responsibility of setting minimum sentences from the Hawaii Paroling Authority, thereby enabling it to focus on determining and assisting prisoners' fitness for parole and supervision of parolees[.]" House Concurrent Resolution No. 23, H.D.1, S.D.1, Thirty-Second Legislature (2023), p. 2.

The Task Force has spent the last several months examining and studying the Hawaii Paroling Authority's (HPA) procedures used in setting minimum terms of imprisonment, the ways in which other states handle parole, and how the courts determine mandatory minimum terms as authorized by sections 706-606.5, 706-660.1, and 706-660.2, Hawaii Revised Statutes (HRS). Now the Task Force seeks to make recommendations concerning the HPA's minimum

term procedures and whether the responsibility of setting minimum terms should be removed from the HPA.

The proposal made by the Council of State Government (CSG) at the Task Force's meeting of June 6, 2024, however, is based on a misunderstanding of the law in Hawaii. In CSG's Power Point presentation to the Task Force, it proposed removing minimum term setting from the HPA and replacing it with minimum terms set by statute, claiming that "Hawaii's guideline minimums side-step this 6<sup>th</sup> Amendment constitutional requirement" in the United States Supreme Court rulings in Apprendi v. New Jersey, Blakely v. Washington, Booker v. United States, and Alleyne v. United States. CSG Power Point presentation, June 6, 2024, p. 16. In those cases, the United States Supreme Court ruled that pursuant to the 6<sup>th</sup> Amendment of the United States Constitution any fact which increases the penalty for a crime beyond the prescribed statutory maximum or a mandatory minimum sentence must be submitted to a jury and proven beyond a reasonable doubt.

CSG's statement in its Power Point presentation is untrue. The Intermediate Court of Appeals in Hawaii specifically ruled that the 6<sup>th</sup> Amendment requirement set out in Apprendi and Alleyne (and in Blakely and Booker) do not apply to the HPA's setting of minimum terms of imprisonment. The Hawaii Supreme Court then denied the inmates' requests for review of the ICA's rulings. See Draizen v. State, 134 Hawaii 477, \*2, 344 P.3d 361 (App.2015) (unpublished), cert. denied, No. SCWC-12-0000708, 2015 WL 3649462 (Haw. June 9, 2015) (unpublished); Star v. State, 143 Hawaii 141, \*1-2, 425 P.3d 603 (App.2018) (unpublished), cert. denied, No. SCWC-17-0000642, 2019 WL 181416 (Haw. Jan. 14, 2019) (unpublished). Thus the main justification for CSG's proposed overhaul of the HPA minimum term procedures is not the law in Hawaii, and its proposal should not be considered when deciding what recommendations should be made to the Legislature or the Legislative Reference Bureau.

Another example of CSG's misunderstanding of Hawaii law is its claim that "Hawaii already uses fixed minimums for repeated offenses and use of firearms," conflating the mandatory minimum terms of imprisonment set by the circuit courts pursuant to sections 706-

606.5, 706-660.1, and 706-660.2, HRS, with the minimum terms set by the HPA pursuant to section 706-669, HRS. The mandatory minimum terms set by the circuit courts are limited to cases involving repeat offenders, the use of a firearm in the commission of a crime, and victimization of the elderly, disabled, or minors. In contrast, the HPA must set minimum terms for all offenders convicted of felonies and sentenced to imprisonment pursuant to section 706-669, HRS. In addition, the Intermediate Court of Appeals has noted that a “trial court’s sentencing decisions and the HPA’s parole decisions (including the HPA’s minimum term determination) are subject to different statutory schemes.” Nichols v. State, 134 Hawaii 390, 398, 341 P.3d 1190, 1198 (App.2015). These different statutory schemes explain how the Hawaii Supreme Court and the Intermediate Court of Appeals distinguish mandatory minimum terms set by sentencing courts from minimum terms set by the HPA.

CSG’s Power Point presentation on June 6, 2024, also referred to outdated data when it stated that “release decisions were not timed to the minimum sentence, despite the HPA setting the minimum in the first place.” The data is from 2006 to 2011, which is thirteen to eighteen years ago. CSG Power Point presentation, June 6, 2024, p. 22. Such data should not be considered when there is much more recent data which shows how the HPA is functioning.

		<b>Fiscal Year</b>					
		<b>17-18</b>	<b>18-19</b>	<b>19-20</b>	<b>20-21</b>	<b>21-22</b>	<b>22-23</b>
<b>MINIMUMs</b>	individuals	493	681	429	412	856	916
<b>Admissions</b>	New, PTF,SFP	664	734	723	548	743	701
<b>ROMs</b>	Applications	202	165	167	217	162	142
	Granted	17	21	19	42	31	19
		9%	13%	11%	19%	19%	13%
	Denied	185	144	148	175	131	123
		91.50%	87%	88.60%	80.60%	80.80%	86.60%
<b>Parole</b>	# hearings	2940	2923	2582	2,431	1861	1685
<b>Consideration</b>	individuals	2066	1932	1761	1656	1462	1277
	re-hear	874	991	821	775	339	408
	Granted	852	768	803	900	528	447
	%	41%	39%	45%	54%	36%	35%
<b>Deferred</b>		294	459	237	428	205	180

<b>MAX OUTS-NP</b>		240	209	251	189	173	224

The data in this table is taken from the HPA’s annual reports from the fiscal years listed. “ROMs” refer to requests for reduction of minimum terms which may be considered by the HPA after a convicted offender has served one third of their minimum term. “New” refers to convicted offenders straight from court. “PTF” refers to pre-trial felons sentenced at court and “SFP” refers to sentenced felon probationers where the court revoked the probation and resentenced to imprisonment. “Deferred” refers to convicted offenders who have had their parole granted but had their release deferred for various reasons, such as a residential substance abuse program not being able to accept the offender at that time. “MAX OUTS-NP” refers to convicted offenders who finished their sentences in custody – this number includes but is not limited to offenders who were previously granted parole but violated institutional policies prior to their release date; offenders who refused to participate in programs recommended by the Department of Corrections and Rehabilitation (DCR); offenders who refused to prepare a verifiable parole plan or whose parole plan was unacceptable, such as not obtaining a residence; offenders who committed misconducts in prison such as escape; offenders who later had their sentences reduced to lengths which didn’t allow for programs and therefore parole; and offenders who asked to stay in custody to finish programs or to earn more money in work furlough. The HPA has set minimum terms the same length as maximum indeterminate sentences in relatively few cases.

The high number of parole hearings listed on the table is due to the statutory requirement that the HPA hold parole hearings at least once a year for all convicted offenders eligible for parole and to the fact that the parole board will at times hold more than one parole hearing a year for offenders. For example, a convicted offender may appear at their parole hearing but may not be finished with their programming at that time. The board can schedule another parole hearing for the convicted offender a few months later, when they are set to finish the programs.

The highlighted portion of the table shows the number of convicted offenders the HPA granted release on parole. The relatively low percentage of offenders being granted parole over the six years covered by the table is due to several factors, including: 1) the multiple hearings many offenders receive before being granted parole; 2) severe staff shortages at DCR facilities, which lead to programs being shut down or limited and preventing convicted offenders from participating and completing their rehabilitation; 3) convicted offenders committing serious violations of institutional policies, which affect their security classification and prevent them from participating in programs while serving their sanctions; 4) some convicted offenders refusing to participate in programs completely; 5) some convicted offenders initially refusing to participate in programs then belatedly agreeing to participate, delaying their completion of the programs; and 6) some convicted offenders who previously served terms of probation, earned enough detention credit that by the time they were sentenced to imprisonment their maximum sentence is too short for them to complete all their recommended programs.

Another factor in the low percentage of parole granted in 2020-2021 and after was the COVID-19 pandemic, which shut down all programs in the correctional facilities and work furlough. This shut-down created a backlog of convicted offenders trying to finish their recommended rehabilitation before their parole hearings, which then delayed other convicted offenders from entering and finishing their recommended rehabilitation. The HPA took the shut-down of programs, age and medical conditions into consideration when deciding parole during this period, leading to the slightly higher percentage of convicted offenders obtaining parole in 2020-2021. Since then, programs and work furlough have re-started and the parole board has returned to looking at the completion of programs before granting parole.

An independent assessment of the HPA's paroling procedures (which includes its minimum term procedures) previously concluded that it was the second-best parole system in the nation. On February 19, 2019, the Prison Policy Initiative judged Hawaii and the HPA to be the second-best parole release system in the nation based on five general factors: 1) whether the state legislature allows the parole board to offer discretionary parole to most sentenced

individuals; 2) the opportunity for the person seeking parole to meet face-to-face with the board members and other factors about witnesses and testimony; 3) the principles by which the parole board makes its decisions; 4) the degree to which staff help every incarcerated person prepare for their parole hearing; and 5) the degree to which the parole board is transparent in the way it incorporates evidence-based tools. Wyoming was the top-ranked state, with a grade of B-, and Hawaii was second with a grade of C+. Jorge Renaud, “Grading The Parole Systems Of All Fifty States,” [prisonpolicyinitiative.org](https://www.prisonpolicy.org/reports/grading_parole.html) (February 19, 2019), [https://www.prisonpolicy.org/reports/grading\\_parole.html](https://www.prisonpolicy.org/reports/grading_parole.html).

The Prison Policy Initiative is a non-profit started in 2001 that describes itself as “produc[ing] cutting edge research to expose the broader harm of mass criminalization, and then spark[ing] advocacy campaigns to create a more just society.” The fact that a national organization critical of the criminal justice system analyzed Hawaii’s laws and the HPA’s procedures and found its parole release system second best in the country belies the criticism that the HPA’s minimum term procedures are somehow unconstitutional and in need of replacement.

Instead of CSG’s proposal unveiled at the June 6, 2024, meeting, the Task Force should instead recommend improvements to the current procedures used by the HPA. The Hawaii Paroling Authority was created in 1931 by the Legislature to set minimum terms of imprisonment and decide whether to grant parole. Hawaii is the only state in the nation which sets minimum terms of imprisonment after hearings which include not only board members reviewing sentencing documents, but input from crime victims as required by Hawaii statute, statements from prosecutors as well as direct presentations by defendants and their counsel to the board members. Arguments about minimum terms are made directly to HPA board members and this is unique to Hawai’i, ensuring convicted individuals have an opportunity to shape their futures and allowing HPA board members to talk with the convicted offenders. As a result of Hawai’i’s distinctive minimum hearing procedures, HPA has essential information to assess how to balance individual circumstances with fairness and consistency with prior HPA minimum sentencing decisions.

In order to improve the current procedures in setting minimum terms and strive to be the top parole system in the nation, the HPA makes the following recommendations to the Task Force for submission to the Legislature:

- Convert one part-time position on the HPA to a full-time Vice-Chair position that overlaps the Chair's term for continuity (353-63, HRS)
- Add one Office Assistant and/or Secretary 1 position to assist with public access to hearings (new position)
- Hire contract position with legal background to draft amendments and/or updates to Hawaii Administrative Rules Chapter 700
- Amend section 353-63, HRS, to require HPA board members to have a background in at least one of the following: the criminal justice system; law enforcement; the judiciary; the prison system; criminal law; treatment programs; or other related experience
- Amend section 706-601, HRS, to remove the ability to waive the preparation of a presentence investigation report for felonies
- Pass legislation to allow the HPA to reduce court-imposed mandatory minimum terms for repeat offenders to allow parole upon program or furlough completion
- Create an integrated database between the Judiciary, the Department of Corrections and Rehabilitation, the Department of Law Enforcement, the HPA, the Crime Victim Compensation Commission, and the Department of the Attorney General

In addition to the recommendations for the HPA, the Crime Victim Compensation Commission (CVCC) also makes the following recommendation to the Task Force for submission to the Legislature:

- Funding for three Victim Advocate positions within CVCC to provide direct services to crime victims throughout the parole process. These positions are needed to provide victims with support during minimum and parole hearings, safety planning, victim notification, community referrals and to ensure that victims can exercise their

statutory rights during the parole process. These services were previously provided through a joint CVCC and HPA project that was federally funded. Unfortunately, a decrease in federal VOCA funds resulted in the project being discontinued.

The Department of Corrections and Rehabilitation (DCR) also makes the following recommendations to the Task Force for submission to the Legislature:

- 20 additional facility case managers (social workers and/or human services professionals) to lower the current caseloads of staff so the DCR can do real integrated case management services
- \$4 million annually to provide “reach in wrap around” reentry services to offenders. These services include staff to act as navigators to assist with connection to community-based services, including social services, benefits, housing, etc.
- \$2 million annually to provide initial tool belts, minimal tools, safety boots, safety equipment, etc., and living wages to offenders participating in apprenticeship programs with various trade craft unions
- \$200,000.00 annually for bus passes, replacement birth certificates, real state ID cards, and replacement social security cards prior to offender’s release from prison.