NEIL ABERCROMBIE
GOVERNOR

STATE OF HAWAII
DEPARTMENT OF PUBLIC SAFETY
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TESTIMONY ON HOUSE BILL 2255
RELATING TO PUBLIC SAFETY
by
Jodie F. Maesaka-Hirata, Director
Department of Public Safety

House Committee on Public Safety and Military Affairs
Representative Henry J. C. Aquino, Chair
Representative Ty Cullen, Vice Chair

Thursday, February 2, 2012; 9:00 A.M.
State Capitol, Conference Room 309

Chair Aquino, Vice Chair Cullen and Members of the Committee:

The Department of Public Safety (PSD) has reviewed House Bill (HB) 2255 and appreciates the legislature's concern with regards to providing a statutory medical release process in the best interest of our ill and disabled inmates. The Department presently provides for a similar "compassionate release" recommendation process and supports the intent of HB 2255.

The Department requests the following amendments to the measure:

1. **Page 2 (line 22)** - After "licensed physician" add **"designated by the department"**.....
2. **Page 3 (line 14)** - After "licensed physician" add **"designated by the department"**.....

The Department believes that these amendments will clarify the recommendation process responsibilities.

Thank you for the opportunity to present this testimony.

STATE OF HAWAII
HAWAII PAROLING AUTHORITY
1177 ALAKEA STREET, GROUND FLOOR
Honolulu, Hawaii 96813

No._____

TESTIMONY ON HOUSE BILL 2255
RELATING TO PUBLIC SAFETY

BY

HAWAII PAROLING AUTHORITY
Bert Y. Matsuoka, Chairman

House Committee on Public Safety and Military Affairs
Representative Henry J. C. Aquino, Chair
Representative Ty Cullen, Vice Chair

Thursday, February 2, 2012; 9:00a.m.
State Capitol, Conference Room 309

Chair Aquino, Vice Chair Cullen and Members of the Committee:

The Hawaii Paroling Authority (HPA) appreciates the legislature's interest in the compassionate release of offenders from custody that do not pose a risk to public safety and expanding the HPA's discretionary authority in this important humanitarian area.

The HPA respectfully requests the following minor amendments to HB 2255:

1. **Page 2 (Line 22)** – After "licensed physician" add **"designated by the department"**.....

2. **Page 3 (Line 14)** – After "licensed physician" add **"designated by the department"**.....

3. **Page 4 (Line 18)** – Add in a new #3 to read "Does not have a detainer in place from another jurisdiction and/or does not have any remaining or consecutive sentence(s) to be served in another jurisdiction.

4. **Page 5 (Line 12)** - After "treatment program" add "**and after care**".....

5. **Page 7 (Line 16)** - After "criteria for release" add "**consideration**".....

6. **Page 7 (Line 21)** - Change "thirty days" to "forty-five".....

7. **Page 8 (Line 2)** - Amend the sentence to read "In making the determination, the paroling authority shall consider the assessment completed by the Department of Public Safety regarding the risk for violence and rate of recidivism.

8. **Page 8 (Line 17)** - After "condition" add, "**as determined by competent medical authority that warrants reconsideration.**"

9. **Page 9 (Line 9)** - Delete "**reasonable times at**"

10. **Page 10 (Line3)** - Delete "with credit given only for the duration of the inmate's medical release served in compliance with all reasonable conditions set forth pursuant to subsection (a)."

The HPA believes the recommended amendments to this measure addresses needed technical changes while simultaneously clarifies the affected areas.

Thank you for this opportunity to provide testimony on this matter.

COMMUNITY ALLIANCE ON PRISONS

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COMMITTEE ON PUBLIC SAFETY& MILITARY AFFAIRS
Rep. Henry Aquino, Chair
Rep. Ty Cullen, Vice Chair
Thursday, February 2, 2012
11:15 a.m.
Room 309

STRONG OPPOSITION to HB 2255 as presented

Chair Aquino, Vice Chair Cullen and Members of the Committees!

My name is Kat Brady and I am the Coordinator Community Alliance on Prisons, a community initiative promoting smart justice policies for more than a decade. This testimony is respectfully offered, always being mindful that 6,000 Hawai`i individuals are living behind bars, including 1,800 men who are serving their sentences abroad, thousands of miles from their loved ones, their homes and, for the disproportionate number of incarcerated Native Hawaiians, far from their ancestral lands.

HB2255 requires the Hawaii paroling authority to establish a medical release program for inmates who are permanently and totally disabled, terminally ill, or geriatric and pose no public safety risk, requests the department of public safety to assess and refer inmates to the Hawaii paroling authority, and sets conditions for medical release.

Community Alliance on Prisons must testify in strong opposition to this bill as presented. We are, however, strong supporters of compassionate release as is the latest research recommends. In our experience have known many individuals who have died alone in prison while their paperwork for compassionate release lingered on someone's desk at the department of public safety.

The Annals of Internal Medicine...

> "Compassionate release consists of two entwined but distinct elements: eligibility (based on medical evidence) and approval (based on legal and correctional evidence) (4). We argue that the medical eligibility criteria of many compassionate-release guidelines are clinically flawed because of their reliance on the inexact science of prognostication, and additional procedural barriers may further limit rational application. Given that early release is politically and socially charged and that eligibility is based largely on medical evidence, it is critical that such medical evaluation be based upon the best possible scientific evidence and that the medical profession help minimize medical-related procedural barriers."[1]

[1] Balancing Punishment and Compassion for Seriously Ill Prisoners. Brie A. Williams, MD; Rebecca L. Sudore, MD; Robert Greifinger, MD; and R. Sean Morrison, MD
http://www.annals.org/content/early/2011/05/31/0003-4819-155-2-201107190-00348.full

The California prison system recently opened a prison hospice in Vacaville because of the number of aging and chronically ill incarcerated individuals serving sentences. This is part of the reason that their prison health care system was under consent decree from the federal government.

A January 30, 2012 public radio story[2] reported:

> SACRAMENTO, Calif. (AP) – The court-appointed receiver overseeing California's prison health care system said Friday the state must keep its promise to spend more than $2 billion for new medical facilities before the federal courts can end an oversight role that has lasted six years.
>
> California has committed to spending $750 million to upgrade existing medical facilities, building a new medical center and converting juvenile lockups. So far, only the new medical center in Stockton is being built.
>
> Receiver J. Clark Kelso told The Associated Press that the state must begin all the upgrades before it should be allowed to retake control of a prison medical system once deemed so poor that it was found to have violated inmates' constitutional rights. They are his first public comments since a federal judge last week told officials to begin preparing for an end to the receivership.
>
> "That leaves a court order that the state is now out of compliance with," Kelso said during the 75-minute interview. "The courts have been promised construction for the last half-decade. Somehow those promises don't get kept." ...

A report by Human Rights Watch released in late January 2012 includes new data developed from a variety of federal and state sources that document dramatic increases in the number of older US prisoners. Human Rights Watch found that the number of sentenced state and federal prisoners age 65 or older grew at 94 times the rate of the overall prison population between 2007 and 2010. The number of sentenced prisoners age 55 or older grew at six times the rate of the overall prison population between 1995 and 2010. The number of US state and federal prisoners age 55 or older nearly quadrupled between 1995 and 2010, growing by 282 percent, while total number of prisoners grew by less than half, 42 percent.[3]

It is interesting that 'geriatric' is defined as "an inmate who is at least sixty-five years of age and suffers from chronic infirmity" since incarcerated persons 50 years or older are considered "elderly" since many people enter the system in such poor health. Also, there are incarcerated individuals suffering from chronic infirmity who are below 65 or even 50 years of age.

Human Rights Watch Report, "Old Behind Bars – the Aging Prison Population in the United States"[4]

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[2] End To California Prison Healthcare Receivership In Works
http://www.capradio.org/articles/2012/01/30/end-to-california-prison-healthcare-receivership-in-works

[3] US: Number of Aging Prisoners Soaring - Corrections Officials Ill-Prepared to Run Geriatric Facilities
January 27, 2012 © 2011 Jamie Fellner/Human Rights Watch

[4] OLD BEHIND BARS – The Aging Prison Population in the US, Human Rights Watch, January 2012, p 12.
http://www.hrw.org/sites/default/files/reports/usprisons0112webwcover_0.pdf

"... The rising tide of older persons in the United States as the "baby boomers" begin to hit age 65 has been called a "silver tsunami." US corrections systems are also confronting a "silver tsunami" of aging prisoners. But the wave they confront is not the result of uncontrollable natural forces. It is the result of legislation enacted decades ago which is long overdue for reform.

Officials should review their sentencing and release laws and practices to determine which can be adjusted to reduce the elderly prisoner population without risking public safety.

Meanwhile, corrections officials should review the conditions of confinement for their elderly prisoners, including the services and programs available to them, and make changes as needed to ensure their human rights are respected. ..."

The bill requires HPA to establish a medical release program and then proceeds to turn over all the discretion to PSD, who is the only arbiter of who gets to present their case to the parole board. Past experience informs that PSD is not dispassionate or compassionate. Since HPA will be responsible for the individual granted compassionate release, why should PSD have control over who goes before HPA in these dire circumstances?

The bill provides no process for appealing a decision made by PSD – they appear to be the court of last resort. We know that no one is infallible, so the fact that an individual has no means to challenge a decision is patently unfair. An individual should have the right to present his/her own evidence to support or contest PSD's position.

The bill also seems to ask physician's to determine risk. We assert that that is not their kuleana. How would they know if an individual poses a risk to public safety? This is akin to asking an ACO to render a medical diagnosis. It is unfair and subject to error.

The definition of "terminal illness" is worse than the current definition. The bill defines "terminal illness" as a condition that will likely produce death within 6 months.

No one can predict the time of death. The nature of terminal illness is that patients have good days and bad days. Good days are not a predictor of improved health. Sometimes people rally right before death one could think they are improving. Doctors who deal with death and dying (a medical specialty) know this. Generally prison doctors are general practitioners and not trained in this specialty.

PSD currently defines "terminal illness" as an illness that "by its nature, can be expected to cause a patient to die within 1 year" or a "persistent illness or disease causing increasing physical weakness to the extent that the patient's quality of life is compromised and care could be better managed within the community. (Category II)."[5]

Sadly, this bill, is actually a step backward in compassionate release, which is why Community Alliance on Prisons is in strong opposition. We are saddened by the lack of compassion exhibited by this bill in the land of aloha.

Community Alliance on Prisons, therefore, respectfully asks the committee to HOLD this measure.

Mahalo for the opportunity to testify.

[5] Department of Public Safety Policy COR.10.1G.11.2(a) and (b).

the Drug Policy Forum of hawai'i

Dedicated to safe, responsible, humane and effective drug policies since 1993

February 2, 2012

To: Rep. Henry Aquino, Chair
Rep. Ty Cullen, Vice Chair and
Members of the Committee on Public Safety and Military Affairs

From: Jeanne Y. Ohta

RE: HB 2255 Relating to Public Safety
Hearing: Thursday, February 2, 2012, 9:00 a.m., Room 309

Position: Strong Support

The Drug Policy Forum of Hawai`i writes in strong support of HB 2255 Relating to Public Safety which would require the establishment of a medical release program for inmates who are permanently and totally disabled, terminally ill, or geriatric and pose no public safety risk.

Hawai`i should have a compassionate release program for the sick, disabled and terminally ill. Incarceration in these situations serves no purpose but exacerbates their illness or disability.

We urge the committee to pass this measure. Thank you for the opportunity to provide testimony.

P.O. Box 241042 Honolulu, HI 96824-1042
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Robert K. Merce
2467 Aha Aina Place
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February 1, 2012

COMMITTEE ON PUBLIC SAFETY AND MILITARY AFFAIRS
Rep. Henry J.C. Aquino, Chair
Rep. Ty Cullen, Vice Chair
Thursday, February 2, 2011
Conference Room 309
9:00 a.m.
HB2255
STRONGLY OPPOSE IN PRESENT FORM

Dear Chair Aquino, Vice Chair Cullen, and Committee Members:

My name is Robert Merce. I practiced law in Hawai'i for over 20 years before retiring in 2007. Last year I worked as a volunteer on a case in which the Native Hawaiian Legal Corporation obtained compassionate release for a 67-year old Hawaiian man who was suffering from terminal liver disease. The process took six months (May12, 2011 to October 28, 2011). During that time I learned that many important issues are not covered by Department of Public Safety ("DPS") policies or Hawai'i Paroling Authority ("HPA") rules, and where rules do exist, they are often ambiguous and unclear. In some instances DPS policies are in direct conflict with the HPA's rules. I strongly support the idea of clarifying the compassionate release process by statute, but HB2255 takes the wrong approach. It codifies many of the worst features of the present system and adds several provisions that are much worse than what we have now. HB2255 should be substantially amended or killed. The following are some of the problems with the bill.

1. **HB2255 does not specify who can initiate a request for compassionate release or how such a request is to be initiated.**

One of the most basic elements of any compassionate release law must be a clear statement as to who can initiate a request for compassionate release and how such request is initiated. Yet HB2255 does not contain that basic information. It leaves intact the present system whereby an inmate's "primary care physician" is the *only* person who can initiate a compassionate release request. *See* DPS Compassionate Release Policy COR.10.1G.11.4.0.2. The problem with that is that physicians make mistakes. They may fail to recognize that a disease has entered the terminal phase, they may mistakenly think they can treat a disease that is in fact untreatable, or they may make mistakes like everyone else due to inattention, inadvertence, inexperience, or carelessness. In those circumstances the inmate, his family or his attorney should be allowed to initiate a request for compassionate release, and the inmate or his representative should have the opportunity to present their case to a fair and impartial body such as the HPA. This approach

ensures fundamental fairness and provides a mechanism for correcting mistakes or errors of judgment by DPS.

2. **The DPS should not decide which compassionate release requests are heard by the HPA.**

The HPA is an independent, quasi-judicial body. HAR §23-700-2(b) (1992). Its members are nominated by a distinguished committee that includes the Chief Justice of the Hawai'i Supreme Court and are selected on the basis of their qualifications to make decisions "that will be compatible with the welfare of the community and of individual offenders, including their background and ability for appraisal of offenders and the circumstances under which offenses were committed." Haw.Rev.Stat. §353-61. The HPA has historically served as the central paroling authority for the state and is accountable for its decisions as to when parole should be granted and when it should be denied. *See* HRS §353-62(a)(3).

HB2255 significantly diminishes the power of the HPA by providing that it can **only grant compassionate release to those inmates who are referred to it by the DPS.** Under HB2255 primary authority for deciding who receives compassionate release and who does not rests with the DPS, yet there is no mechanism for holding DPS accountable for its decisions. It does not have to report to anyone on its compassionate release decisions, there is a complete lack of transparency with respect to its decision making process, and the decisions of its medical personnel and administrators – no matter how flawed or erroneous– are final and absolute.

I respectfully submit that to ensure transparency and accountability, **all compassionate release requests should be made directly to the HPA.** The HPA would refer the requests to the DPS for review and recommendations. The DPS would provide a report and recommendations to the HPA, and the HPA would then make a final decision after reviewing the DPS's recommendations **and allowing the inmate to present his own evidence to support or contest the DPS position.** This approach ensures fundamental fairness and provides a mechanism to correct inadvertent mistakes or errors of judgment at the DPS.

3. **HB2255's Release Plan is unrealistic.**

HB2255 provides that a "medical release plan" must be developed for every inmate who is being considered for compassionate release and the plan must include, at a minimum, documentation that qualified doctors are prepared to care for the inmate and that a financial plan is in place to cover the cost of anticipated treatment, including documentation on eligibility for enrolment in commercial insurance, Medicare, Medicaid, or access to other financial resources.

In my experience it is extremely difficult to find a physician who is willing to accept a terminally ill patient with multiple medical problems, particularly when the patient has no insurance or is insured by Quest, Medicare or Medicaid. It can be done, but it takes a great deal of time and effort. I do not believe DPS has the staff, time, or money to engage in the difficult business of finding doctors for profoundly ill patients.

I also doubt that any insurer, private or government, will commit over the telephone and in advance to insuring a patient who is close to death and will requiring costly and time consuming

end of life care. The result will be that in many cases DPS will not be able to develop the plan called for by HB2255 and consequently many inmates will not be released.

4. **The definition of "terminal illness" is too restrictive.**

HB2255 defines "terminal illness" as a condition that will likely produce death within **6 months.**

The DPS currently defines "terminal illness" as an illness that (1) "by its nature, can be expected to cause a patient to die **within 1 year"** or (2) a "persistent illness or disease causing increasing physical weakness to the extent that the patient's quality of life is compromised and care could be better managed within the community. See DPS Policy COR.10.1G.11.2(a) and (b).

HB2255 will cause will extend the time that very sick inmates will have to remain in prison, and will cost the state a great deal of money. HB2255 is also far less compassionate than the policies we now have. I do not understand why the State of Hawai'i is becoming less compassionate rather than more compassionate.

5. **Physicians are not competent to determine if an inmate poses a risk to public safety.**

Under HB2255 an inmate cannot qualify for medical release unless a "licensed physician" determines that the inmate is so disabled and incapacitated from a chronic and irreversible disease or illness that they are **physically incapable of posing a risk to public safety.** There are several problems with this approach:

> (1). Doctors are not trained to assess public safety risks. HB2255 asks them to do something they do not know how to do and are not qualified to do. It guarantees bad outcomes.
>
> (2) Most medical condition are not static, they wax and wane, and unless the inmate is comatose or in an ICU it is practically impossible for any physician to say with any certainty that if released, the inmate will continuously be so incapacitated or debilitated that he is not capable of committing a crime or posing a risk to public safety.
>
> (3) HB2255 would prevent the compassionate release of some inmates who clearly should be released. For example, suppose that an inmate is dying from cancer but is still ambulatory and has not become totally "debilitated "or incapacitated from the disease. Under HB2255 that inmate would **not** be eligible for compassionate release even if everyone agreed that he posed absolutely no danger to the public because he is not *incapacitated as a result of his illness* which is what HB2255 requires.
>
> That makes no sense. A much more sensible approach would be to simply say that an inmate who meets the medical criteria for release should be released provided that he does not pose a danger to the public, and that an inmate who poses a potential danger to the public should not be eligible for release, regardless of his physical condition.

(4) If physicians are required to make judgments on whether an inmate is so incapacitated that he or she does not pose a risk to public safety, they will most likely err on the side of safety *and very few inmates will end up being released.*

6. **Physician Reports to the HPA are costly and unnecessary.**

HB2255 provides that a released inmate's treating physician must provide the HPA with periodic assessments of the inmate's condition. This is simply more red tape for doctors and will certainly discourage them from accepting inmates as patients. I also doubt that most HPA members would understand the medical reports or pay much attention to them. It is also unclear who would pay for the reports. They certainly would not be covered by any health insurance plan I am aware of. Would the inmate have to pay for the reports? What if he can't afford it? Is this necessary? Practical?

7. **The SOTP provisions are unnecessary.**

One of the longest and most complicated sections of HB2255 is the provision pertaining to when, how, and whether an inmate who has been convicted of a sex crime will have to participate in the sex offender treatment program (SOTP). Those provisions should be eliminated because the HPA currently has the statutory authority to order SOTP for any inmate who they believe requires such treatment. It should also be recognized that SOT will not be appropriate for inmates who are receiving hospice care and have only a few weeks or months to live, or who are suffering from incurable age-related illnesses such as Alzheimer's or dementia.

8. **HB2255 does not reflect current thinking on compassionate release.**

Experts who have studied compassionate release recommend that: (1) Compassionate release guidelines embrace *evidence based principles*; (2) that the release process be completely transparent; (3) that incapacitated inmates be assigned an advocate to help them navigate the process; and (4) prison administrators adopt a "fast-track option for the evaluation of rapidly dying prisoners, and a well-described and disseminated application procedure". Williams, BA, Sudore RL, Greifinger R, Morrison RS. *Balancing Punishment and Compassion for Seriously Ill Prisoners*. Ann Intern Med. 2011 Jul 19;155(2):122-6. Epub 2011 May 31. HB2255 has **none of these features** and does not meet contemporary standards for compassionate release.

There are many other problems with HB2255 but I will not go into all of them. It should be clear that HB2255 has nothing to do with compassion and that enacting it would not be in the best interest of our sick and aging prison populating or the state. HB2255 should not be passed in its present form and should not pass at all unless the problems discussed above are corrected.

Thank you for allowing me to share my thoughts with you.