



LATE

Committee: Committee on Public Safety, Government Operations and Military Affairs
Hearing Date/Time: Thursday, February 9, 2012, 2:45 p.m.
Place: Room 224
Re: Testimony of the ACLU of Hawaii in Opposition to S.B. 2735

Dear Chair Espero and Members of the Committee on Public Safety, Government Operations and Military Affairs:

The American Civil Liberties Union of Hawaii (“ACLU of Hawaii”) writes in strong opposition to S.B. 2735, which seeks to require prisoners to exhaust administrative remedies before bringing a civil court action.

Prisons by their nature present an ever-present threat of abuse because prison officials – of necessity – are given enormous power over the lives and well-being of their charges. In order to prevent abuse of that power, prisons need effective forms of oversight to ensure that public officials cannot violate their legal obligations with impunity. In our state, the courts have traditionally provided this necessary oversight because they ensure that no matter how disfavored and disenfranchised the individual, he or she has the opportunity to seek vindication of his or her rights in the courtroom.

S.B. 2735 will have a disastrous effect on the ability of prisoners, particularly prisoners without access to counsel, to have their own non-frivolous cases adjudicated on the merits. Serious prisoner claims will be prevented from reaching the courts, including claims of brutal physical and sexual abuse, disgusting and inhumane conditions and deadly refusals to provide medical and mental health treatment.

While we want to encourage correctional facilities to manage problems and improve conditions without court intervention, S.B. 2735 will damage the ability of prisoners to present meritorious constitutional claims for a number of reasons. First, prisoners, as a general matter, have very low rates of literacy and education.¹ Moreover, the number of severely mentally ill and cognitively impaired

¹ The National Center for Education Statistics reported in 1994 that seven out of ten prisoners perform at the lowest literacy levels. Karl O. Haigler et al., U.S. Dept. of Educ., *Literacy Behind Prison Walls: Profiles of the Prison Population from the National Adult Literacy Survey* xviii, 17-19 (2003), available at <http://nces.ed.gov/pubsearch/pubsinfo.asp?pubid=04102>.

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persons in prison is staggering. According to the most recent report by the U.S. Department of Justice, Bureau of Justice Statistics, 56% of state prisoners, 45% of federal prisoners and 64 % of jail prisoners in the U.S. suffer from mental illness.² Experts estimate that people with mental retardation may constitute as much as 10% of the prison population.³ As a result, S.B. 2735 will prove to be a trap for the unschooled and the disabled.

In reality, prison internal complaint procedures and/or grievance systems do not operate in a manner that ensures that meritorious complainants have the ability to exhaust the process in order to have their complaints heard in court. Typical systems often have a series of short deadlines and other technical obstacles that lead to prisoners being denied their right to sue. For example, many facilities require that grievances be submitted only on approved forms, which are often not made available to prisoners or only made available from the staff member who is responsible for the action the prisoner wishes to challenge. Further, timely responses to grievances are not provided to prisoners. Vague rules regarding which issues are grievable or the difference between rules and practice also contribute to prevent prisoners from exhausting the administrative process. For illiterate, mentally ill or cognitively challenged prisoners, these convoluted administrative systems are virtually impossible to navigate. As a result, constitutional claims for many of the most vulnerable will be lost under S.B. 2735 because of technical misunderstandings and obstacles rather than lack of legal merit.

Prisoners with meritorious claims who need immediate injunctive relief will have no ability to litigate their claim for relief because fully exhausting the grievance systems typically require 3-6 months.

Many prisoners are simply too afraid to file grievances for fear of consequences – and with good reason.

Ultimately, S.B. 2735 will establish an incentive for prison officials to use their grievance systems as a shield against accountability, rather than an effective management tool.

Hawaii law already provides the court with a remedy to declare an individual a vexatious litigant, see H.R.S. § 634J-7, and the judiciary is already equipped with ample tools to deal with these cases. For example, courts are permitted to dismiss *in forma pauperis* cases if they obviously lack an arguable

² James, Doris J. & Lauren E. Glaze, *Mental Health Problems of Prison and Jail Inmates*, Bureau of Justice Statistics *Special Report 1*, Department of Justice, Bureau of Justice Statistics, December 14, 2006.

³ Leigh Ann Davis, *People with Mental Retardation in the Criminal Justice System*, available at www.thearc.org/faqs/crimqa.html.

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basis in law or fact. In addition, prisoners who repeatedly abuse the judicial system can be ordered to cease their abuses, and the orders are enforceable with sanctions.

An individual should not be subject to special obstacles to the civil justice system based solely on his or her status as a detainee or an inmate without any showing of an attempt to abuse the judicial system.

The mission of the ACLU of Hawaii is to protect the fundamental freedoms enshrined in the U.S. and State Constitutions. The ACLU of Hawaii fulfills this through legislative, litigation, and public education programs statewide. The ACLU of Hawaii is a non-partisan and private non-profit organization that provides its services at no cost to the public and does not accept government funds. The ACLU of Hawaii has been serving Hawaii for over 40 years. Thank you for this opportunity to testify.

Sincerely,
Laurie A. Temple
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