



*The Judiciary, State of Hawai'i*

**Testimony to the Thirtieth State Legislature, 2020 Session**

**House Committee on Judiciary**  
Representative Chris Lee, Chair  
Representative Joy A. San Buenaventura, Vice Chair

Wednesday, March 11, 2020, 2:00 p.m.  
Hawaii State Capitol, Conference Room 325

**WRITTEN TESTIMONY ONLY**

by  
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Administrative Director of the Courts

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**Bill No. and Title:** Senate Bill No. 2047, S.D. 2, Relating to the Penal Code.

**Purpose:** Requires the judicial council to conduct a comprehensive review of the penal code and to recommend proposed changes. Requires the Judicial Council to appoint an advisory committee to assist in the review, and allows the Council to also appoint a reporter and other staff as necessary. Requires the advisory committee to report to the Legislature. Makes an appropriation. Effective 7/1/2050.

**Judiciary's Position:**

The Judiciary takes no position on the merits of Senate Bill No. 2047, S.D. 2 (SB 2047), and respectfully offers the following comments.

Roughly every decade since 1983, the Legislature has convened a committee on penal code review to conduct a comprehensive review of the Hawai'i penal code and recommend revisions to the Legislature. The committees have historically consisted of members from the Judiciary, the department of the attorney general, the department of public safety, the office of the public defender, the county prosecutors' offices and police departments, victim advocacy



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groups, interested attorneys and private citizens, and others. The penal code has been reviewed by committees convened in 1983, 1993, 2005, and most recently in 2015. Significant time and attention was dedicated to reviewing the penal code and devising recommended ways to improve it each time committees were convened.

The latest 2015 committee on penal review convened pursuant to House Concurrent Resolution No. 155, S.D. 1. The committee met in plenary session on seven different occasions, and broke into five subcommittees that met separately on a number of occasions to provide in-depth review of subject areas. The result was a total of eighty-four proposals and recommendations submitted to the Legislature in 2016, consisting of amendments to fifty existing statutes, recommendations to adopt four new statutes, and many other suggested revisions to the penal code. We are very appreciative of the twenty-nine members, representing nearly twenty different departments, organizations, and interests, who contributed more than a thousand hours to the 2015 penal code review.

Since then, there have been several fairly comprehensive efforts and statutory revisions, the effects of which have yet to be fully realized. For example, the 2016 Legislature adopted the committee's recommendations in Act 231, including a penal code amendment that sought to "improve property crime enforcement by making more repeat offenders of crimes prohibited by this chapter subject to punishment for a class C felony when they commit another subject offense." In addition, the convening of the Pretrial Reform Task Force, whose recommendations were adopted just last legislative session as Act 179, and initiatives to address the needs of defendants with mental illness, including the efforts that have resulted from the statewide Mental Health Summit held in November 2019. The impacts of these efforts and others have yet to be fully realized.

If there are particular issues of interest to the Legislature that relate to the administration of criminal justice, such as those listed in Section 2(b) of SB2047, S.D. , the Judiciary welcomes the opportunity to work together and discuss potential ways to address those areas of concern.

Should the Legislature decide that it is appropriate to convene another committee on penal review, the Judiciary is appreciative of the inclusion of funds to complete this project. Depending on the scope of the work, the composition of the committee (i.e., how many committee members are from the neighbor islands), the number of in-person meetings held, and the cost if any for a reporter and research/clerical staff, the \$25,000 appropriated may be sufficient to cover those committee expenses.

Thank you for the opportunity to testify on this measure.



**SB2047 SD2**  
**RELATING TO THE PENAL CODE**  
House Committee on Judiciary

March 11, 2020

2:00 p.m.

Room 325

The Office of Hawaiian Affairs (OHA) offers the following **COMMENTS** on SB2047 SD2, which would require the judicial council to convene an advisory committee on penal code review, to conduct a comprehensive review of the Hawai'i Penal Code and make recommendations to the legislature on any amendments needed to ensure that it is internally consistent, that it reflects best practices and data-driven approaches, and that its force and effectiveness continues. This measure offers an excellent opportunity to identify ways to improve the penal code; however, to maximize its effectiveness, the contemplated 2020 Penal Code Review Committee (2020 PCRC) should be given clearer direction on a narrower scope, adequate resources, and a more complete membership with additional expertise and perspectives.

As this measure describes, the penal code was most recently reviewed by the Penal Code Review Committee established by HCR155, Regular Session 2015 (2015 PCRC). The legislature directed the 2015 PCRC to examine the penal code in the context of extremely concerning Justice Policy Institute data indicating that our criminal justice system harmed low-income families, especially Native Hawaiian 'ohana, and was not a cost-effective approach to deter crime, reduce recidivism, or provide restitution.<sup>1</sup> Unfortunately, the 2015 PCRC's success was limited, and it was not able to provide robust recommendations to address the manifold problems contributing to the injustice, mass incarceration, and overall inefficiencies evidenced in our penal system. Despite the adoption of penal code amendments made pursuant to the 2015 PCRC's recommendations, the relative stagnation of conviction and incarcerated population data, the slight increase in violent crime (despite the largest decrease overall crime rate since data collection began), and the substantial increase in corrections costs<sup>2</sup> in the years since, support the continued review and revision of the penal code, as envisioned by this measure.

Unfortunately, the resolution establishing the 2015 PCRC may have itself impeded the 2015 PCRC's ability to provide a robust analysis of the penal system, a comprehensive examination of national data and models, and broad recommendations for changes to our system. As a participant on the 2015 PCRC, in hindsight OHA believes that **the shortcomings of HCR155 were:**

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<sup>1</sup> HCR155, Regular Session 2015, available at [https://www.capitol.hawaii.gov/session2015/bills/HCR155\\_SD1.htm](https://www.capitol.hawaii.gov/session2015/bills/HCR155_SD1.htm).

<sup>2</sup> On average, Hawai'i spends \$72,270 a year—or \$198 per inmate per day—to incarcerate each prisoner in our custody, and the annual corrections budget has now ballooned to over \$230M. DEPARTMENT OF PUBLIC SAFETY, ANNUAL REPORT FY 2019, 16 (2019), available at <https://dps.hawaii.gov/wp-content/uploads/2019/11/PSD-ANNUAL-REPORT-2019.pdf>.

- **An infeasibly broad scope of focus;**
- **Inadequate resources: the 2015 PCRC had neither funding, nor enough time; and**
- **Imbalanced and inadequate representation.**

Accordingly, the success of the newly proposed 2020 PCRC may depend the careful crafting of SB2047 SD2. In order to best facilitate meaningful change in our penal code and penal system, and to align with and build upon the recommendations of the HCR85 Task Force on Prison Reform, the HCR134 Task Force on Pretrial Reform, the Native Hawaiian Justice Task Force, and the several other criminal justice review bodies convened since the 1980s, OHA respectfully submits that **the 2020 PCRC should be tasked with a narrower scope, should be given more resources to complete its work, and should include in its membership several additional stakeholders with expertise and interest in penal code review.**

First, **OHA believes that the 2020 PCRC's scope should be narrowed, to specifically focus on evidence-based sentencing reform recommendations.** A focus on sentencing reform would allow the 2020 PCRC to fully examine and develop recommendations that could not only reduce the disparate impacts of our penal system on poor families and the Native Hawaiian community, but also reduce our overall corrections costs, and thereby allow for greater investment in rehabilitative programming and public safety initiatives generally. During its pendency, a 2020 PCRC could conduct a thorough examination of national data, sentencing reform models from other jurisdictions, evidence-based strategies to reduce recidivism, Hawai'i's own justice reinvestment initiative, probation and parole processes and alternative approaches, and the proportionality and internal consistency of sentencing provisions in the code; the 2020 PCRC would also have a number of specific and long-proposed sentencing reform approaches to evaluate, including diversion programs for low-level non-violent offenders, expansion of community supervision options, and community-based treatment solutions for the mentally ill and substance addicted. Such a focus would also complement recent policy recommendations made by experts and stakeholders: the HCR85 Task Force, in its 2018 report, specifically recommended that the legislature form a Sentencing Reform Commission to review the penal code with the goal of downgrading offenses and shortening sentences.<sup>3</sup> **Reviewing the penal code with a focus on improving the overall effectiveness and fairness of its sentencing provisions would not only be more achievable than a comprehensive penal code review, but would also offer the greatest opportunity for cost savings on corrections, while yielding a more just system.**

Therefore, OHA recommends that Section 2 of SB2047 SD2 be amended to read as follows:

SECTION 2. (a) The judicial council, as established pursuant to section 601-4, Hawaii Revised Statutes, through an advisory committee on penal code review, shall conduct a

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<sup>3</sup> The Task Force offered a substantial body of research to support its primary recommendation to transition our criminal justice system from a punitive one to a rehabilitative and therapeutic model, which would require a serious and ongoing sentencing reform effort. HCR85 TASK FORCE, CREATING BETTER OUTCOMES, SAFER COMMUNITIES; FINAL REPORT TO THE HAWAII LEGISLATURE (2018), available at <https://19of32x2yl33s8o4xza0gf14-wpengine.netdna-ssl.com/wp-content/uploads/HCR-85-Task-Force-on-Prison-Reform-Final-Report-12.28.18.pdf>.

comprehensive review of the Hawaii penal code and recommend to the legislature necessary amendments to ensure that:

- (1) The penal code is consistent and proportional with regard to sentencing, across the various types and classes of offenses;
  - (2) The penal code is aligned with national best practices and based upon evidence-based strategies to reduce recidivism; and
  - (3) The continued force and effectiveness of the penal code is ensured.
- (b) The judicial council shall give special consideration

to:

- (1) Reviewing The American Law Institute Model Penal Code, including recent proposals; the criminal codes of other states; national data on recidivism and successful models to reduce recidivism rates; and other criminal law resources;
- (2) Analyzing whether grades and punishment are appropriate and proportionate to other sentences imposed for criminal or civil offenses and are cost-effective in deterring crime, reducing recidivism, and providing restitution to victims in a manner that provides equal justice and punishment regardless of socioeconomic class or ethnicity;
- (3) Considering whether enhanced penalties for repeat offenders should remain incorporated in the penal code; and
- (4) Evaluating additional sentencing options and alternatives to aid in the enforcement of the penal code.

Second, although the instant measure offers its contemplated 2020 PCRC a much greater amount of time than the 2015 PCRC had to complete a comprehensive penal code review, the two-and-a-half years and limited funding it offers may still be inadequate for the 2020 PCRC to sufficiently conduct even a narrowed review of the code's sentencing provisions. Therefore, at minimum, **adequate funding should be provided for professional consultants and researchers, who specialize in penal code revision, to support the proposed 2020 PCRC in its important work.**

Lastly, to seriously consider and accomplish criminal justice policy reform, **it is critical that the PCRC's membership be provided with key experts and stakeholders who can provide additional perspectives and expertise on the penal code and penal system.** OHA offers the following additional possible members for this Committee's consideration:

- The chair of the section on criminal law and justice of the Hawai'i bar association;
- A representative of the council of each county (insofar as the county councils are the legislative bodies responsible for funding enforcement of the state penal code, and are also directly representative of their respective local communities);

- A criminal law professor at the University of Hawai'i William S. Richardson School of Law;
- A professor of criminology at the University of Hawai'i;
- A representative of the mental health division or the alcohol and drug addiction division of the department of health;
- A representative of a law enforcement assisted diversion program;
- A representative of a drug treatment program; and/or
- A representative of the family reunification working group.

Mahalo piha for the opportunity to testify on this measure.

# COMMUNITY ALLIANCE ON PRISONS

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## COMMITTEE ON JUDICIARY

Rep. Chris Kalani Lee, Chair

Rep. Joy San Buenaventura, Vice Chair

Wednesday, March 11, 2020

2 PM – Room 325

## COMMENTS ON SB 2047 – PENAL CODE REVIEW

Aloha Chair Lee, Vice Chair San Buenaventura and Members of the Committee!

My name is Kat Brady and I am the Coordinator of Community Alliance on Prisons, a community initiative promoting smart justice policies in Hawai'i for more than two decades. This testimony is respectfully offered on behalf of the families of **JAMES BORLING SALAS, ASHLEY GREY, DAISY KASITATI, JOEY O'MALLEY, JESSICA FORTSON AND ALL THE PEOPLE WHO HAVE DIED UNDER THE "CARE AND CUSTODY" OF THE STATE**, including the eleven (11) people that we know of, who have died in the last six (6) months. We also remind the committee of the approximately 5,200 Hawai'i individuals living behind bars or under the "care and custody" of the Department of Public Safety on any given day, and we are always mindful that more than 1,200 of Hawai'i's imprisoned people are serving their sentences abroad thousands of miles away from their loved ones, their homes and, for the disproportionate number of incarcerated Kanaka Maoli, far, far from their ancestral lands.

SB 2047 requires the judicial council to conduct a comprehensive review of the penal code and to recommend proposed changes. Requires judiciary council to appoint an advisory committee to assist in the review, and allows the council to also appoint a reporter and clerical staff as necessary. Requires the advisory committee to report to the legislature. Makes an appropriation. The SD 2 defected the date.

After a more careful review of the bill, we offer comments. Although Community Alliance on Prisons supports a comprehensive review of the penal code, we assert that it should be on-going process as research emerges and times change. We are deeply concerned that this bill might stall any reform of Hawai'i's draconian laws enacted during the "tough on crime" era while we wait for their report and recommendations in 2023.

With the coronavirus looming, the state should be considering ways to reduce the incarcerated population, since prisons and jails are breeding grounds for infection. Our sick and elderly population should be released into community care to stem the spread of the COVID-19.

Hawai'i's correctional system is currently in crisis as our facilities are bursting with individuals who are imprisoned for the lowest felonies, misdemeanors, violations, petty misdemeanors, and parole or probation violations. Our draconian laws have grown the criminal underclass, to no one's advantage. Sending people whose lives are in chaos to jail or prison only serves to educate people in the dark arts.

There are many things we can do right now that are not radical – there are proven strategies in states that have reduced their incarcerated population while reducing crime at the same time. Hawai`i is at a crossroads – are we going to continue down this punitive and very expensive road and continue to ‘review’ what the research makes so clear? Or will we acknowledge that we need good laws? Laws that are based on sound research and data.

That is why Community Alliance on Prisons strongly asserts that there must be action taken now to address Hawai`i’s sentencing laws that are so out of whack with the rest of the world. Hawai`i must stop criminalizing some of the most vulnerable people in our community who are contending with a myriad of public health and social challenges. Our system turns people who make mistakes into criminals. This is not where we should be investing hard-earned taxpayer dollars.

The January 6, 2020 population report from the department of public safety shows 5,208 as the total population under the “care and custody” of the state; 45% of these folks are pretrial detainees *innocent until proven guilty* (1,117/21%) and parole or probation violators (1,237/24%).

The current rate that the department is using is \$198 a day. The pretrial detainee and parole/probation populations total 2,354 persons - 45% of the total statewide population. Here is how much these policies cost taxpayers:

$2,354 \times \$198/\text{day} = \$466,092/\text{day}; \$3,262,644/\text{week};$   
 $\$13,050,576/\text{month}; \$156,606,912/\text{year}.$

If the Pretrial Population (1,117 persons) was released with promissory notes to show up in court (Act 277 - Unsecured Bonds):

**Hawai`i could save \$221,166 a day; \$1,548,162 a week;**  
**\$6,192,648 a month; and \$74,311,776 a year!**

The cost of incarcerating the Parole and Probation Violator Populations

$1,237 \text{ persons} \times \$198/\text{day} = \$244,926/\text{day}; \$1,714,482/\text{week};$   
 $\$6,857,928/\text{month}; \$82,295,136/\text{year}$

If we reduced the parole and probation violator population by 50% (618 persons)

**Hawai`i could save \$122,364/day; \$856,548/week;**  
**\$3,426,192/month; \$41,114,304/year!**

Imagine the services we could provide to the most impacted communities if Hawai`i made its sentencing laws proportional to the offense, if Hawai`i stopped criminalizing struggling folks, and if Hawai`i instead lifted up our communities with the help they need. Hawai`i could really make an impact on some of our most intractable challenges.

Mahalo for the opportunity to share our concerns.