

The Judiciary, State of Hawai'i

Testimony to the Thirty-First State Legislature, 2021 Regular Session

Senate Committee on Public Safety, Intergovernmental, and Military Affairs

Senator Clarence K. Nishihara, Chair
Senator J. Kalani English, Vice-Chair

Tuesday, February 9, 2021, 1:20 PM

WRITTEN TESTIMONY ONLY

By

Shirley M. Kawamura

Deputy Chief Judge, Criminal Administrative Judge, Circuit Court of the First Circuit

Bill No. and Title: Senate Bill No. 1189, Relating to Pretrial Services Provided by the Intake Service Centers, Department of Public Safety.

Purpose: Amends Section 353-6.2, Section 353-10, and Section 804-7.1, Hawaii Revised Statutes, enacted as part of Act 179, Session Laws of Hawaii 2019, to delete the additional duties and responsibilities of the Intake Service Centers (ISC), Department of Public Safety, in providing augmented bail reports under the Act's bail reform initiatives, due to the imposition of budget restrictions for the fiscal biennium 2021-23 that defunded the ISC positions responsible for this work.

Judiciary's Position:

The Judiciary respectfully but strongly opposes this measure. This legislation, and its companion, removes a significant portion of the pretrial bail reform passed in Act 179, Session Laws of Hawai'i 2019 which codified a number of the specific recommendations made by the Criminal Pretrial Task Force ("Pretrial Task Force") convened in response to House Concurrent Resolution No. 134, H.D. 1. The removal of these portions essentially renders the remaining reforms to pretrial detention made by Act 179 untenable. The report of the Pretrial Task Force was a culmination of an examination of other jurisdictions and best practices to recommend legislation and revisions to criminal pretrial practices and procedures to increase public safety

while maximizing pretrial release of those who do not pose a danger or risk of flight. All the work of the Pretrial Task Force will be for naught with the passage of this bill.

The Judiciary understands that meaningful and sustainable improvements to the pretrial system can only be achieved when Intake Service Center (“ISC”) is provided with sufficient additional resources and personnel to carry out its mission. Nevertheless, this legislation reverses the significant steps in the right direction enacted by Act 179 (2019), and would in all likelihood lead to increased expense to the Department of Public Safety (DPS).

I. The Instant Bill Severely Hinders Prompt Bail Hearings Based on the Best Available Evidence

Section 3 of the proposed legislation purports to remove all of the legislative requirements of Act 179 pertaining to the responsibilities of ISC. This proposed legislation would render Section 804-7.5, which requires a prompt bail hearing, a nullity. Bail hearings cannot be conducted without the pretrial risk assessments and bail reports currently required by Section 353-10. Removing the assessments noted below and extending the deadline to provide the bail report to the court from three to seven working days (essentially extending the incarceration of the defendant by almost a week), will require the “prompt” hearing to be continued as well because there will be no information available at the initial arraignment.

a. Bail Reports

Currently, ISC must conduct a pretrial risk assessment on adult offenders and deliver its pretrial bail reports to the court within three working days. The proposed legislation would extend this time requirement from three to seven days. As specifically noted by the Pretrial Task Force, for felony defendants who are arrested and charged via complaint and preliminary hearing, this three day requirement is vital. When a defendant is arrested, Hawai‘i Rules of Penal Procedure Rule 5(c)(3) requires the district court to conduct a preliminary hearing within two days after the defendant’s initial appearance. Requiring risk assessments and bail reports to be completed in three days enables bail to be addressed at the earliest phases of the pretrial process, including at felony preliminary hearings.

A seven business day requirement for risk assessments and bail reports means bail cannot be meaningfully addressed at these early stages and those charged by way of preliminary hearing must wait until arraignment in circuit court (generally 10 days later) for an opportunity to address bail. Further, for those charged by way of information or indictment, their arraignment in circuit court is set within three to no more than five business days of their arrest. A seven-business day requirement for an assessment and report would mean none of these defendants would be able to meaningfully address bail at arraignment. Given the pretrial procedural

timeframe, this delay would render bail reports meaningless. It would also result in lengthier detention of defendants and attendant costs to DPS.

b. Risk of Violence or Harm to Any Person or the General Public

Second, Section 3, along with Section 5, of the proposed legislation removes the obligation of ISC to evaluate the defendant's risk of violence or harm to any person or the general public. Currently, one of the most critical components of a pretrial bail report is the evaluation of risk danger posed by a defendant. For a court to make an informed release or detention decision, the court must take into account whether the defendant is a danger to a complainant or the community. Negating this requirement would eliminate the primary components of the pretrial bail reports and could compromise the safety of victims and the community. It would also likely result in lengthier detention of defendants and attendant costs to DPS.

Further, when a defendant is charged with a crime against persons (as opposed to crimes against property), particularly crimes involving domestic violence or violation of restraining orders and protective orders, the time period immediately after police intervention is a volatile and dangerous time for victims. Defendants who are charged with these offenses may be more likely to re-victimize or stalk their victims. Risk assessment processes take these factors into consideration in order to prevent further violence.

ISC should continue to take into consideration the defendant's history of involvement with the victim (including prior police contact involving victim and arrestee), the status of their relationship, and any prior criminal history of the defendant. Section 5 of the proposed legislation removes any obligation of ISC to consider or amend any pretrial risk assessment process it is using to ensure integration of consideration of victim's rights into the pretrial system.

c. Financial Circumstances of Defendant

Third, Section 3 of the proposed legislation removes any inquiry by ISC into the financial circumstances of the defendant and inclusion of that information in the pretrial bail report. Currently, this inquiry provides the court information concerning the defendant's financial conditions to form an individualized determination of a bail amount which is fair, reasonable and comports with existing law.

Federal courts have held that a defendant's financial circumstances and possible alternative release conditions must be considered prior to detention. See, Hernandez v. Sessions, 872 F.3d 976, 991(9th Cir, 2017), O'Donnell v. Harris County, 892 F.3d 147 (2018). Hawaii's statutes also instruct all officers setting bail to "consider [not only] the punishment to be inflicted on conviction, [but also] the pecuniary circumstances of the party accused." H.R.S. §804-9.

Prior to Act 179, little, if any, inquiry was made concerning the defendant's financial circumstances.

Courts must be provided with information regarding the defendant's financial circumstances when addressing bail in order to comply with the current law. Given the volume of cases and compressed time frame within which assessments must be conducted, financial information bearing upon a defendant's ability to afford bail would only result from the defendant's self-reporting to the ISC officer. Eliminating this inquiry would remove any information regarding financial circumstances from the court's consideration, contrary to the requirements of federal and state law.

In addition, it would likely result in lengthier detention of defendants and attendant costs to DPS.

d. Full Risk Assessment and Validation

Finally, Section 3 of the proposed legislation removes the ISC's obligation to provide the risk assessment to the court as well as the obligation to periodically review and validate every five years the effectiveness of the pretrial risk assessment tool. Currently, ISC is required to include the fully executed pretrial risk assessment as part of the bail report. The statutory requirement for the use of a validated risk assessment tool makes clear that defendants' risk levels must be assessed in an objective and scientifically valid manner. The risk assessment tool included in a pretrial bail report is intended to inform the court and the attorneys of all available information that may bear upon a defendant's risks and whether the defendant may be safely and appropriately released from custody. The full assessment is vital as ISC and correctional center staff who administer the ORAS-PAT are allowed to employ overrides under current regulations, and these overrides frequently have the effect of increasing the restrictiveness of the release recommendations. To increase transparency and clarity, judges, as part of the bail report, must be provided the completed risk assessment, including the score and written explanations of any overrides applied. The inclusion of the risk assessments does not burden ISC with any additional cost.

In 2012, Hawai'i began using a validated risk assessment tool as required by HRS § 353-10. This tool, the ORAS-PAT, was validated in Hawai'i in 2014. Janet T. Davidson, *Validation of the Ohio Risk Assessment System (ORAS) Pretrial Assessment Tool (PAT) on a Hawaii Pretrial Population* (Aug. 2014). At that time, Dr. Davidson recommended an additional validation be conducted in the future as she only had six months of data from which to work. Regular validation studies of the ORAS-PAT or any other tool utilized to conduct pretrial risk assessment is critical to ensure Hawai'i is using a reliable tool and process. In addition, the required periodic review and the further validation of the risk assessment tool is necessary to evaluate the effectiveness of the tool and the procedures associated with its administration at

least every five years. This evaluation should examine the ORAS-PAT tool, the procedures associated with its administration and the manner in which such recommendations are relied upon by judges.

II. The Instant Bill Eliminates Alternatives to Pretrial Detention

Section 4 of the proposed legislation requires elimination of the recently expanded alternatives to pretrial detention, specifically, the authority of the court to order the alternatives of electronic monitoring and/or home detention. The court often considers release of defendants because risks they pose may be mitigated through home detention and electronic monitoring. If these alternatives are not available, less defendants will be released (with attendant conditions as necessary and appropriate), ultimately leading to the increased costs of detention for the Department of Public Safety (“DPS”). These tools must remain to reduce the potential risk to the public of a pretrial detainee’s release under the least restrictive non-financial conditions.

III. The Instant Bill Eliminates Periodic Reviews of Pretrial Detainees

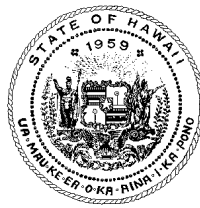
Section 2 of the proposed legislation removes from Chapter 353 the recommended provision requiring ISC to conduct regular reviews and surveys of the jail population to identify pretrial defendants who may be appropriate for pretrial release or supervision after their initial appearances. Prior to Act 179, court determinations as to whether a defendant is detained or released were made at or about the time of the charging of the case. Defendant’s detention or release was addressed at arraignment, but thereafter was rarely addressed.

As adopted in Act 179, in order to afford the pretrial detainee greater and continuing opportunities to be released or other least restrictive non-financial conditions necessary and appropriate, ISC is required to periodically review the pretrial detainee’s status in order to reassess whether a detainee should remain in custody. In addition, DPS policies and procedures were modified to provide for these periodic reviews and reassessments. Under this option, ISC is to make recommendations to the courts, and upon motion, the courts would determine whether or not to modify previously issued bail orders. Repealing this periodic review requirement will likely lead to longer pretrial incarceration periods for a vast number of defendants, and again increased costs of detention DPS.

In conclusion, the years long efforts of the Pretrial Task Force culminated in the legislative progression accomplished just a year ago towards a more equitable pretrial bail system. The proposed legislation would inevitably nullify such gains. The Judiciary understands that meaningful and sustainable improvements to the pretrial system can only be achieved when ISC and DPS are able to utilize sufficient resources, and as an alternative to the proposed legislation, the Judiciary respectfully supports allocation of resources to allow the DPS and ISC to carry out the mandates of Act 179.

Thank you for the opportunity to testify on this important measure.

DAVID Y. IGE
GOVERNOR



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TESTIMONY ON SENATE BILL 1189
RELATING TO PRETRIAL SERVICES PROVIDED BY THE INTAKE
SERVICE CENTERS, DEPARTMENT OF PUBLIC SAFETY.

by
Max N. Otani, Director
Department of Public Safety

Senate Committee on Public Safety, Intergovernmental, and Military Affairs
Senator Clarence K. Nishihara, Chair
Senator J. Kalani English, Vice Chair

Tuesday, February 9, 2021; 1:20 p.m.
Via Videoconference

Chair Nishihara, Vice Chair English, and Members of the Committee:

The Department of Public Safety (PSD) supports Senate Bill 1189, which seeks to repeal specific sections of Act 179 (SLH 2019) related to bail reform measures that directly impact PSD, due to the State of Hawaii's budget constraints.

PSD supports bail reform efforts. However, continuing with the added duties and responsibilities enabled by Act 179 without the necessary staffing, strains the Intake Service Centers' ability to provide timely pretrial bail reports that include all the legislatively mandated information.

This bill impacts the Judiciary, the Offices of the Prosecutors, the Office of the Public Defender, and defense attorneys, ensuring that the information needed to determine release or detention of pretrial persons is not delayed.

Thank you for the opportunity to present this testimony.



Office of the Public Defender State of Hawai'i



Testimony of the Office of the Public Defender, State of Hawai'i to the House Committee on Public Safety, Intergovernmental and Military Affairs

February 9, 2020

S.B. 1189: RELATING TO PRETRIAL SERVICES PROVIDED BY THE INTAKE SERVICES CENTER, DEPARTMENT OF PUBLIC SAFETY

Chair Clarence Nishihara, Vice Chair J. Kalani English and Members of the Committee:

The Office of the Public Defender strongly opposes S.B. 1189.

This proposed legislation effectively eviscerates the implementation of key proposals of HCR 134 Pretrial Task Force under Act 179.

SB 1189 is a major step backwards and would result in increased incarceration, delays in release of individuals and thus cost for the State. Furthermore, it will cause irreparable harm to the people who remain incarcerated and their families. Any momentary cost savings is far outweighed by the cost of increased incarceration and its social damages.

The Pretrial Task Force reported that delays in obtaining information and the timely creation of bail reports were critical to an efficient pretrial bail system and release determinations. Hence, The Task Force requested to provide ISC with the necessary funding, personnel, training etc. to meet current and projected responsibilities in conducting timely risk assessments, efficiently disseminating bail reports, and supervising pretrial detainees.¹

¹ Recommendations of the Criminal Pretrial Task Force to the Thirtieth Legislature of the State of Hawai'i "HCR 134" (December 2018): https://19of32x2yl33s8o4xza0gf14-wpengine.netdna-ssl.com/wp-content/uploads/HCR134-Task-Force-on-Pretrial-Reform_Final-Report_12.14.18.pdf, pp 2 & 73-74

There are at least 8 key provisions in Act 179 eliminated by this S.B. 1189. All these provisions are necessary components to the criminal pretrial system which were carefully described, supported, and recommended in the report of the Pretrial Task Force.² For example, extending the time in which bail reports are generated from the current three (3) to (7) days will severely handicap release determinations as the information will necessarily delay the distribution of critical pieces of information and recommendations to the Courts, prosecutors, and defense attorneys. In fact, the Pretrial Task Force recommended two (2) working days of the defendant's admission to the county correctional center to prepare a bail report. Hence, adding additional days will further compromise the pretrial system and will cause delays in release determinations, increased incarceration, and cost to the state.

SB 1189 seeks to eliminate reporting on a defendant's financial circumstances. However, as long as the current system still emphasizes money bail, failure to consider a person's financial circumstances will risk further incarceration and will prove more costly to the State.

Hawai'i's practice of requiring case or a money bond as a condition for pretrial release discriminates based on wealth, which exacerbates racial disparities, results in over-incarceration, and imposes unnecessary costs on individuals and society at large.³ On February 1, 2021, 883 people were incarcerated throughout the State even though they have not been convicted of a crime. Feeding and caring for an incarcerated person costs \$198 a day in Hawai'i.⁴ Pre-COVID19 the state was spending around \$209,000 a day (\$76 million annually) of taxpayer dollars to incarcerate more than 1,000 people statewide simply because they were too poor to afford bail.⁵ Data collected over the years tell us that 80 percent of these individuals are charged with relatively low-level

² Id. at pages 75-83

³ Final Report of the House Concurrent Resolution 85 Task Force on Prison Reform to the Hawai'i Legislature 2019 Regular Session, "Creating Better Outcomes, Safer Communities" (December 2018), https://19of32x2yl33s8o4xza0gf14-wpengine.netdna-ssl.com/wp-content/uploads/HCR-85-Task-Force-on-Prison-Reform_Final-Report_12.28.18.pdf.

⁴ State of Hawai'i Department of Public Safety Annual Report FY 2019 at 16, <https://dps.hawaii.gov/wp-content/uploads/2019/11/PSD-ANNUAL-REPORT-2019.pdf>.

⁵ HCR 85 Report at 64.

offenses and many are homeless or living with mental illness or substance use disorders.⁶

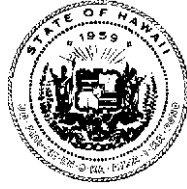
Beyond the financial consequences, pretrial incarceration leads to devastating collateral consequences impacting individuals for a lifetime and families for generations. People who cannot make bail stand to lose their jobs, and thus cannot pay the rent, utilities and put food on the table for their family. They may lose their homes, their health insurance, may end up deep in debt and then lose hope. Holding people in jail who do not pose a significant safety risk of danger also exacerbates overcrowding, creates unsafe conditions, places a huge financial burden on taxpayers, and compromises public safety.⁷ In the end, the cost of funding the responsibilities of the Intake Services Centers to conduct their legislative mandate would be far less than the cost of increased incarceration.

This testimony does not address the elimination of all key components in Act 179 impacted by S.B. 1189 as other entities will likely provide testimony or public comment regarding those concerns.

For the foregoing reasons, the Office of the Public Defender objects to S.B. 1189 and requests that the proper funding be approved to carry out necessary legislative mandates. Thank you for the opportunity to comment on this Bill.

⁶ HCR 85 Report at 65.

⁷ National Institute of Corrections, “The Hidden Costs of Pretrial Detention” (2018) at 4, https://craftmediabucket.s3.amazonaws.com/uploads/PDFs/LJAF_Report_hidden-costs_FNL.pdf (Finding that the longer low-risk defendants are detained, the more likely they are to commit another low-level offense).



LATE

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**STATE OF HAWAII
HAWAII CORRECTIONAL SYSTEM OVERSIGHT COMMISSION**

February 9, 2021

TO: Honorable Senator Clarence K. Nishihara
Public Safety, Intergovernmental, and Military Affairs

FROM: Mark Patterson, Chair, Hawaii Correctional System Oversight
Commission.

SUBJECT: SB 1189: RELATING TO PRETRIAL SERVICES PROVIDED BY THE INTAKE
SERVICE CENTERS, DEPARTMENT OF PUBLIC SAFETY

POSITION: The Hawaii Correctional System Oversight Commission strongly opposes
the intent of this measure.

PURPOSE: Amends Section 353-6.2, Section 353-10, and Section 804-7.1, Hawaii
Revised Statutes, enacted as part of Act 179, Session Laws of Honolulu 2019, to delete the
additional duties and responsibilities of the Intake Service Centers (ISC), Department of Public
Safety, in providing augmented bail reports under the Act's bail reform initiatives, due to the
imposition of budget restrictions for the fiscal biennium 2021-23 the defunded the ISC positions
responsible for this work.

The Hawaii Correctional System Oversight Commission opposes SB 1189, Relating to Pretrial
Services Provided by the Intake Service Centers, Department of Public Safety. This bill would
render ineffective essential portions of legislation enacted in 2019 designed to improve Hawaii's
pretrial release and detention system. This legislation was based on recommendations made by a
Task Force convened under the auspices of HCR 134, 2017, and Chaired by Judge Rom Trader.
The Task Force was comprised of a representative of all criminal justice agencies, including the
Intake Service Centers. The Task Force reports, that "the recommendations in this report seek to
improve our current practices, with the goal of achieving a more just and fair pretrial release and
detention system, maximizing defendants' release, court appearance and protecting community
safety. With these goals in mind, the Task Force respectfully submits the following
recommendations to be considered and implemented as a whole . . ." (Emphasis Added)
Recommendations of the Criminal Pretrial Task Force to the Thirtieth Legislature of the State of
Hawaii, December 2018. p.1

An important impact of such reforms, when implemented effectively, is to reduce our reliance on
secure incarceration as means of assuring a defendant's appearance in court. This can have
substantial effect on our chronically overcrowded jails, and eventually reduce the number of beds

we need. The reduce in capacity would translate into lower construction and long term operating costs.

The justification of this bill is that the Department of Public Safety has been unable to implement the legislation because budgetary restrictions caused by the COCID-19 pandemic. This is shortsighted. We understand that the required actions cannot be undertaken without proper staffing. However, the statue is sound and should be left in place. If this legislation is passed, then Hawaii's Community Correctional Centers will likely remain badly overcrowded, and persons charged with non-violent crimes will continue to be detained unnecessarily.

SB 1189 should be held without action.

Sincerely,

Mark Patterson, Chair
Correctional System Oversight Commission

Justin F. Kollar
Prosecuting Attorney



Rebecca Vogt Like
Second Deputy

Jennifer S. Winn
First Deputy

Diana Gausepohl-White
Victim/Witness Program Director

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THE HONORABLE CLARENCE K. NISHIHARA, CHAIR
THE HONORABLE J. KALANI ENGLISH, VICE CHAIR
SENATE COMMITTEE ON PUBLIC SAFETY
Thirty-First State Legislature
Regular Session of 2021
State of Hawaii

February 9, 2021

**RE: S.B. 1189 – RELATING TO PRETRIAL SERVICES PROVIDED BY THE
INTAKE SERVICE CENTERS, DEPARTMENT OF PUBLIC SAFETY**

Chair Nishihara, Vice Chair English, and members of the Senate Committee on Human Services, the Office of the Prosecuting Attorney of the County of Kauai submits the following testimony in opposition to S.B. 1189.

This bill deletes the additional duties and responsibilities of the Intake Service Center (ISC), Department of Public Safety, in providing augmented bail reports due to the imposition of budget restrictions that defunded the ISC positions responsible for this work.

Bail reports are critical in providing the court with information in assessing pretrial risk. A pretrial risk assessment is “an objective, research-based, validated assessment tool that measures an offender’s risk of flight, risk of criminal conduct, and risk of violence or harm to any person or the general public while on pretrial release pending adjudication.” This information is integral in providing equal access to justice regardless of income. An individual’s access to freedom should not be based solely on whether or not they can post monetary bail, but instead should be based on factors predicting their risk to the community. Without these reports, more people will be needlessly incarcerated. In addition, the burden will fall on overly burdened public defenders to research their client’s personal situations in order to advocate for their release. The pretrial risk assessment is critical to a healthy, functioning court system.

For these reasons, the Office of the Prosecuting Attorney opposes the passage of S.B. 1189. Thank you for this opportunity to testify.