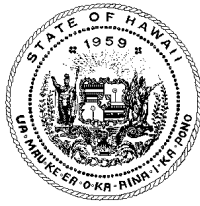


JOSH GREEN, M.D.
GOVERNOR



STATE OF HAWAII | KA MOKU'ĀINA 'O HAWAII
DEPARTMENT OF PUBLIC SAFETY
Ka 'Oihana Ho'opalekana Lehulehu
1177 Alakea Street
Honolulu, Hawaii 96813

TOMMY JOHNSON
DIRECTOR

Melanie Martin
Deputy Director
Administration

Michael J. Hoffman
Acting Deputy Director
Corrections

William F. Oku
Deputy Director
Law Enforcement

No. _____

TESTIMONY ON HOUSE BILL 823, HD 1
RELATING TO DEATHS WITHIN THE CORRECTIONAL SYSTEM

By
Tommy Johnson, Director

House Committee on Judiciary and Hawaiian Affairs
Representative David A. Tarnas, Chair
Representative Gregg Takayama, Vice Chair

Tuesday, February 28, 2023; 2:00 p.m.
State Capitol, Conference Room 325 and via Video Conference

Chair Tarnas, Vice Chair Takayama, and Members of the Committees:

The Department of Public Safety (PSD) offers comments on House Bill (HB) 823, House Draft (HD) 1, which seeks to expand the scope of inmate deaths that are to be reported to the Governor and Legislature, require reports to be published on the PSD website, require reports on the cause of death, and mandate public access to information within the reports.

The occurrence of death is an unfortunate reality in our jails and prisons. Responsible reporting of deaths is essential to ensure accurate communication of information to: a) the public for purposes of transparency and trust and b) decision-makers who have a need to know in order to provide resources and support to reduce the occurrence of preventable deaths in the criminal justice system.

PSD is a participant in the federal Death in Custody Reporting Act (DCRA). Along with other correctional institutions across the United States, information concerning deaths in jails and prisons are publicly available (see recent publications for example: Mortality in State and Federal Prisons, 2001-2019 – Statistical Tables; Mortality in Local Jails, 2000-2019 – Statistical Tables; Suicide in Local Jails and State and Federal Prisons, 2000-2019 – Statistical Tables). Data submitted to Office of Justice Programs

(OJP)/Bureau of Justice Assistance (BJA) of the U.S. Department of Justice to comply with DCRA are subject to 34 U.S.C. §10231(a), which protects from disclosure information that is identifiable to any private person. Accordingly, OJP/BJA does not release identifiable DCRA data to the public.

As a hybrid Health Insurance Portability and Accountability Act (HIPAA) entity, responsible reporting of deaths includes compliance with federal HIPAA requirements. While PSD has been and will continue to disclose the names of incarcerated individuals and correctional employees who die or are fatally injured on prison grounds, PSD has reservations about the requirements included in HB 823, HD 1, concerning the disclosure of certain other information besides the names being disclosed to the public. PSD notes that employees and the individuals in our care and custody, who would be directly affected by HB 823, HD 1, have never been consulted about their wishes concerning the disclosure of their protected health information, including the extent of such disclosure. This is an omission that PSD urges the committee to consider, given the federal non-disclosure practice involving identifiable information by the DCRA, when balancing decision-making on transparency and privacy.

Responsible death reporting also includes implementation of a process that would minimize the creation of unnecessary alarm and anxiety among the public, particularly if deaths are reported in a way that is sensationalized or taken out of context. This could inadvertently and mistakenly undermine public confidence in our criminal justice system. In recent years, for example, deaths by suicide in our jails and prisons resulted in periods of substantial attention to individual cases. However, data shows that the department experienced more than a 50% reduction in deaths by suicide during the 5-year period from 2018-2022 compared to the previous 5-year period from 2013-2017. In national comparisons, Hawaii has outperformed other unified jail-prison systems in recent years.

While the intent of the proposed bill seeks to improve public transparency, HB 823, HD1, may be inadvertently overlooking issues of individual privacy and responsible

Testimony on HB 823, HD1
House Committee on Judiciary and Hawaiian Affairs
February 28, 2023
Page 3

death reporting. The department is hopeful that HB 823, HD 1, will result in a process for the responsible reporting of deaths in our custody.

Thank you for the opportunity to provide testimony on HB 823, HD 1.



STATE OF HAWAII
HAWAII CORRECTIONAL SYSTEM OVERSIGHT COMMISSION
235 S. Beretania Street, 16th Floor
HONOLULU, HAWAII 96813
(808) 587-4160

TO: The Honorable David A. Tarnas, Chair
The Honorable Gregg Takayama, Vice Chair
House Committee on Judiciary and Hawaiian Affairs

FROM: Mark Patterson, Chair
Hawaii Correctional System Oversight Commission

SUBJECT: House Bill 823, House Draft 1, Relating to Deaths within the Correctional System
Hearing: Tuesday, February 28, 2023; 2:00 p.m.
State Capitol, Room 325

Chair Tarnas, Vice Chair Takayama, and Members of the Committee:

The Hawaii Correctional System Oversight Commission (the Commission) **strongly supports** House Bill 823, House Draft 1, Relating to Deaths within the Correctional System, which requires the Department of Public Safety to release certain information to the public concerning the death of an inmate or a staff member. This measure requires the Department to proactively disclose such information in a timely manner, rather than waiting for someone to make a request as has been the practice in the past.

This issue has been subject to litigation and brought before the Hawaii State Legislature in previous years. The prior administration under Director Max Otani had agreed in principle to release some information concerning such deaths and we believe current Director Tommy Johnson takes a similar stand. We are concerned, though, that Mr. Johnson's previous testimony to the House Committee on Corrections, Military & Veterans on this matter recommended amending parts of this measure to require certain information in reports to the Governor and the Legislature is only allowed "if the employee or incarcerated individual provides written authorization to release protected health information in the event of death." We do not agree with this requirement and believe it would seriously impede the release of death-related information.

Mr. Johnson also included in his previous testimony that the disclosure and public review of clinical mortality review "is in violation of the Hawaii Health Care Quality Improvement Act of 1989," citing Chapter 671D, Section 624.25.5, and Section 663-1.7(e) of the Hawaii Revised Statutes. These laws provide protection to professionals involved with peer review and quality assurance committees. We do not understand why Mr. Johnson believes those protections would be nullified by the disclosure and public review of clinical mortality reviews.

Should you have additional questions, the Oversight Coordinator, Christin Johnson, can be reached at 808-900-2200 or at christin.m.johnson@hawaii.gov. Thank you for the opportunity to testify.

TESTIMONY IN SUPPORT OF HB 823, HD 1

TO: Chair Tarnas, Vice Chair Takayama, & Committee Members

FROM: Nikos Leverenz
Grants & Advancement Manager

DATE: February 28, 2023 (2:00 PM)

Hawai'i Health & Harm Reduction Center (HHRC) **strongly supports** HB 823, HD 1, which expands the scope of inmate deaths that are reported to the Governor and Legislature.

This bill should be strengthened to require that the names of those in the care and custody of the Department of Public Safety (PSD) be released to the public as expeditiously as possible. The longstanding PSD practice of claiming that the identity of a deceased prisoner or inmate was “protected medical information” is a grossly unfounded assertion and a woefully aberrant practice that is not in alignment with established penological practices in other jurisdictions.

We hope that the new director of PSD can offer the Legislature, and the public it represents, express assurances that it shouldn't take a lawsuit or legislative enactment to properly manage basic administrative functions of this state's carceral facilities in accord with acceptable penological practices, [as has been the case in carceral deaths](#).

HHRC's mission is to reduce harm, promote health, create wellness, and fight stigma in Hawai'i and the Pacific. We work with many individuals who are impacted by poverty, housing instability, and other social determinants of health. Many have behavioral health problems, including those relating to substance use and underlying mental health conditions, and have been deeply impacted by trauma, including histories of physical, sexual, and psychological abuse.

Thank you for the opportunity to testify on this measure.

COMMUNITY ALLIANCE ON PRISONS

P.O. Box 37158, Honolulu, HI 96837-0158

Phone/E-Mail: (808) 927-1214 / kat.caphi@gmail.com



COMMITTEE ON JUDICIARY AND HAWAIIAN AFFAIRS

Rep. David Tarnas, Chair

Rep. Gregg Takayama, Vice Chair

Tuesday, February 28, 2023

Room 325

2:00 PM

STRONG SUPPORT FOR HB 823 HD1 - DEATHS IN CORRECTIONS

Aloha Chair Tarnas, Vice Chair Takayama 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 4,028 Hawai'i individuals living behind bars¹ and under the "care and custody" of the Department of Public Safety/Corrections and Rehabilitation on any given day. We are always mindful that 917 (41% of the male imprisoned population²) 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.

Community Alliance on Prisons appreciates this opportunity to testify in strong support of HB 823 HD1 that expands the scope of inmate deaths that are reported to the Governor and Legislature and requires public access to certain information within the reports.

We work closely with families and we hear heartbreaking stories about messages left on answering machines about their imprisoned loved ones. We have spoken with Tommy Johnson about finding someone on staff who can be trained in grief counseling to handle these sensitive communications with families. He has contacted other jurisdictions to find out what their process was when someone dies in jail or prison. We have not met yet to discuss better and less harmful ways to deliver serious news to families about their imprisoned loved ones. The department testified that it is the Warden who makes the calls, however, that is not always true according to some grieving families who have called us.

¹ Department of Public Safety, Weekly Population Report, February 13, 2023.

https://dps.hawaii.gov/wp-content/uploads/2023/02/Pop-Reports-Weekly-2023-02-13_George-King.pdf

² Why are 41% of Hawai'i's male prison population sent thousands of miles from home when the following prisons in Hawai'i have room? Here are the capacity rates of the following prisons: Halawa is at 74.3%; Halawa Special Needs Facility is at 63.6%; Kulani is at 39.5%; Waiawa is at 59% of operational capacity. SEE FN1

Although this research from 2008³ is about the importance of police death notifications for family members of victims and for police-community relations, it is applicable to correctional workers as well. This article outlines best practices in death notifications and suggests resources police might use to assist in death notifications.

Another article in Officer.com⁴ highlights the importance of compassion when delivering sad news:

Notifications should be done in person, in time, in pairs, in plain language and with compassion.

One of the biggest taboos committed in death notification is the use of the telephone, which is sometimes used to make notification if the victim's family resides outside the jurisdiction.

"Using the phone to make death notification is cold-hearted and a sign of intellectual laziness," says Joseph Morgan, an assistant professor of criminal justice and forensics at North Georgia College and State University. "For all you know, the survivor might have a heart condition, be suicidal or eight months pregnant."

The highlighted paragraph is an important one for Hawai`i as we send more than 900 of our male prisoners to Arizona. How do we notify families/loved ones when someone dies there, or if someone's family/loved one moved out of Hawai`i while they were incarcerated?

Below are best practices that Hawai`i should implement as they are embodied in our Aloha Spirit Law.⁵ **[\$5-7.5] "Aloha Spirit"**. (a) "Aloha Spirit" is the coordination of mind and heart within each person. It brings each person to the self. Each person must think and emote good feelings to others. In the contemplation and presence of the life force, "Aloha", the following unuhi laula loa may be used:

- "Akahai", meaning kindness to be expressed with tenderness;
- "Lokahi", meaning unity, to be expressed with harmony;
- "Oluolu", meaning agreeable, to be expressed with pleasantness;
- "Haahaa", meaning humility, to be expressed with modesty;
- "Ahonui", meaning patience, to be expressed with perseverance.

These are traits of character that express the charm, warmth and sincerity of Hawaii's people. It was the working philosophy of native Hawaiians and was presented as a gift to the people of Hawaii. "Aloha" is more than a word of greeting or farewell or a salutation. **"Aloha" means mutual regard and affection and extends warmth in**

³ Death Notification: Breaking the Bad News, *Law Enforcement Technology*, Volume: 35 Issue: 3, March 2008, Pages: 18,20,22,25, NCJ Number 222266.

<https://www.ojp.gov/ncjrs/virtual-library/abstracts/death-notification-breaking-bad-news>

⁴ Death notification: Breaking the bad news, Why does so little training exist for the most grim job in law enforcement? Feb. 29, 2008. <https://www.officer.com/home/article/10249064/death-notification-breaking-the-bad-news>

⁵ **[\$5-7.5] "Aloha Spirit"**.

https://www.capitol.hawaii.gov/hrscurrent/vol01_ch0001-0042f/hrs0005/hrs_0005-0007_0005.htm

caring with no obligation in return. "Aloha" is the essence of relationships in which each person is important to every other person for collective existence. "Aloha" means to hear what is not said, to see what cannot be seen and to know the unknowable.

(b) In exercising their power on behalf of the people and in fulfillment of their responsibilities, obligations and service to the people, the legislature, governor, lieutenant governor, executive officers of each department, the chief justice, associate justices, and judges of the appellate, circuit, and district courts may contemplate and reside with the life force and give consideration to the "Aloha Spirit". [L 1986, c 202, §1]

Best practices in death notifications⁶

Next of kin are due the respect of having the death notification done by an official, and to be given the news straight, with kindness.

Notification should be done:

- *In person. Use of the telephone to make death notification is callous and insensitive. Ask yourself how you would like your family notified.*
- *In pairs. Death notification is best done by two people, at least one of whom should be in uniform. Do not arrive in a large group. Two vehicles are best, in the event medical transport may be necessary.*
- *In private. Present credentials. Ask to come inside. Do not make notification on the porch or in a public place.*
- *In plain language. Don't use medical jargon. Use simple, straightforward language to describe how, when and where the person died. Don't be afraid to use the "D" words — dead, died or death. Terms such as "expired," "passed on" or "lost" are words of denial. "Expired" can be used on a drivers license but not on a person — it's not respectful.*
- *In time. Make notification before the family sees it on the news. Then get to the point. Don't drag it out. People know when police arrive at their door at 4 a.m. it is not because they won the lottery. Say something like, "I'm sorry, your husband was in an auto accident tonight. He died while paramedics were attempting to revive him." Then give details as indicated.*

When people are incarcerated, we can never forget that they come from families, from neighborhoods, and from larger communities. Treating people with kindness, empathy, and compassion - especially upon hearing the worst news possible about your loved one - goes a long way in helping people heal from trauma.

Mahalo for this opportunity to share our thoughts. We urge the committee to pass this measure so it can cross over to the other chamber.

⁶ Sue Rutherford, executive director of the Arizona Trauma Intervention Program and "In Person, In Time: Recommended Procedures for Death Notification".

https://irp-cdn.multiscreensite.com/ac5c0731/files/uploaded/in_person.pdf

HB-823-HD-1

Submitted on: 2/27/2023 9:02:54 AM

Testimony for JHA on 2/28/2023 2:00:00 PM

Submitted By	Organization	Testifier Position	Testify
Ilima DeCosta	Ho'opono Na Mea Ola	Support	Written Testimony Only

Comments:

Mahalo for the opportunity to testify in **strong support** of HB 1336, HD1, which would offer a range of reforms that would advance pretrial fairness and place limits on pretrial incarceration. This bill importantly prohibits the arrest of a probationer or parolee, or the revocation of probation or parole, solely due to the person testing positive for drug use. This bill would also reduce the number of arrests made in criminal cases. As the bill’s finding notes, “an arrest can significantly jeopardize [an] arrestee’s housing and employment and set into motion a chain of economic and logistical hardships for the arrestee’s family, especially when the arrestee is the main source of household income and has multiple dependents.”

The Department of Public Safety relayed a critical data point to the [HCR 85 Prison Reform Task Force, which published its final report in January 2019](#): *only 26% of the combined jail and prison population is incarcerated for class A or B felony, while the remaining 74% are incarcerated for a class C felony or lower (misdemeanor, petty misdemeanor, technical offense, or violation).*

The criminal legal system has disproportionately impacted Native Hawaiians since the establishment of the Republic of Hawai‘i in the late 19th Century. [Native Hawaiians are more likely to get a prison sentence, and for longer periods of time, than other groups. Native Hawaiians comprise the highest percentage of those incarcerated in out-of-state and women’s prisons. Native Hawaiians are sentenced to longer probation terms than other groups. Native Hawaiians also bear a disproportionate burden of the punitive response to drug use, with sentencing structures, police practices, and prosecutorial practices contributing to that disproportionality.](#)

As noted in a 2020 report from the Pew Charitable Trusts, [Hawai‘i has the highest average term of probation in the nation at just under five years](#). Statewide probation reform that substantially reduces terms is another tangible means of repairing the harm of structural racism that is manifest in the operation of the state’s criminal legal system.

I strongly believe that those who use substances should not be subject to criminal sanctions absent actual harm to others, including those who use substances because of underlying mental health conditions. Criminalizing drug users significantly perpetuates lasting social, medical, and legal stigma. Hawai‘i should instead increase its capacity to provide low-threshold, evidence-based care, and medical treatment upon request and apart from the framework of the criminal legal system.

The high individual, familial, and governmental costs associated with consigning persons with behavioral health problems to protracted involvement in the criminal legal system are readily apparent to those familiar with assessing punitive responses to drug use at the state, national, and international levels.

[The APHA vigorously endorses a public health response to drug use and misuse, including the decriminalization of personal drug possession and use. It urges state governments to eliminate “criminal penalties and collateral sanctions for personal drug use and possession offenses and to avoid unduly harsh administrative penalties, such as civil asset forfeiture...”](#)

Thank you for the opportunity to testify in support of this measure.

THE CIVIL BEAT
LAW CENTER FOR THE PUBLIC INTEREST

700 Bishop Street, Suite 1701
Honolulu, HI 96813

Office: (808) 531-4000
Fax: (808) 380-3580
info@civilbeatlawcenter.org

House Committee on Judiciary & Hawaiian Affairs
Honorable David A. Tarnas, Chair
Honorable Gregg Takayama, Vice Chair

**RE: Testimony Supporting H.B. 823 H.D. 1, Relating to
Deaths Within the Correctional System**
Hearing: February 28, 2023 at 2:00 p.m.

Dear Chair and Members of the Committee:

My name is Brian Black. I am the Executive Director of the Civil Beat Law Center for the Public Interest, a nonprofit organization whose primary mission concerns solutions that promote governmental transparency. Thank you for the opportunity to submit testimony **strongly supporting H.B. 823 H.D. 1.**

The public should know the identity of people who die while incarcerated. This bill would codify a process for public disclosure of these deaths and alleviate any confusion for the Department of Public Safety regarding the scope of other privacy and confidentiality laws.

This issue has been a problem since the Department changed its interpretation of HIPAA in 2020 and started withholding the identity of individuals who died while in its custody and care. Notwithstanding the fact that the Department had disclosed the identity of deceased individuals for years after the HIPAA Privacy Rule took effect in 2001 and the fact that many correctional facilities across the country disclose the same information, the Department refused to identify those who died in prison in Hawai'i.

In October 2021, the Law Center represented Honolulu Civil Beat in challenging the Department's change in position. In November 2022, the circuit court confirmed that basic information identifying individuals who died while in the Department's custody and care must be publicly disclosed and cannot be withheld under HIPAA.

H.B. 823 tracks a proposal that was discussed with and supported by the Department last year. The only material deviation from that prior proposal is that H.B. 823 continues a requirement that the Department publicly disclose cause of death and indications of sexual assault within seven days (and disclose again in the second report once the official cause of death is determined). The disclosure of this information is critical for the second report in subsection (c), but the Law Center defers to the Committee as to whether (b)(6) and (7) should be deleted.

The Law Center reviewed the Department of Public Safety's comments on this proposal as submitted to the prior committee. The Department's suggested amendments defeat the purpose of this legislation to streamline a process for timely disclosing what is clearly public information.

- Conditioning public disclosure on written authorization from the deceased individual is not required by any law. For example, the circuit court already ordered disclosure of information about the deaths of incarcerated individuals without regard for whether those individuals provided written authorization.
- H.B. 823 does not require public disclosure of clinical mortality reviews. It expressly provides that public disclosure of the second report (once cause of death is determined) only includes the items identified in (c)(2) (cause of death) and (c)(3) (indications of sexual assault leading to the death). The clinical mortality review in (c)(1) is not open to public inspection.

Thank you again for the opportunity to testify **strongly supporting** H.B. 823 H.D. 1.

Opportunity Youth Action Hawai'i

February 28, 2023

House Committee on Judiciary & Hawaiian Affairs

Hearing Time: 02:00 p.m.

Location: State Capitol

Re: HB 823 HD1, Relating to Deaths Within the Correctional System

Aloha e Chair Tarnas, and members of the Committee:

We are writing in **strong support of** HB 823 HD1, Relating to Deaths Within the Correctional System.

This bill will expand the scope of inmate deaths that are reported to the Governor and Legislature; require reports to be published on the Department of Corrections and Rehabilitation website; and require reports on the cause of death and mandate public access to certain information within those reports.

The lives of those in correctional facilities matter just as much as those that are not. And their deaths should be investigated, treated, and reported on with the utmost respect and diligence. The public deserves complete transparency on the happenings within the correctional and justice systems of Hawai'i.

Our collective, Opportunity Youth Action Hawai'i (OYAH), works to support young people under the age of 25 who are disconnected from school and work, referred to as "opportunity youth." This developmental time period is extremely consequential to the individual growth and overall life chances of our children. **We support this measure.**

Opportunity Youth Action Hawai'i is a collaboration of organizations and individuals committed to reducing the harmful effects of a punitive incarceration system for youth; promoting equity in the justice system; and improving and increasing resources to address adolescent and young adult mental health needs. We seek to improve the continuity of programs and services for youth and young adults transitioning from minor to adult status; eliminate youth homelessness and housing market discrimination against young adults; and promote and fund more holistic and culturally-informed approaches among public/private agencies serving youth.

Please support HB 823 HD1.

HB-823-HD-1

Submitted on: 2/24/2023 4:32:59 PM

Testimony for JHA on 2/28/2023 2:00:00 PM

Submitted By	Organization	Testifier Position	Testify
Dana Keawe	Individual	Support	Written Testimony Only

Comments:

support

HB-823-HD-1

Submitted on: 2/25/2023 5:11:03 PM

Testimony for JHA on 2/28/2023 2:00:00 PM

Submitted By	Organization	Testifier Position	Testify
Will Caron	Individual	Support	Written Testimony Only

Comments:

Please support HB823 HD1.

HB-823-HD-1

Submitted on: 2/27/2023 8:02:36 AM

Testimony for JHA on 2/28/2023 2:00:00 PM

Submitted By	Organization	Testifier Position	Testify
Nanea Lo	Individual	Support	Written Testimony Only

Comments:

Hello,

My name is Nanea Lo. I'm born and raised in the Hawaiian Kingdom a Kanaka Maoli.

I'm writing in SUPPORT of HB823 HD1.

me ke aloha 'āina,
Nanea Lo, Mō'ili'ili

HB-823-HD-1

Submitted on: 2/27/2023 11:51:15 AM

Testimony for JHA on 2/28/2023 2:00:00 PM

Submitted By	Organization	Testifier Position	Testify
Diana Bethel	Individual	Support	Written Testimony Only

Comments:

Aloha,

I am writing in strong support of HB823 HD1 which expands the scope of inmate deaths that must be reported to the Governor and Legislature. It requires reports to be published on the Department of Corrections and Rehabilitation website. It requires the Department to report the cause of death and mandates public access to certain information in the reports. The bill further mandates an effective date of 1/1/24, as indicated in section 353-40. Hawaii Revised Statutes.

It is hard to believe that the issue of reporting deaths in prison is, after so many years, still not enshrined in law. How many more years will it take? It is the Department of Public Safety's responsibility to the public to report on deaths occurring in its facilities. It is the Legislature's responsibility to make sure the Department is protecting the people in its care. Not reporting deaths, including the cause of death, seems suspicious and dangerous in a democracy. It makes the Department of Public Safety seem like an unaccountable, secretive, and dangerous institution.

The former AG's interpretation of the HIPAA law was clearly flawed and this bill is necessary to correct that. My only question is why will we have to wait until 1/1/24 for deaths to be reported. Please pass HB823 HD1.

Mahalo for this opportunity to testify.

Diana Bethel, Honolulu

HB-823-HD-1

Submitted on: 2/27/2023 12:28:37 PM

Testimony for JHA on 2/28/2023 2:00:00 PM

Submitted By	Organization	Testifier Position	Testify
Kristine Crawford	Individual	Support	Written Testimony Only

Comments:

The public has a right to know what happens in our correctional institutions and when and why people die there. Having this information may help prevent the abuse of those who work there and those who live there. Please pass HB823 HD1.