



## *The Judiciary, State of Hawaii*

### **Testimony to the Thirty-First Legislature, 2022 Regular Session**

#### **House Committee on Corrections, Military, & Veterans**

Representative Takashi Ohno, Chair

Representative Sonny Ganaden, Vice Chair

Wednesday, March 23, 2022 at 10:30 a.m.

Conference Room 430 & Videoconference

By

Rodney A. Maile

Administrative Director of the Courts

#### **WRITTEN TESTIMONY ONLY**

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**Resolution No. and Title:** House Concurrent Resolution No. 16, Requesting the Judicial Council to Appoint a Committee to Review and Recommend Revisions to the Hawai'i Penal Code.

#### **Judiciary's Position:**

The Judiciary takes no position on the merits of this resolution and respectfully offers the following comments.

Judicial discretion is an important part of the criminal justice system. As relates to this resolution, in particular, a "one size fits all" approach at sentencing does not always achieve fairness and equity under the law in every situation. Our judges strive to address each offender fairly depending on the individual circumstances of their case, where repeat offender status is just one of many factors considered. When appropriate, the judges consistently consider alternatives to incarceration and specialty court programs, which are designed specifically to reduce recidivism and rehabilitate the offender, among other benefits.

Reviews of the penal code are large undertakings that require extensive time commitments by numerous stakeholders across the state, and since 1972 have occurred approximately every ten years. Just six years ago, in 2016, the Legislature considered recommendations from a 29-member penal code review committee representing nearly twenty different departments, organizations, and interests, who contributed more than a thousand hours



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to the 2015 penal code review. After considering eighty-four proposals, the Legislature passed the 137-page Act 231 (SLH 2016) (HB2561, HD1, SD1, CD1). The work of a penal code review also requires modest funding for a reporter, the holding of meetings, and research/clerical staff.

Penal code reviews typically involve a comprehensive examination of the penal code as opposed to the limited scope contemplated by this resolution, and are historically chaired by a sitting judge.

Given the broad, state-wide membership of the committee and intensive work proposed by HCR No. 16, perhaps it would be more meaningful and efficient to consider the sentencing provisions for repeat offenses as a part of the next comprehensive penal code review, which could occur in the normal course approximately four years from now. The additional time would also allow the committee to consider the impacts of recent developments in criminal justice reform (such as the 2019 Act 179 that began implementation shortly before the pandemic began, and the 2020 Act 26 pertaining to those with mental health challenges who find themselves before district courts), and other changes to the criminal justice system brought on by the pandemic—the effects of which are yet to be fully realized.

Thank you for the opportunity to testify.

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## Written Comments

# **HCR16/HR15** **REQUESTING THE JUDICIAL COUNCIL TO APPOINT A COMMITTEE TO REVIEW** **AND RECOMMEND REVISIONS TO THE HAWAII PENAL CODE**

Testimony by the Legislative Reference Bureau  
Charlotte A. Carter-Yamauchi, Director

Presented to the House Committee on Corrections, Military, & Veterans

Wednesday, March 23, 2022, 10:30a.m.  
Conference Room 430  
Via Videoconference

Chair Ohno and Members of the Committee:

Good afternoon Chair Ohno and members of the Committee, my name is Charlotte Carter-Yamauchi and I am the Director of the Legislative Reference Bureau. Thank you for providing the opportunity to submit written comments on H.C.R. No. 16/H.R. No. 15, Requesting the Judicial Council to Appoint a Committee to Review and Recommend Revisions to the Hawaii Penal Code.

The purpose of these measures is to request that the Judicial Council, established pursuant to section 601-4, Hawaii Revised Statutes, appoint a committee to review the Hawaii Penal Code and recommend to the Legislature revisions that will help ensure judicial discretion, consistency, and fairness in sentencing repeat offenders. The measures also establish the membership of the committee and requires the committee to recommend updates to the Hawaii Penal Code by reviewing HOPE Probation (Hawaii's Opportunity Probation with Enforcement).

The measures establish that the Judicial Council may request the Legislative Reference Bureau to assist the committee with research and reporting assistance, as needed, and encourages the Judicial Council to use, to the greatest extent possible, the faculty and students of the University of Hawaii William S. Richardson School of Law in performing its work.

The measures also request that the Judicial Council submit its findings and recommendations, including any proposed legislation, to the Governor and Legislature no later than twenty days prior to the convening of the Regular Session of 2023:

The Bureau takes no position on these measures but submits the following comments for your consideration.

The Bureau believes that the services requested under this measure are manageable and that the Bureau will be able to provide the services in the time allotted; provided that the measures are amended to direct the Judicial Council to submit a draft of its final report to the Bureau by no later than October 1, 2022, and Bureau's interim workload is not adversely impacted by too many other delegated responsibilities, such as conducting, writing, or finalizing other reports, drafting legislation, or both, for other state agencies, task forces, or working groups that may be requested or required under other legislative measures.

Thank you again for the opportunity to submit written comments.



## COMMENTS ON HCR 16

TO: Chair Ohno, Vice Chair Ganaden, & Committee Members

FROM: Nikos Leverenz, Grants & Advancement Manager

DATE: March 23, 2022 (10:30 PM)

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Hawai'i Health & Harm Reduction Center (HHHRC) offers the following comments regarding HCR 16, which requests the Judicial Council to appoint a committee to review and recommend revisions of the penal code to the Legislature.

The prospective membership of this proposed committee skews far too heavily toward prosecutorial interests. Designating the Honolulu prosecutor's office as its chair is unwarranted given its institutional interests. The position should instead be given to a legal professional who has a broader view of the criminal legal system, particularly with respect to the practices of other states.

While prosecutors from every county are invited to participate as members, only one representative from the Office of the Public Defender, which also operates in every county. Further, it is not appropriate to invite representatives from the Department of Public Safety of the county police departments as it is outside of the scope of their functions. This proposed committee notably has no representatives from Hawai'i's law school or other institutions of higher learning, which is typically the case in other jurisdictions.

Generally, Hawai'i's current sentencing regime vests far too much power in the Hawaii Paroling Authority and is an aberration when compared to the practices of other states. The Legislature should instead provide judges with the kind of discretion that is inherent in the function of the judicial branch in our tripartite system of government. The Legislature can also place direct statutory limits on terms of sentences as well as terms for probation and parole. [Hawai'i has the longest average term of probation in the nation at 59 months](#), which should prompt direct remedial action by the Legislature via statute.

HHHRC's mission is to reduce promote health, create wellness, and fight stigma. Many of those we work with have behavioral health problems, including those related to substance use and mental health conditions and also impacted by poverty, housing instability, and other social determinants of health. Additionally, many of our program clients and participants have also been deeply impacted by trauma, including histories of physical, sexual, and psychological abuse.

Thank you for the opportunity to provide testimony.



Hawai'i

Committee: House Committee on Corrections, Military, and Veterans  
Hearing Date/Time: Wednesday, March 23, 2022 at 10:30 AM  
Place: Via videoconference

### **Comments on HCR 16 Relating to Penal Code Committee with Amendments**

Dear Chair Ohno, Vice Chair Ganaden and Committee Members:

The ACLU of Hawai'i is committed to transforming Hawai'i's criminal legal system and building a new vision of safety and justice. We advocate for the State to shift spending priorities away from mass criminalization and incarceration that disparately impacts Native Hawaiians, Pacific Islanders and other people of color and the poor - towards rehabilitation, education, housing, health and human services, and restorative justice in the community.

The ACLU of Hawai'i submits comments on HCR No. 16 Requesting the Judicial Council to Appoint a Committee to Review and Recommend Revisions to the Penal Code.

As drafted, the composition of the proposed Commission is skewed towards the interest of law enforcement, expanding policing powers, surveillance, criminalization and incarceration – despite research confirming that data-driven approaches to improve public safety, reduce corrections and related criminal justice spending, and reinvesting savings in strategies can decrease crime and reduce recidivism.

The reality is that our jails and prisons are severely overcrowded, resulting in inhumane conditions of confinement. Yet, we continue to enact laws that open the floodgates to our jails and prisons – where the majority of people do not receive adequate health care and substance use treatment, education, training and support needed to break the cycle of incarceration.

Between 1980 and 2010, Research by the National Research Council reveals that, the 222% increase in the rate of incarceration in state prisons was a function of changes in policy, not changes in crime rates.<sup>1</sup>

Hawai'i is not an exception. Changes in policies and practices, within policing, the Prosecutors, Judiciary, Adult Client Intake Services, Department of Public Safety, and the Hawaii Paroling Authority have increased the number of people who are arrested, placed on community supervision, incarcerated, the length of incarceration and revoked for technical violations of probation and parole conditions.

If we decriminalized drug use and houselessness, and provided housing and adequate support services in our community, less people would be arrested in the first place. And if police issued more citations instead of arrests, we would have less people detained in our jails.

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<sup>1</sup> See NAT'L RES. COUNCIL, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 33 (J. Travis et al. eds., 2014).

Nearly 57% of people detained in Hawaii's jails are pre-trial status – meaning they have been accused, but not convicted of a crime. Although cash bail has been deemed unconstitutional in other jurisdictions, Hawaii continues with this fundamentally unfair practice. If we were to implement meaningful criminal pretrial reforms, including the elimination of the cash bail system, our system would uphold equal protection under the law. Moreover, we would be able to reduce our pretrial population by 35-40% of the jail population – by starting with a presumption of release and only detaining individuals who pose a flight risk or serious risk of harm to a specific person.

**INCARCERATED POPULATION IN HAWAII**  
**Department of Public Safety Weekly Population Report (Jan. 24, 2022) Pretrial Population**

<b>Total Pretrial <b>Felony</b> Males &amp; Females</b>	<b>824 (or 47% pretrial population)</b>
<b>Total Pretrial <b>Misdemeanor</b> Males &amp; Females</b>	<b>179 (or 10% pretrial population)</b>
<b>Total Pretrial <b>Felony and Misdemeanor Population</b> Combined at all jails (HCCC, KCCC, MCCC, OCCC; exclude pretrial at Halawa)</b>	<b>1003 (or 57% of total jail population)</b>
<b>TOTAL JAIL POPULATION - Combined at all jails (HCCC, KCCC, MCCC, OCCC, exclude Halawa Medium Security prison)</b>	<b>1736</b>

A Pew Report study confirmed that Hawai'i has the longest lengths of probation compared to all other states. This lengthy duration increases the likelihood of technical violations, which often leads to incarceration.

**Pew Report Probation lengths across the U.S. (2020)**  
National average (2018) = **22.4 months**

<b>Rank (1 = longest)</b>	<b>State</b>	<b>Average probation term in months, 2018</b>
1	Hawaii	59 months
2	New Jersey	52 months
3	Rhode Island	44 months
4	Oklahoma	42 months
5	Arkansas	41 months
46	Indiana	15 months
47	Delaware	15 months
48	West Virginia	15 months
49	Massachusetts	10 months
50	Kansas	9 months

As of January 24, 2022, 1,016 out of 4099 people, or approximately 25% of all new admissions to jails and prisons in Hawai'i were the result of parole and probation revocations. Department of Public Safety, Weekly Population Report, January 24, 2022. If we implemented probation and parole reform, we could substantially reduce our jail and prison population, without compromising public safety and while saving taxpayer dollars.

Hawaii's own studies confirm high rates of recidivism as an outcome of our criminal legal system.

**AG's Interagency Council on Intermediate Sanctions** (2019) Recidivism Update (State of Hawai'i, FY 2016 Cohort) reports recidivism as a felony, misdemeanor, petty misdemeanor arrest, or probation or parole revocation to record the recidivism event.

<b>Recidivism Rates</b>	<b>(FY 2016 Cohort)</b>	<b>Baseline 1999</b>	<b>Difference</b>
Probation	54.6%	53.7 %	+0.9 increase
Parole	50.1%	72.9 %	-22.8 decrease
Max Term Release	57.1%	76.1%	-19 decrease
<b>Total Average Recidivism Rate: 53.8%</b>			

### **Proposed Amendments**

To move towards a more rational criminal legal system driven by data, we recommend a Committee that is more balanced. Accordingly, we recommend the following amendments:

1. Page 2, lines 30-32. Strike "The prosecuting attorney of the City and County of Honolulu, who shall serve as chairperson of the committee." The Prosecuting Attorney of the City and County of Honolulu should have equal representation to the Prosecuting Attorney in every county.
2. Page 3, lines 16-17. Strike "A representative from the police department of each county." Enacting laws is outside the scope of police duties.
3. Page 3, lines 21-22, expand psychologists or social workers to also include health care professionals with experience in behavioral health, harm reduction and substance use treatment.
4. To ensure geographic representation on par with representation from the Prosecutor's office, the Office of the Public Defender shall have a representative from each County.
5. To advance criminal legal reforms driven by data, we recommend at least two representatives from criminal legal advocacy organizations.
6. We recommend the inclusion of at least two justice impacted people who have been under criminal legal supervision and/or incarcerated;
7. We recommend the inclusion of at least one person with expertise in Restorative Justice practices.
8. Add two representatives from institutions of higher learning in Hawai'i who have expertise in crime, corrections and criminal legal reform.
9. Add a representative from the Criminal Justice Research Institute.
10. Add a representative from communities disparately impacted by the criminal legal system. This would include a representative from the Native Hawaiian community, Pacific Islander community, Filipino community and Black community.



In closing, we recommend changes to the composition of the Hawai'i Penal Code Committee to achieve a more rational and balanced criminal legal system where due process and equal protection rights are protected, and disparities based on race and poverty are eliminated.

Sincerely,

*Carrie Ann Shirota*

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Policy Director  
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*The mission of the ACLU of Hawai'i is to protect the fundamental freedoms enshrined in the U.S. and State Constitutions. The ACLU of Hawai'i fulfills this through legislative, litigation, and public education programs statewide. The ACLU of Hawai'i is a non-partisan and private nonprofit organization that provides its services at no cost to the public and does not accept government funds. The ACLU of Hawai'i has been serving Hawai'i for over 50 years.*

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**HCR-16**

Submitted on: 3/23/2022 8:56:58 AM

Testimony for CMV on 3/23/2022 10:30:00 AM

Submitted By	Organization	Testifier Position	Testify
Robert K. Merce	Individual	Oppose	Written Testimony Only

Comments:

Dear Chair Ono, Vice Chair Ganaden, and members of the committee:

**I strongly oppose HCR 16.**

I am a retired attorney and practiced law in Hawaii for 28 years. In 2016-2081 I served as vice-chair of the HCR 85 Task Force on Prison Reform, and I served on the Hawaii Reentry Commission in 2018 and 2019 until its responsibilities were transferred to the Hawaii Correctional System Oversight Commission.

I am shocked and appalled by HCR 16 which accuses Hawaii’s criminal court judges of routinely **abusing their discretion** and acting in an **unfair and inconsistent** manner when sentencing repeat offenders.

This is an incredibly serious allegation against our State judges because an abuse of discretion in sentencing means that our judges are consistently acting “beyond the bounds of reason” in an “arbitrary or caprecious manner,” or disregarding “rules or principles of law or practice.” *State v. Kahapea*, 111 Hawai5i 267, 278, 141 P.3d 440, 451 (2006).

In my view, a document that makes such serious and sweeping allegations of misconduct or incompetence against our judiciary has an ethical duty to back it up with proof, but HCR 6 has no proof. It does not cite or refernce any studies or reports showing that our judges are abusing their discretion, and tries to make the case for a serious system-wide problem by referring to a single “new story involving a single individual who committed various offenes, many of which appear to be misdemeanors or petty misdemeanors” and appears to be someone who is suffering from chronic mental illness and/or substance use disorder.

If the allegations in HCR 16 are correct, and our judges are in fact routinely acting arbitrarily and capriciously, beyond the bounds of reason, and disregarding the law, **we should remove the judges who are acting in such a manner from office and appoint new criminal court judges**, but I know some of the judges who handle criminal cases. They are extremely competent and I am certain that they are not acting as alleged in HCR 16. They are not abusing their discretion and they are not acting in an unfair and inconsistent manner.

By accusing our judges of being unfair, unreasonable, and disregarding the law, HRC 16 undermines confidence in our judicial system and effectively calls into question the competency, character, and integrity our judges, and it does so without any competent evidence whatsoever.

If this committee passes HCR 16 it will give credence to the idea that our criminal justice system is filled with judges who cannot or will not follow the law, and that simply is not the case.

I urge you to DEFER HCR 16.