

STATE OF HAWAI‘I  
**OFFICE OF THE PUBLIC DEFENDER**

**Testimony of the Office of the Public Defender,  
State of Hawai‘i to the House Committee on  
Judiciary & Hawaiian Affairs**

March 23, 2023

HCR 23 / HR 25: REQUESTING THE JUDICIARY TO CONVENE A TASK FORCE TO EXAMINE AND MAKE RECOMMENDATIONS REGARDING EXISTING PROCEDURES OF THE HAWAII PAROLING SETTING THE MINIMUM TERMS OF IMPRISONMENT

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

The Office of the Public Defender (OPD) supports HCR 23 and HR 25, which requests that the Judiciary convene a task force to examine and make recommendations on the viability and the efficiency of delegating the responsibility of setting minimum terms of imprisonment to the Hawai‘i Paroling Authority (HPA).<sup>1</sup>

Hawai‘i is one of thirty-three states that have an indeterminate sentencing system. However, Hawai‘i is the only one of those thirty-three states that uses a parole board to set the minimum term of imprisonment that a defendant must serve before becoming eligible for parole.<sup>2</sup> A task force should be convened to examine whether Hawai‘i’s reliance on the HPA to set minimum terms is viable and efficient and to make recommendations on whether the administration of justice would be better served by having the sentencing court set the minimum term.

**Current procedure for setting a minimum term**

Currently, a defendant sentenced to an indeterminate (or open) term of imprisonment must appear before the HPA within six months to set the minimum term of

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<sup>1</sup> The Parole Board of the HPA will be referred to as “the HPA” herein.

<sup>2</sup> Hereinafter, the minimum term of imprisonment that a defendant must serve before being eligible for parole will be referred to as their “minimum term.”

imprisonment they must serve before becoming eligible for parole.<sup>3</sup> Minimum term hearings are generally held four to six months after sentencing.

At the minimum term hearing, the defendant has the right to be represented by an attorney and has the opportunity to inform the HPA about themselves and the offense(s) for which they are serving time. While the defendant may present documentary evidence on their behalf, only the victim of the offense(s) is allowed to testify in person at the hearing. *See* HPA Parole Handbook, pp. 3, 9.<sup>4</sup> The HPA also reviews records which include a description of the offense(s) (often times, based on a one-sided police report), the defendant's criminal history, psychiatric reports, institutional reports, input from the prosecuting attorney, and letters from the victim(s) and other interested parties, including the defendant and the defendant's family, friends and employers. The HPA has the opportunity to ask the defendant and their attorney questions. Typically, a minimum term hearing lasts about fifteen to thirty minutes.

### **Responsibility for the setting of minimum term**

A task force should be convened to examine whether the responsibility for setting the minimum term of imprisonment should be delegated to the judge who presides over the defendant's sentencing.

It would appear that a sentencing judge is in a much better position to determine the length of a minimum term before a defendant is eligible for parole. In addition to possessing the same records and files made available to the HPA, the sentencing judge has significant and intimate knowledge of the facts of the case and the defendant's circumstances. It is more likely than not that the judge had presided over the case immediately after the arraignment and plea through sentencing. And if the case had proceeded to trial, having seen and heard all of the evidence, the presiding judge would be fully apprised of the relevant facts of the case. Even if the case did not proceed to trial, the judge will have been made familiar with the defendant and the particular circumstances of the case during pretrial conferences, pretrial motions, and plea bargain negotiations.

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<sup>3</sup> The HPA's procedures for setting a minimum term of imprisonment are set forth in the Hawai'i Administrative Rules (HAR), Title 23, Subtitle 5, Chapter 700.

<sup>4</sup> HPA Parole Handbook is available on the Department of Public Safety website at [https://dps.hawaii.gov/hpa/files/2020/11/HPA-Parole-Handbook\\_Revised\\_09\\_2020-1.pdf](https://dps.hawaii.gov/hpa/files/2020/11/HPA-Parole-Handbook_Revised_09_2020-1.pdf)

The judge will also have the opportunity to hear live testimony not only from the victims and victims' family members, but also from the defendant's family, friends, case workers or employers. The judge also has the opportunity to ask the prosecution and defense testifiers questions.

### **Current Delay in Rehabilitation**

One significant advantage in having the sentencing judge set the minimum term of imprisonment is that this may expedite the defendant's access to programming while incarcerated, especially if the defendant received a low minimum term. Such in-facility programs include substance abuse treatment, anger management, cognitive skills, education (e.g., GED), sex offender treatment, and work furlough.

After sentencing, defendants are assessed by the Reception Assessment and Diagnostic (RAD) units at Halawa Correctional Facility (male defendants) or Women's Community Correctional Center (female defendants). The RAD unit evaluates each newly sentenced defendant to determine their initial custody classifications and appropriate facility placement.<sup>5</sup> The RAD unit will also generate a report that identifies programs and activities for each defendant in preparation to satisfy parole eligibility requirements and that which is appropriate to their needs and custody classification.<sup>6</sup>

Even though the RAD unit assesses each person shortly after their arrival (within 60 days) to the facility, program participation cannot start until the HPA sets the minimum term(s).<sup>7</sup> Because minimum term hearings are not held until four to six months after sentencing, there is a delay to begin programming. Completion of required programming is a standard requirement for parole eligibility.

If, however, the sentencing judge sets the minimum term, programming may begin immediately after the person is assessed by the RAD unit. By shortening the period

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<sup>5</sup> Department of Public Safety Corrections Administration, Policy No. COR 18.03, available at <https://dps.hawaii.gov/wp-content/uploads/2017/12/COR.18.03.pdf>

<sup>6</sup> Department of Public Safety Corrections Administration, Policy No. COR 18.04, available at <http://dps.hawaii.gov/wp-content/uploads/2012/10/COR.18.04.pdf>

<sup>7</sup> Note, the OPD is aware of a few female inmates who began their programming prior to meeting with the HPA.

between admission into a facility and the start of programming, the “dead time” would be eliminated and incarcerated persons would be able to start and complete their programs sooner, and thus be eligible for parole sooner. Therefore, delegating the responsibility of setting the minimum term to the sentencing judge would help to move defendants more quickly through the system and thereby reduce prison populations.

### **Review Process**

Currently, under the two-step process, if a defendant wishes to challenge the HPA’s setting of the minimum term, the defendant must file an onerous and time-consuming petition pursuant to Rule 40 of the Hawai‘i Rules of Penal Procedure (HRPP). The petition is even more difficult, if not impossible, to prepare if the defendant is uneducated or is not proficient in English. Because these petitions are considered a new cause of action and a quasi-civil matter, indigent defendants are not entitled to the services of the OPD or court-appointed counsel and therefore must file their own petitions.

Under a system in which the sentencing judge is tasked with setting the minimum term of imprisonment (and the maximum term of imprisonment), a defendant can directly appeal the sentence (including the setting of the minimum term) to the Intermediate Court of Appeals, and the defendant will be represented by counsel. Moreover, if the defendant already intends to appeal the conviction (e.g., wrongly convicted, the admission or exclusion of evidence), the appeal can simply include any challenge to the court’s sentencing decision (maximum term and minimum term). So, rather than the possibility of two separate challenges (petition and appeal), there will only be one.

### **Conclusion**

The OPD strongly supports a resolution which would request the Judiciary to convene a task force to examine and make recommendations on the viability and the efficiency of delegating the responsibility of setting minimum terms of imprisonment to the HPA. A task force will also assist in the determination as to whether the administration of justice may be better served by removing the responsibility of setting minimum sentences from the HPA, thereby enabling it to focus on determining and assisting prisoners’ fitness for parole and the supervision of parolees.

Thank you for the opportunity to testify on this resolution.