


OFFICE OF HAWAIIAN AFFAIRS
Legislative Testimony

HB1487
Relating to Public Safety

Date: February 5, 2009 Time: 9:15am
Room: 309

The Office of Hawaiian Affairs **supports HB 1487 with amendments.**

The Department of Public Safety reports that Native Hawaiians overwhelmingly comprise thirty-nine percent of the prison population. Data shows that Native Hawaiians are arrested less than Caucasians, and yet, they are sentenced more than Caucasians, and other ethnic groups.

Why are Native Hawaiians over-represented in prison? Hawaii State policies may be racially biased as it imprisons large numbers of Native Hawaiians. On the United States continent, African Americans and Latinos are also over-represented in prisons. Claims of racial disparities can be found in the Justice Policy Institute, *The Vortex*, and Barack Obama and Joe Biden, *Strengthening Our Civil Rights and Criminal Justice Laws*. These publications urge for national and state policy reform to an overwhelming, over-crowded, prejudice criminal justice system.

The proposed study will help uncover the root cause of over-imprisonment. A study is imperative to gather necessary data to accurately assess the criminal justice system. The study is also vital to identify improvements needed for programming services, developing alternative rehabilitation programs, reducing recidivism rates, and effective cost-savings policy reform. With accountable data, the study can produce clear recommendations for mandatory minimums, the three strike laws, drug laws, and community re-entry programming. This information is greatly needed for legislation, law makers, and advocates.

When a Hawaiian person is jailed or imprisoned, the impact of incarceration extends far into families and communities. *Keiki* are left without their natural caregivers, *kupuna* must now care for their grandchildren, and the community loses its vitality of productive citizenship. In short, Hawaii's culture begins to deteriorate as its people become displaced, hidden, and removed from its environment.

Similar to HB 1487, OHA introduced HCR 27 to conduct a study of the disparate treatment in Hawaii's criminal justice system. We would prefer the language of HCR 27 to be considered. First, allow OHA to use its discretion to allow appropriate agencies and organizations not listed to participate in the study. Second, request that all agencies involved in Hawaii's criminal justice

system, provide full cooperation and relevant data to OHA, and its consultants for the planning and implementation of the study.

OHA would like to support HB 1487 with amendments. Mahalo nui loa for allowing us to provide testimony.



Via E-mail: PBSTestimony@Capitol.hawaii.gov
Committee: Committee on Public Safety
Hearing Date/Time: Thursday, February 5, 2009, 9:15 a.m.
Place: Room 309
Re: Testimony of the ACLU of Hawaii in Support of HB 1487, Relating to Public Safety

Dear Chair Hanohano and Members of the Committee on Public Safety:

The American Civil Liberties Union of Hawaii (“ACLU of Hawaii”) writes in strong support of HB 1487, which requires the Office of Hawaiian Affairs to conduct a study on the disparate treatment of native Hawaiians and other groups in Hawaii’s criminal justice system.

As evidenced in a recent informational briefing, native Hawaiians are disproportionately represented in prison. Studying the reasons why these disparities exist is the first step towards ensuring that our criminal justice system operates in an even-handed and objective manner.

Among other things, this study will help lawmakers identify subjective, rather than objective, points of decision-making in law enforcement.¹ Differences in incarceration may have their inception because of differences in law enforcement officers’ decisions to arrest an individual or issue a warning; detain the individual or let the individual go free; prosecute the individual for all crimes, lesser-included offenses, or no crimes at all. Differences could arise in the types of sentences sought (probation, community custody, or incarceration). Differences can arise in sentencing reports, transfer decisions, and availability of prison-based programs. Examining these points of disparity – and then taking concrete steps to make law enforcement decision-making as objective as possible – has reduced racial disparities in other jurisdictions² and can do so here in Hawaii.

The mission of the ACLU of Hawaii is to protect the fundamental freedoms enshrined in the U.S. and State Constitutions. The ACLU of Hawaii fulfills this through legislative, litigation,

¹ See, e.g., Building Blocks for Youth Initiative, *No Turning Back Summary: Promising Approaches to Reducing Racial and Ethnic Disparities Affecting Youth of Color in the Justice System* (2005), available at http://www.buildingblocksforyouth.org/noturningback/ntb_summary.pdf.

² See *id.*

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Hon. Rep. Hanohano, Chair, PBS Committee
and Members Thereof
February 5, 2009
Page 2 of 2

and public education programs statewide. The ACLU of Hawaii is a non-partisan and private non-profit organization that provides its services at no cost to the public and does not accept government funds. The ACLU of Hawaii has been serving Hawaii for over 40 years.

Thank you for this opportunity to testify.

Sincerely,

A handwritten signature in black ink, appearing to read 'D. M. Gluck', written in a cursive style.

Daniel M. Gluck
Senior Staff Attorney
ACLU of Hawaii

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TO: COMMITTEE ON PUBLIC SAFETY
Rep. Faye Hanohano, Chair
Rep. Henry Aquino, Vice Chair
Thursday, February 5, 2009
9:15 AM
Room 309, Hawaii State Capitol

RE: Testimony in Support of HB 1487 – Disparate Treatment

FROM: African American Lawyers Association
1188 Bishop Street, Suite 1909, Honolulu, Hawaii 96813

Dear Representative Hanohano:

My name is attorney Daphne Barbee-Wooten representing the African American Lawyers Association (AALA). AALA supports SB 214 relating to racial impact statements. Racial disparities in the prison is no joke. It is very real. Nationwide there is disproportionate black males incarcerated than in the public at large, close to 50%. In Hawaii, there is a disproportionate of Hawaiians incarcerated. Some states such as Oregon and Iowa have already introduced racial impact statements which alert the criminal justice system to this problem of racial disparity. See attached articles, “Racial Impact Statements: Changing Politics to Address Disparities” and “The Sentencing Project”. We only ask that instead of just focusing on Native Hawaiians, that all other racial groups such as African American, Latinos, Japanese Americans, Chinese Americans, Filipino Americans, and other ethnicities also be included in this reporting and study.

Dated: Honolulu, Hawaii

2-4-09



Daphne Barbee-Wooten
Attorney at Law

Racial Impact Statements

CHANGING POLICIES TO ADDRESS DISPARITIES

BY MARC MAUER

In reaction to a study that found Iowa topped the nation in racial disparity in its prison population, Iowa Governor Chet Culver in April 2008 made history by signing into law the nation's first piece of legislation to require policy makers to prepare racial impact statements for proposed legislation that affects sentencing, probation, or parole policies. In signing the bill, Gov. Culver noted that "I am committed to making sure government at all levels reflects our shared values of fairness and justice." In the following months Connecticut and Wisconsin took similar action.

These policy initiatives come at a moment when the scale of racial disparity within the criminal justice system is truly staggering. One of every nine black males between the ages of 20 and 34 is incarcerated in prison or jail, and one of every three black males born today can expect to do time in state or federal prison if current trends continue. For Hispanic males, the lifetime odds of imprisonment are one in six. Rates for women are lower overall, but the racial/ethnic disparities are similar.

The effects of high rates of incarceration go beyond the experience of imprisonment itself, and have broad consequences for both the offender and the community. A prison term results in challenges in gaining employment, reduced lifetime earnings, and restrictions on access to various public benefits. Families of offenders themselves experience the shame and stigma of incarceration, as well as the loss of financial and emotional support with a loved one behind bars. And for the community at large, the challenges of reentry result in high rates of recidivism and the consequent costs of a burgeoning prison system.

Thus, we are faced with twin problems in the justice system. Clearly, we need policies and practices that can work effectively to promote public safety. At the same time, it also behooves us to find ways to reduce the disproportionate rate of incarceration for people of color. These are not competing goals. If we are successful in addressing crime in a proactive way, we will be able to re-

duce high imprisonment rates; conversely, by promoting racial justice we will increase confidence in the criminal justice system and thereby aid public safety efforts.

Reducing minority rates of confinement is a complex process. These outcomes result from a complex set of factors, including socioeconomic disadvantages, involvement in criminal behavior, resource allocation in the criminal justice system, sentencing policies, limited diversionary options, and biased decision making among practitioners. We can debate the relative contribution of each of these factors, but there are few who would dispute that each plays at least some role.

The premise behind racial impact statements is that policies often have unintended consequences that would be best addressed prior to adoption of new initiatives. In this sense they are similar to fiscal and environmental impact statements. Policy makers contemplating new construction projects or social initiatives routinely conduct such assessments, which are now widely viewed as responsible mechanisms of government.

Racial impact statements are particularly important for criminal justice policy because it is exceedingly difficult to reverse sentencing policies once they have been adopted. The classic example in this regard is the federal crack cocaine mandatory sentencing policies. Adopted in 1986 and 1988, at a time of widespread concern about this new form of cocaine, the laws were hastily passed by Congress with virtually no discussion of their potential racial impact. Two decades later, the results are in and they are very sobering. More than 80 percent of the prosecutions for crack (as opposed to powder cocaine) offenses have been of African Americans, far out of proportion to the degree that they use the drug, and there is broad consensus that the penalties are overly punitive. (U.S. Sentencing Commission, *Cocaine and Federal Sentencing Policy*, May 2007.) But despite the fact that the U.S. Sentencing Commission amended its guidelines for crack offenses in 2007, and bipartisan legislation has been introduced in Congress to scale back the penalties, the mandatory sentencing policies remain in place today.

Reports Offer Hard Numbers

Although in recent years there has been increasing attention to issues of race and criminal justice, two policy

MARC MAUER is the executive director of *The Sentencing Project* in Washington, D.C. He is the author of *Race to Incarcerate* and the coeditor of *Invisible Punishment: The Collateral Consequences of Mass Imprisonment*, both published by *The New Press*. He can be contacted at mcauer@sentencingproject.org.

Scope of racial impact statements

While proposed changes in sentencing policies are the most obvious decision-making point at which unwarranted racial disparities might emerge, a host of policy decisions at other stages of the criminal justice system can affect the racial/ethnic demographics of the prison population as well. These include adjustments to sentencing guidelines, "truth in sentencing" and other policies that affect length of stay in prison, parole release and revocation policies, and "early" release mechanisms, such as participation in drug treatment or other programs. Conceivably, a racial impact statement policy could cover one or more of these decision-making points.

Preparation of racial impact statements

Depending on the jurisdiction, there are a variety of mechanisms and agencies that could be charged with preparing racial impact statements. These would include:

- *Sentencing Commissions*—In addition to the federal system, 21 states and the District of Columbia currently have a sentencing commission that in most cases should be capable of producing racial impact statements. Generally, these bodies have relatively sophisticated databases of sentencing data and trends, and usually contain relatively complete information on race, gender, and offense demographics. Some states, including North Carolina and Virginia, already maintain legislative requirements that their sentencing commissions produce impact statements to project any effects of new policy on the size of the prison population. And as described above, the Minnesota commission has begun to produce racial impact assessments as an outgrowth of an internal policy decision.
- *Budget and Fiscal Agencies*—Many state legislative analysts routinely produce fiscal and other analyses of legislative initiatives, and could be delegated to produce racial impact statements as well.
- *Departments of Correction*—State and federal corrections agencies now generally have sophisticated analytical tools with which they can produce detailed forecasts of changes in prison populations based on sentencing data and trends. To the extent that their databases contain information on race and ethnicity, it is likely that they could produce racial impact statements as well.

Policy implementation

Racial impact statements should be viewed as a mechanism to help guide the development of sound and fair policy, but they are not an impediment to enacting

changes in the law. That is, they represent one component of the discussion regarding sentencing policy, but only in conjunction with other relevant considerations. In some cases, lawmakers might receive analyses indicating that African Americans or other racial/ethnic groups would be disproportionately impacted by a proposed sentencing change, but conclude that public safety concerns override these considerations.

In order to see how this might play out in the legislative arena, consider two types of proposed changes. In the first example, legislators are contemplating a sentencing enhancement to school zone drug laws that penalize conduct committed within a certain distance of a school. The racial impact statement provides data indicating that African Americans would be disproportionately affected by such a change, most likely as a result of the disproportionate effect of these policies on the densely populated urban areas where African Americans are more likely to reside. If so, then lawmakers need to assess the concern about exacerbating racial disparity with the goal of providing greater public safety.

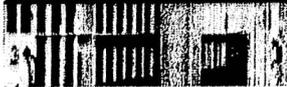
A key aspect of formulating policy in this regard relates to the breadth and effectiveness of the school zone law. Certainly, no one wants drug dealers peddling narcotics to school children on the playground during recess. But in some states, these laws also provide for additional penalties for drug transactions between consenting adults that take place in the middle of the night. Clearly, these drug sales are illegal, but should penalties be enhanced if they will disproportionately affect African Americans?

Using the public safety framework, legislators might decide that they could avoid exacerbating racial disparity and promote better public safety by tailoring the law itself rather than the punishment. For example, they could define the statute in a more targeted way, specifically focusing on selling drugs to children on school property. Such a policy could address legitimate concerns of the public while also delineating distinctions in penalties that would not adversely affect minority defendants.

In a second example, consider a legislative proposal to enhance mandatory sentences for robbery convictions. An impact statement produced for such a proposal might demonstrate that African Americans would be disproportionately affected by such a change as a result of greater involvement in the crime. After reviewing such documentation, many policy makers would be likely to place the concern for public safety above the objective of reducing racial disparity, and proceed with adopting the initiative. But it is also conceivable that legislators could use this analysis as an occasion to explore overall investments in public safety. For example, extending the length of time that persons convicted of robbery stay in prison clearly



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RACIAL DISPARITY

More than 60% of the people in prison are now racial and ethnic minorities. For Black males in their twenties, 1 in every 8 is in prison or jail on any given day. These trends have been intensified by the disproportionate impact of the "war on drugs," in which three-fourths of all persons in prison for drug offenses are people of color.

Racial Disparity News

January 27, 2009

OREGON JOINS MOMENTUM, INTRODUCES RACIAL IMPACT BILL

Oregon Rep. Chip Shields (D) has introduced a racial impact bill that would require lawmakers to consider the potential racial or ethnic impact of proposed criminal justice legislation. The bill, HB 2352, would apply not only to legislation considered by the legislature, but also to ballot measures considered by voters. Oregon joins a trend of states recognizing the need for such legislation including Iowa, Illinois and Connecticut, which have recently adopted such policies in an effort to alleviate the racial disparity that exists in prisons nationally.

January 18, 2009 *(Birmingham News)*

Key Publications

Reducing Racial Disparity in the Criminal Justice System: A Manual for Practitioners and Policymakers

Disparity By Geography: The War on Drugs in America's Cities

A 25-Year Quagmire: The "War On Drugs" and Its Impact on American Society

Uneven Justice: State Rates of Incarceration by Race and Ethnicity

Federal Crack Cocaine Sentencing

MORE PUBLICATIONS

From: watsont@hawaii.edu
Sent: Wednesday, February 04, 2009 2:41 PM
To: PBStestimony
Cc: davidr@oha.org
Subject: Testimony in Support of HB 1487

February 5, 2009 9:15 am Room 309

Support for HB 1487

Dear Chair Hanohano and Vice Chair Aquino,

I am writing in support of HB 1487. I understand that in these difficult economic times, funding a study requires a great deal of consideration. Yet, creating fairness and equity in our criminal justice system would ultimately help our economic situation by reducing costs in our criminal justice system and keeping good citizens as productive, tax paying members of our society.

I believe the long term benefits of this study, which can be well done for a reasonable sum, will greatly outweigh any short-term and nominal economic expense.

Making our criminal justice system fair for all members of our society is too critical an issue to leave unaddressed any longer.

Thank you for this opportunity to testify.

Respectfully submitted,
Trisha Kehaulani Watson, JD, PhD

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