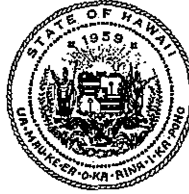
SB 2248

Measure Title:	RELATING TO PUBLIC SAFETY.
Report Title:	Paroling Authority; Medical Release of Ill and Disabled Inmates
Description:	Requires the Hawaii paroling authority to establish a medical release program for inmates who are permanently and totally disabled, terminally ill, or geriatric and pose no public safety risk. Request the department of public safety to assess and refer inmates to the Hawaii paroling authority. Sets conditions for medical release.
Companion:	
Package:	None
Current Referral:	HMS/HTH, PGM
Introducer(s):	ESPERO, CHUN OAKLAND, Baker, Gabbard, Kidani, Ryan

NEIL ABERCROMBIE
GOVERNOR



STATE OF HAWAII
DEPARTMENT OF PUBLIC SAFETY
919 Ala Moana Boulevard, 4th Floor
Honolulu, Hawaii 96814

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Law Enforcement

TESTIMONY ON SENATE BILL 2248
RELATING TO PUBLIC SAFETY
by
Jodie F. Maesaka-Hirata, Director
Department of Public Safety

Senate Committee on Human Services
Senator Suzanne Chun Oakland, Chair
Senator Les Ihara, Jr., Vice Chair

Senate Committee on Health
Senator Josh Green, M.D., Chair
Senator Clarence K. Nishihara, Vice Chair

Monday, February 06, 2012; 3:00 P.M.
State Capitol, Conference Room 229

Chairs Chun Oakland and Green, Vice Chairs Ihara and Nishihara, and Members of the Committees:

The Department of Public Safety (PSD) has reviewed Senate Bill (SB) 2248 and appreciates the legislature's concern with regards to providing a statutory medical release process in the best interest of our ill, geriatric, and disabled inmates. The Department presently provides for a similar "compassionate release" recommendation process and supports the intent of SB 2248.

The Department requests the following amendments to the measure:

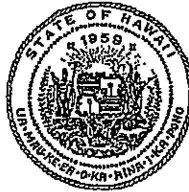
1. **Page 2 (line 22)** - After "licensed physician" add **"designated by the department"**..........
2. **Page 3 (line 14)** - After "licensed physician" add **"designated by the department"**..........
3. **Page 6 (line 8)** - Change "may" to **"will"**.........

4. **Page 6 (line 19)** – Delete **"or it may endorse the recommendation of competent medical authorities outside the department. The department's medical director shall determine whether the department will endorse a recommendation from an outside medical authority."**

The Department believes that these amendments will clarify the recommendation process responsibilities.

Thank you for the opportunity to present this testimony.

NEIL ABERCROMBIE
GOVERNOR



STATE OF HAWAII
HAWAII PAROLING AUTHORITY
1177 ALAKEA STREET, GROUND FLOOR
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BERT Y. MATSUOKA
CHAIR

JOYCE K. MATSUMORI-HOSHIJO
MEMBER

MICHAEL A. TOWN
MEMBER

TOMMY JOHNSON
ADMINISTRATOR

No.____________

TESTIMONY ON SENATE BILL 2248
RELATING TO PUBLIC SAFETY

BY

HAWAII PAROLING AUTHORITY
Bert Y. Matsuoka, Chairman

Senate Committee on Human Services
Senator Suzanne Chun Oakland, Chair
Senator Les Ihara, Jr., Vice Chair

AND

Senate Committee on Health
Senator Josh Green, M.D., Chair
Senator Clarence K. Nishihara, Vice Chair

Monday, February 6, 2012; 3:00 p.m.
State Capitol, Conference Room 309

Chair Chun Oakland, Chair Green and Members of both the Committees:

The Hawaii Paroling Authority (HPA) supports the intent of SB 2248 and appreciates the legislature's interest in the compassionate release of offenders from custody that do not pose a risk to public safety and expanding the HPA's discretionary authority in this important humanitarian area.

The HPA respectfully requests the following minor amendments to SB 2248:

1. **Page 2 (Line 22)** – After "licensed physician" add "**designated by the department**"………
2. **Page 3 (Line 14)** – After "licensed physician" add "**designated by the department**"………

3. **Page 4 (Line 9)** – After "contrary and" add **"/or whether an inmate was previously granted parole and parole was subsequently revoked"**.............

4. **Page 4 (Line 16)** – Add in a new #3 to read "Does not have a detainer in place from another jurisdiction and/or does not have any remaining or consecutive sentence(s) to be served in another jurisdiction."

5. **Page 5 (Line 12)** - After "treatment program" add **"and after care"**............

6. **Page 7 (Line 16)** - After "criteria for release" add **"consideration"**...........

7. **Page 7 (Line 21)** - Change "thirty days" to **"forty-five"**..................

8. **Page 7 (Line 22)** - Amend the sentence to read **"In making the determination, the paroling authority shall consider the assessment completed by the Department of Public Safety regarding the risk for violence and rate of recidivism."**

9. **Page 8 (Line 15)** - After "condition" add, **"as determined by competent medical authority designated by the department that warrants reconsideration."**

10. **Page 9 (Line 9)** - Delete **"reasonable times at"**

11. **Page 10 (Line 3)** - Delete "with credit given only for the duration of the inmate's medical release served in compliance with all reasonable conditions set forth pursuant to subsection (a)."

The HPA believes the recommended amendments to this measure addresses needed technical changes while simultaneously clarifies the affected areas.

Thank you for this opportunity to provide testimony on this matter.

COMMUNITY ALLIANCE ON PRISONS

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COMMITTEE ON HUMAN SERVICES
Senator Suzanne Chun Oakland, Chair
Senator Les Ihara, Jr., Vice Chair

COMMITTEE ON HEALTH
Senator Josh Green, Chair
Senator Clarence Nishihara, Vice Chair
Monday, February 6, 2012
3:00 p.m.
Room 016

STRONG OPPOSITION to SB 2248 and SB 2251 - COMPASSIONATE RELEASE

Aloha Chairs Chun Oakland and Green, Vice Chairs Ihara and Nishihara and Members of the Committees!

My name is Kat Brady and I am the Coordinator Community Alliance on Prisons, a community initiative promoting smart justice policies for more than a decade. This testimony is respectfully offered, always being mindful that 6,000 Hawai`i individuals are living behind bars, including 1,800 men who are serving their sentences abroad, thousands of miles from their loved ones, their homes and, for the disproportionate number of incarcerated Native Hawaiians, far from their ancestral lands.

SB 2248 requires the Hawaii paroling authority to establish a medical release program for inmates who are permanently and totally disabled, terminally ill, or geriatric and pose no public safety risk. Request the department of public safety to assess and refer inmates to the Hawaii paroling authority. Sets conditions for medical release.

SB 2251 requires the Hawaii paroling authority to establish a program for the medical release from prison of ill, disabled, and geriatric inmates.

Community Alliance on Prisons must testify in strong opposition to this bill as presented. Sadly, neither of these bills helps the process of suffering or elderly incarcerated persons. We are, however, strong supporters of compassionate release as the latest research recommends.

In our experience have known many individuals who have died alone in prison while their paperwork for compassionate release lingered on someone's desk at the department of public safety.

There has been much research in the past year about compassionate release:

The Annals of Internal Medicine[1]

> "Compassionate release consists of two entwined but distinct elements: eligibility (based on medical evidence) and approval (based on legal and correctional evidence) (4). We argue that the medical eligibility criteria of many compassionate-release guidelines are clinically flawed because of their reliance on the inexact science of prognostication, and additional procedural barriers may further limit rational application. Given that early release is politically and socially charged and that eligibility is based largely on medical evidence, it is critical that such medical evaluation be based upon the best possible scientific evidence and that the medical profession help minimize medical-related procedural barriers."

Human Rights Watch[2]

> "Life in prison can challenge anyone, but it can be particularly hard for people whose bodies and minds are being whittled away by age. Prisons in the United States contain an ever growing number of aging men and women who cannot readily climb stairs, haul themselves to the top bunk, or walk long distances to meals or the pill line; whose old bones suffer from thin mattresses and winter's cold; who need wheelchairs, walkers, canes, portable oxygen, and hearing aids; who cannot get dressed, go to the bathroom, or bathe without help; and who are incontinent, forgetful, suffering chronic illnesses, extremely ill, and dying."

Bureau of Justice Statistics[3]

The Bureau of Justice Statistics reports found that between 1995 and 2010, the number of state and federal prisoners age 55 or older nearly quadrupled (increasing 282 percent), while the number of all prisoners grew by less than half (increasing 42 percent). There are now 124,400 prisoners age 55 or older.

Our prisons and those with whom we contract are not equipped to handle this aging or ill population. We know of cases where inmates have been denied wheelchairs and have had to crawl to receive medication. This is absolutely inhumane.

The California prison system recently opened a prison hospice in Vacaville because of the number of aging and chronically ill incarcerated individuals serving sentences. This is part of the reason that their prison health care system was under consent decree from the federal government. A January 30, 2012 public radio story[4] reported:

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[1] Balancing Punishment and Compassion for Seriously Ill Prisoners. Brie A. Williams, MD; Rebecca L. Sudore, MD; Robert Greifinger, MD; and R. Sean Morrison, MD
http://www.annals.org/content/early/2011/05/31/0003-4819-155-2-201107190-00348.full

[2] OLD BEHIND BARS The Aging Prison Population in the United States, January 2012,
http://www.hrw.org/sites/default/files/reports/usprisons0112webwcover_0.pdf

[3] Bureau of Justice Statistics, Prisoner Series, 1995-2010. Based on number of sentenced prisoners under jurisdiction of federal and state correctional authorities with sentences of more than one year.

[4] "End To California Prison Healthcare Receivership In Works"
http://www.capradio.org/articles/2012/01/30/end-to-california-prison-healthcare-receivership-in-works

"SACRAMENTO, Calif. (AP) — The court-appointed receiver overseeing California's prison health care system said Friday the state must keep its promise to spend more than $2 billion for new medical facilities before the federal courts can end an oversight role that has lasted six years.

California has committed to spending $750 million to upgrade existing medical facilities, building a new medical center and converting juvenile lockups. So far, only the new medical center in Stockton is being built. ..."

Department of Public Safety Compassionate Release Statistics[5]

37 Compassionate Releases Recommended
22 Compassionate Releases Approved
14 Compassionate Releases

The problems with these bills are numerous - so numerous, in fact that we recommend that they be HELD, as they are actually a step backwards, unrealistic and, in our humble opinion, lack in compassion.

Ironically, they require HPA to establish a medical release program and then proceed to turn over all the discretion to PSD, who is the only arbiter as to who gets to present their case to the parole board.

It is interesting that 'geriatric' is defined as "an inmate who is at least sixty-five years of age and suffers from chronic infirmity, illness, or disease related to aging that has progressed such that the inmate is incapacitated to the extent that the inmate does not pose a risk to public safety. " Incarcerated persons 50 years or older are considered "elderly" by the system since so many people enter the system in such poor health. Also, there are incarcerated individuals suffering from chronic infirmity who are below 65 or even below 50 years of age.

The definition of "terminal illness" is worse than the current definition, which is an illness that "by its nature, can be expected to cause a patient to die within 1 year" or a "persistent illness or disease causing increasing physical weakness to the extent that the patient's quality of life is compromised and care could be better managed within the community. (Category II)."[6]

These bills define "terminal illness" as a condition that will likely produce death within 6 months. No one has a crystal ball to foretell the time of another person's death; chronically ill individuals have good days and bad days and the good days are not predictors of improved health.

There is no process to appeal a decision made by PSD - they appear to be the court of last resort. We know that no one is infallible, so the fact that an individual has no means to appeal a decision seems patently unfair. An individual should have the right to present his/her own evidence to support or contest PSD's position.

This measure also seems to ask the physician to determine if an individual poses a risk to public safety. Doctors are not trained to make these kinds of decisions and asking them to make this judgment call, in our view, is like asking an ACO to diagnose someone's medical condition.

[5] Department of Public Safety 2009 -2011 Compassionate Release Statistics
[6] Department of Public Safety Policy COR.10.1G.11.2(a) and (b).

Sadly, these bills are actually a step backward in compassionate release, which is why Community Alliance on Prisons is in strong opposition. We are saddened by the lack of compassion exhibited by these measures in the land of aloha.

Community Alliance on Prisons sees compassionate release for a chronically ill or geriatric individual as something that should happen before they are on life-support. We have heard many heart-breaking stories about the treatment some terminally ill individuals have received in prison infirmaries. We have also been told that there are some elderly inmates in one of our prisons who have been paroled yet are still incarcerated because they have nowhere else to go since their families are all deceased and there are not community facilities willing to take them.

Community Alliance on Prisons, therefore, respectfully asks the committee to HOLD both SB 2248 and SB 2250, so we can start over next session with a real compassionate release measure based on research, experience, and reality.

Mahalo nui for this opportunity to share our mana`o on these measures.

OFFICE OF HAWAIIAN AFFAIRS
Legislative Testimony

SB2248
RELATING TO PUBLIC SAFETY
Senate Committee on Human Services
Senate Committee on Health

February 6, 2012 3:00 p.m. Room 229

The Office of Hawaiian Affairs (OHA) offers the following comments on SB2248, which would clarify the medical release program for terminally ill inmates.

OHA's 2010 report, "The Disparate Treatment of Native Hawaiians in the Criminal Justice System," indicated that there are deficiencies in the operation of the criminal justice system in Hawai'i. Recently, OHA worked with advocate Robert Merce to assist Delbert Wakinekona, a beneficiary in dire need of medical release.

Years of neglect and inadequate medical treatment brought Mr. Wakinekona to the brink of death. In what should have been a straight forward process, Robert Merce had to struggle with endless bureaucratic barriers to obtain basic information on Mr. Wakinekona's condition and what was needed to obtain his medical release.

OHA urges the committee to review Mr. Merce's testimony that outlines real fixes the medical release program urgently needs. The following is proposed language to replace the existing version of SB2248:

RELATING TO PUBLIC SAFETY
BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAI'I

SECTION 1. SECTION 1. According to the Society of Correctional Physicians, an ever increasing number of people are entering prison with serious medical conditions or disabilities, while those in custody are at increasing risk of developing a serious illness or disability due to the long terms of incarceration that are being imposed through mandatory minimum sentencing.[1] Longer sentences and an aging population mean that correctional facilities across the United States are becoming home to a growing number of elderly adults who often have extensive and costly

[1] Compassionate Medical Release, Society of Correctional Physicians, posted August 13, 2009 at http://www.corrdocs.org/framework.php?pagetype=newsstory&guidelineid=10110&bgn=2

medical needs that are driving up the cost of incarceration.[2] Concern over how society should deal with the aging and seriously ill prison population has led policy makers in many states to endorse early release for older and seriously ill prisoners who pose a low risk to public safety. As of 2009, 39 states had laws governing medical release.[3] However, these laws are rarely used due to political considerations, narrow eligibility criteria, procedures that discourage inmates from applying for release, and complicated and lengthy referral and review processes.[4]

The authors of an article recently published in *Annals of Internal Medicin*e, the flagship journal of the American College of Physicians (ACP), recommend broader use of "compassionate" release in the nation's prison system. "Compassionate release is a program through which some eligible, seriously ill prisoners are able to die outside of prison before sentence completion. The program functions on 2 premises: It is ethically and legally justifiable to release a subset of prisoners with life-limiting illnesses, and the financial costs to society of continuing to incarcerate such persons outweigh the benefits. The U.S. Federal Prison System and most state systems have a compassionate- or medical-release program.

Many states are also considering expanding medical release to include physically or mentally incapacitated and elderly prisoners in addition to those with a terminal diagnoses. Physicians and other medical professionals thus have an opportunity to use their unique expertise and knowledge of prognosis, geriatrics, cognitive and functional decline, and palliative medicine to ensure that medical criteria for compassionate release are appropriately evidence-based. Using this medical foundation, criminal justice professionals can balance the need for punishment with an eligible individual's appropriateness for release. As a society, we have incorporated compassionate release into most prison jurisdictions. As a medical profession, we must lend our expertise and ethical suasion to ensure that compassion is fairly delivered."[5]

SECTION 2. Chapter 353, part II, Hawai`i Revised Statutes, is amended by designating section 353-61 to 353-72 as subpart A and inserting a title before section 353-61 to read as follows:

" A. GENERAL PROVISIONS"

SECTION 3. Chapter 353, Hawai`i Revised Statutes, is amended by adding a new subpart to part II to be appropriately designated and to read:

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[2] Chiu, T. It's About Time, Aging Prisoners, Increasing Costs, and Geriatric Release. Vera Institute of Justice, April 2010.

[3] E-Bulletin, Sentencing and Corrections Polcy Updates: Three Years of Conditional Release Laws, National Conference of State Legislatures, June, 2010. http://www.ncsl.org/default.aspx?tabid=20591

[4] See Chiu fn. 2 supra.

[5] Balancing Punishment and Compassion for Seriously Ill Prisoners http://www.annals.org/content/early/2011/05/31/0003-4819-155-2-201107190-00348.full

" . **MEDICAL RELEASE OF ILL AND ELDERLY INMATES**

§353-A Definitions. For the purpose of this subpart, unless the context clearly requires otherwise:

"Continuity of care" means an integrated system that ensures that a patient's medical needs are met as the patient transitions from one health care provider to another, from one setting to another, and from one level of care to another.

"Inmate" means any person sentenced to the custody of the Department of Public Safety.

"Medical release" means the release of an inmate before the expiration of his or her sentence due to the patient's medical condition.

"Medical release plan" means a comprehensive written medical and psychosocial care plan that is specific to the inmate and includes, at a minimum:

(1) A recommended course of treatment;

(2) A plan to provide continuity of care as the inmate transitions from prison to the community

"Paroling authority" means the Hawai`i Paroling Authority.

"Reasonable medical probability" means that a medical outcome is more likely to occur than to not occur.

§353-B Medical release program; authority to release; rules. (a) An inmate in the custody of the Department of Public Safety shall be eligible to be considered for medical release if the inmate:

(1) Has an illness, disease or medical condition with a prognosis to a reasonable medical probability that death will occur within 1 year; or

(2) Has a seriously debilitating and irreversible mental or physical condition that impairs the inmate's functional ability and that can be managed more appropriately in a community setting; or

(3) Suffers from a serious, debilitating and irreversible physical or mental condition related to aging that impairs the inmate's functional ability and is expected to require costly or complex care, treatment, or management.

(b) All requests for medical release shall be in writing and shall be made to the Hawaii Paroling Authority. Requests may be made by the Director of the Department of Public Safety or by an inmate or the inmate's representative.

(c) If a request is made by the Department of Public Safety it shall contain the following information:

(1) A report from a Department of Public Safety physician stating whether or not the inmate meets the criteria for medical release and the basis for the physician's opinion. The report shall state each diagnosis that applies to the inmate and the prognosis for each condition to a reasonable medical probability. Where practicable the physician shall discuss the results of any tests, studies or physical findings that affect the diagnosis and prognosis and the nature and extent of the medical treatment that will be required to manage the inmate's condition in prison within the standard of care. Where appropriate, the physician shall provide citations to relevant medical literature.

(2) A report on the risk for violence and recidivism, if any, that the inmate poses to society in light of such factors as the inmate's medical condition, the severity of the offense for which the inmate is incarcerated, the inmate's prison record, and the medical release plan, if any.

(3) A statement as to whether or not the Department recommends medical release for the inmate and the reasons therefore; and

(4) A medical release plan that provides for continuity of care if the inmate meets the criteria for medical release.

(c) If a request is made by an inmate or his representative it shall state the basis for the request and contain a statement as to where the inmate will reside if released, who will care for the inmate, how the inmate will support himself/herself and obtain medical insurance or pay for medical care. All requests initiated by an inmate shall be promptly referred to the Department of Public Safety. Within 20 days of receiving such a request the Department shall submit a report to the Paroling Authority containing the information in paragraphs 1-3 of subpargraph (c) above and a recommendation from the Director as to whether the inmate should be released or not. If the Director recommends release, the report shall also contain a medical release plan that ensures continuity of care.

(d) A copy of all DPS reports pertaining to the request for medical released shall be provided to the inmate.

(d) The Hawaii Paroling Authority shall conduct a hearing on all requests for medical release. The hearing shall be held within 15 days of receiving a medical release report from the Department of Public Safety. The inmate and the inmate's representative shall be permitted to participate in the hearing and submit medical and other evidence in support of the request. The Authority shall independently determine whether the inmate meets the criteria for medical release and shall independently assess the risk for violence and recidivism, if any, that the inmate poses to society. The paroling authority shall also provide the victim or victims of the inmate or the victim's or victims' family or families with the opportunity to be heard. The Authority shall not release any inmate who poses a danger to society. The Authority shall grant or deny the request within 2 days of the hearing.

(e) A denial of medical release by the paroling authority shall not affect an inmate's eligibility for any other form of parole or release under applicable law.

(f) If the paroling authority denies medical release under this subpart, the inmate may not reapply or be reconsidered unless there is a demonstrated change in the inmate's medical condition.

(g) The Director of the Department of Public Safety shall appoint an advocate for any inmate who is too incapacitated or debilitated to advocate for himself or herself.

(h) The Department of Public Safety and the Hawaii Paroling Authority shall adopt rules for a fast track procedure for the evaluation and release of rapidly dying prisoners;

(i) All rules, regulations and procedures pertaining to compassionate release shall be published on the websites of the Department of Public Safety and Hawaii Paroling Authority;

(h) The Hawaii Paroling Authority and the Department of Public Safety shall adopt rules in accordance with chapter 91 to implement the medical release program.

§353-C Conditions of a medical release. (a) The paroling authority thall set reasonable conditions on an inmate's medical release that shall apply through the date upon which the inmate's sentence would have expired. These conditions shall include the following:

(1) The released inmate shall be subject to supervision by the paroling authority and
shall permit officers from the paroling authority to visit the inmate at reasonable
times at the inmate's home or elsewhere; and

(2) The released inmate shall comply with all conditions of release set by the paroling authority.

(b) The paroling authority shall promptly order an inmate returned to custody of the department to await a revocation hearing if the paroling authority receives credible information that an inmate has failed to comply with any reasonable condition set upon the inmate's release. If the paroling authority subsequently revokes an inmate's medical release for failure to comply with conditions of release, the inmate shall resume serving the balance of the sentence, with credit given only for the duration of the inmate's medical release served in compliance with all reasonable conditions set forth pursuant to subsection (a). Revocation of an inmate's medical release for violating a condition of release shall not affect an inmate's eligibility for any other form of parole or release provided by law but may be used as a factor in determining eligibility for such parole or release.

SECTION 4. Chapter 353, Hawai`i Revised Statutes, is amended by adding a new section to part I to be appropriately designated and to read as follows:

<u>**§353- Medical release program.** The department shall assess and refer inmates to the Hawai`i Paroling authority under the medical release program established by the Hawai`i paroling authority under subpart of Part II."</u>

SECTION 5. Section 353-62, Hawai`i Revised Statutes, is amended by amending subsection (a) to read as follows:

"(a) In addition to any other responsibility or duty prescribed by law for the Hawai`i paroling authority, the paroling authority shall:

(1) Serve as the central paroling authority for the state;

(2) In selecting individuals for parole, consider for parole all committed persons, except
in cases where the penalty of life imprisonment not subject to parole has been
imposed, regardless of the nature of the offense committed;

(3) Determine the time at which parole shall be granted to any eligible individual as that
time at which maximum benefits of the correctional institutions to the individual

have been reached and the element of risk to the community is minimal;

(4) Establish rules of operation to determine conditions of parole applicable to any
individual granted parole;

(5) Provide continuing custody, control, and supervision of parole individuals;

(6) Revoke or suspend parole and provide for the authorization of return to a correctional Institution for any individual who violates parole or any conditions of parole when, in the opinion of the Hawai`i Paroling Authority, the violation presents a risk to community safety or a significant deviation from any condition of parole;

(7) Discharge an individual from parole when supervision is no longer needed;

(8) Interpret the parole program to the public [~~in order~~] to develop a broad base
of public understanding and support; [~~and~~]

(9) Establish the medical release program under subpart : and

[~~(9)~~] (10) Recommend to legislature sound parole legislation and recommend to the governor sound parole administration.

SECTION 6. In codifying the new sections added by section 2 of this Act, the revisor of statutes shall substitute appropriate section numbers for the letters used in designating the new sections of this Act.

SECTION 7. Statutory material to be repealed is bracketed and stricken. New statutory material is underscored.

SECTION 8. This Act shall take effect upon approval.

Robert K. Merce
2467 Aha Aina Place
Honolulu, Hawai'i 96821
February 1, 2012

COMMITTEE ON PUBLIC SAFETY, GOVERNMENT OPERATIONS, AND MILITARY AFFAIRS
Sen. Will Espero, Chair
Sen. Michelle N. Kidani, Vice Chair
Monday, February 6, 2012
Conference Room 229
3:00 p.m.
SB2248
STRONGLY OPPOSE

Dear Chair Espero, Vice Chair Kidani, and Committee Members:

My name is Robert Merce. I practiced law in Hawai'i for over 20 years before retiring in 2007. Last year I worked as a volunteer on a case in which the Native Hawaiian Legal Corporation obtained compassionate release for a 67-year old Hawaiian man who was suffering from terminal liver disease. The process took six months (May12, 2011 to October 28, 2011). During that time I learned that many important compassionate release issues are not covered by Department of Public Safety ("DPS") policies or Hawai'i Paroling Authority ("HPA") rules, and where rules do exist, they are often ambiguous and unclear. In some instances DPS policies are in direct conflict with the HPA's rules. I strongly support the idea of compassionate release and clarifying Hawai'i's compassionate release process by statute, but SB2248 takes the wrong approach. It codifies many of the worst features of the present system and adds several provisions that are much worse than what we have now. The following are some of the problems with the bill.

1. SB2248 does not specify who can initiate a request for compassionate release or how such a request is to be initiated.

One of the most basic elements of any compassionate release law must be a clear statement as to who can initiate a request for compassionate release and how such request is initiated. Yet SB2248 does not contain that basic information. It leaves intact the present system whereby an inmate's "primary care physician" is the *only* person who can initiate a compassionate release request. *See* DPS Compassionate Release Policy COR.10.1G.11.4.0.2. The problem with that is that physicians make mistakes. They may fail to recognize that a disease has entered the terminal phase, they may mistakenly think they can treat a disease that is in fact untreatable, or they may make mistakes like everyone else due to inattention, inadvertence, inexperience, or carelessness. In those circumstances the inmate, his family or his attorney should be allowed to initiate a request for compassionate release, and the inmate or his representative should have the opportunity to present their case to a fair and impartial body such as the HPA. This approach

ensures fundamental fairness and provides a mechanism for correcting mistakes or errors of judgment by DPS.

2. **The DPS should not decide which compassionate release requests are heard by the HPA.**

The HPA is an independent, quasi-judicial body. HAR §23-700-2(b) (1992). Its members are nominated by a distinguished committee that includes the Chief Justice of the Hawai'i Supreme Court and are selected on the basis of their qualifications to make decisions "that will be compatible with the welfare of the community and of individual offenders, including their background and ability for appraisal of offenders and the circumstances under which offenses were committed." Haw.Rev.Stat. §353-61. The HPA has historically served as the central paroling authority for the state and is accountable for its decisions as to when parole should be granted and when it should be denied. *See* HRS §353-62(a)(3).

SB2248 significantly diminishes the power of the HPA by providing that it can **only grant compassionate release to those inmates who are referred to it by the DPS.** Under SB2248 primary authority for deciding who receives compassionate release and who does not rests with the DPS, yet there is no mechanism for holding DPS accountable for its decisions. It does not have to report to anyone on its compassionate release decisions, there is a complete lack of transparency with respect to its decision making process, and the decisions of its medical personnel and administrators – no matter how flawed or erroneous– are final and absolute.

I respectfully submit that to ensure transparency and accountability, **all compassionate release requests should be made directly to the HPA.** The HPA would refer the requests to the DPS for review and recommendations. The DPS would provide a report and recommendations to the HPA, and the HPA would then make a final decision after reviewing the DPS's recommendations **and allowing the inmate to present his own evidence to support or contest the DPS position.** This approach ensures fundamental fairness and provides a mechanism to correct inadvertent mistakes or errors of judgment at the DPS.

3. **SB2248's Release Plan is unrealistic.**

SB2248 provides that a "medical release plan" must be developed for every inmate who is being considered for compassionate release and the plan must include, at a minimum, documentation that qualified doctors are prepared to care for the inmate and that a financial plan is in place to cover the cost of anticipated treatment, including documentation on eligibility for enrolment in commercial insurance, Medicare, Medicaid, or access to other financial resources.

In my experience it is extremely difficult to find a physician who is willing to accept a terminally ill patient with multiple medical problems, particularly when the patient has no insurance or is insured by Quest, Medicare or Medicaid. It can be done, but it takes a great deal of time and effort. I do not believe DPS has the staff, time, or money to engage in the difficult business of finding doctors for profoundly ill patients.

I also doubt that any insurer, private or government, will commit over the telephone and in advance to insuring a patient who is close to death and will requiring costly and time consuming

end of life care. The result will be that in many cases DPS will not be able to develop the plan called for by SB2248 and consequently many inmates will not be released.

4. The definition of "terminal illness" is too restrictive.

SB2248 defines "terminal illness" as a condition that will likely produce death within **6 months.**

The DPS currently defines "terminal illness" as an illness that (1) "by its nature, can be expected to cause a patient to die **within 1 year"** or (2) a "persistent illness or disease causing increasing physical weakness to the extent that the patient's quality of life is compromised and care could be better managed within the community. See DPS Policy COR.10.1G.11.2(a) and (b).

SB2248 will cause will extend the time that very sick inmates will have to remain in prison, and will cost the state a great deal of money. SB2248 is also far less compassionate than the policies we now have. I do not understand why the State of Hawaiʻi is becoming less compassionate rather than more compassionate.

5. Physicians are not competent to determine if an inmate poses a risk to public safety.

Under SB2248 an inmate cannot qualify for medical release unless a "licensed physician" determines that the inmate is so disabled and incapacitated from a chronic and irreversible disease or illness that they are **physically incapable of posing a risk to public safety**. There are several problems with this approach:

> (1). Doctors are not trained to assess public safety risks. SB2248 asks them to do something they do not know how to do and are not qualified to do. It guarantees bad outcomes.
>
> (2) Most medical condition are not static, they wax and wane, and unless the inmate is comatose or in an ICU it is practically impossible for any physician to say with any certainty that if released, the inmate will continuously be so incapacitated or debilitated that he is not capable of committing a crime or posing a risk to public safety.
>
> (3) SB2248 would prevent the compassionate release of some inmates who clearly should be released. For example, suppose that an inmate is dying from cancer but is still ambulatory and has not become totally "debilitated "or incapacitated from the disease. Under SB2248 that inmate would **not** be eligible for compassionate release even if everyone agreed that he posed absolutely no danger to the public because he is not *incapacitated as a result of his illness* which is what SB2248 requires.
>
> That makes no sense. A much more sensible approach would be to simply say that an inmate who meets the medical criteria for release should be released provided that he does not pose a danger to the public, and that an inmate who poses a potential danger to the public should not be eligible for release, regardless of his physical condition.

(4) If physicians are required to make judgments on whether an inmate is so incapacitated that he or she does not pose a risk to public safety, they will most likely err on the side of safety *and very few inmates will end up being released.*

6. **Physician Reports to the HPA are costly and unnecessary.**

SB2248 provides that a released inmate's treating physician must provide the HPA with periodic assessments of the inmate's condition. This is simply more red tape for doctors and will certainly discourage them from accepting inmates as patients. I also doubt that most HPA members would understand the medical reports or pay much attention to them. It is also unclear who would pay for the reports. They certainly would not be covered by any health insurance plan I am aware of. Would the inmate have to pay for the reports? What if he can't afford it? Is this necessary? Practical?

7. **The SOTP provisions are unnecessary.**

One of the longest and most complicated sections of SB2248 is the provision pertaining to when, how, and whether an inmate who has been convicted of a sex crime will have to participate in the sex offender treatment program (SOTP). Those provisions should be eliminated because the HPA currently has the statutory authority to order SOTP for any inmate who they believe requires such treatment. It should also be recognized that SOT will not be appropriate for inmates who are receiving hospice care and have only a few weeks or months to live, or who are suffering from incurable age-related illnesses such as Alzheimer's or dementia.

8. **SB2248 does not reflect current thinking on compassionate release.**

Experts who have studied compassionate release recommend that: (1) Compassionate release guidelines embrace *evidence based principles*; (2) that the release process be completely transparent; (3) that incapacitated inmates be assigned an advocate to help them navigate the process; and (4) prison administrators adopt a "fast-track option for the evaluation of rapidly dying prisoners, and a well-described and disseminated application procedure". Williams, BA, Sudore RL, Greifinger R, Morrison RS. *Balancing Punishment and Compassion for Seriously Ill Prisoners*. Ann Intern Med. 2011 Jul 19;155(2):122-6. Epub 2011 May 31. SB2248 has **none of these features** and does not meet contemporary standards for compassionate release.

There are many other problems with SB2248 but I will not go into all of them. It should be clear that SB2248 has nothing to do with compassion and that enacting it would not be in the best interest of our sick and aging prison populating or the state. SB2248 should not be passed in its present form and should not pass at all unless the problems discussed above are corrected.

Thank you for allowing me to share my thoughts with you.

From:	mailinglist@capitol.hawaii.gov
Sent:	Sunday, February 05, 2012 3:04 PM
To:	HMS Testimony
Cc:	shaglund@hotmail.com
Subject:	Testimony for SB2248 on 2/6/2012 3:00:00 PM
Categories:	Purple Category

Testimony for HMS/HTH 2/6/2012 3:00:00 PM SB2248

Conference room: 229
Testifier position: Oppose
Testifier will be present: No
Submitted by: Sue Haglund
Organization: Individual
E-mail: shaglund@hotmail.com
Submitted on: 2/5/2012

Comments:

From: mailinglist@capitol.hawaii.gov
Sent: Saturday, February 04, 2012 9:59 AM
To: HMS Testimony
Cc: robertscottwall@yahoo.com
Subject: Testimony for SB2248 on 2/6/2012 3:00:00 PM

Categories: Purple Category

Testimony for HMS/HTH 2/6/2012 3:00:00 PM SB2248

Conference room: 229
Testifier position: Support
Testifier will be present: Yes
Submitted by: Scott Wall
Organization: Individual
E-mail: robertscottwall@yahoo.com
Submitted on: 2/4/2012

Comments:
I support this bill. So many of these inmates are consumers and need treatment, not costly incarceration anyway. This bill would be better for consumers, society, and the tax payers in general.