



TESTIMONY OF THE DEPARTMENT OF THE ATTORNEY GENERAL TWENTY-EIGHTH LEGISLATURE, 2016

ON THE FOLLOWING MEASURE:

H.B. NO. 1046, H.D. 1, RELATING TO WRONGFUL IMPRISONMENT.

BEFORE THE:

HOUSE COMMITTEE ON JUDICIARY

DATE: Tuesday, February 2, 2016

TIME: 2:00 p.m.

LOCATION: State Capitol, Room 325

TESTIFIER(S): Douglas S. Chin, Attorney General, or
Mark Nomura, Deputy Attorney General

Chair Rhoads and Members of the Committee:

The Department of the Attorney General supports H.B. No. 1046, Proposed H.D. 1, which provides a procedure for persons who are “actually innocent” of crimes for which they were convicted and imprisoned, to seek compensation from the State of Hawaii. The Department had opposed H.B. No. 1046, as originally introduced, for reasons raised previously.

H.B. No. 1046, Proposed H.D. 1, is substantially the product of the American Judicature Society-Hawaii Chapter’s special committee on redress for unlawful imprisonment. The American Judicature Society is an independent, nonpartisan, national organization of judges, lawyers and interested members of the public, whose mission is to improve the American justice system. The special committee on redress for unlawful imprisonment was co-chaired by the Honorable Jeannette H. Castagnetti, state circuit court judge, and Mark J. Bennett, Esq., former Hawaii Attorney General.

The Proposed H.D. 1 represents the collaborative work of the special committee, which was comprised of a wide range of state and federal judicial representatives, as well as legal, educational, and community representatives from all interested stakeholders in the community. The committee considered wording from existing statutes in other states on issues such as the eligibility for compensation, evidence of innocence, evidence of a claim, burdens of proof, decision-making entities, exclusions, amounts of compensation, types of eligible benefits, attorney’s fees, and tax implications.

Ultimately, the committee drafted proposed legislation that is substantially the same as this Proposed H.D. 1. The Department believes that this Proposed H.D. 1 presents a reasonable compensation statute, based on the collaborative effort of significant stakeholders in the community, which balances the interests of an allegedly wrongfully imprisoned petitioner against the State's limited resources.

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

Chair: Rep. Karl Rhoads

Vice Chair: Rep. Joy San Buenaventura

Tuesday, February 2, 2016

2:00 p.m.

Room 325

STRONG SUPPORT for HB 1046 - WRONGFUL IMPRISONMENT

Aloha Chair Rhoads, Vice Chair San Buenaventura 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 for almost two decades. This testimony is respectfully offered on behalf of the 5,600 Hawai'i individuals living behind bars, always mindful that more than 1,600, and soon to be rising number of Hawai'i individuals who are serving their sentences abroad, thousands of miles away from their loved ones, their homes and, for the disproportionate number of incarcerated Native Hawaiians, far from their ancestral lands.

HB 1046 provides compensation and services to persons who can demonstrate they were wrongfully convicted of a crime and imprisoned.

Community Alliance on Prisons is in strong support of this measure. The state imprisons people who cause harm to others. Conversely, when it is the state that causes the harm, it is the moral responsibility of the state to compensate the person who endured that harm.

Committee members, we want you to understand that this could happen to any one of us. How many times have you been mistaken for another person? What if you looked like someone who committed a crime and no one believed that you were innocent? What would you want the state to do when you were found innocent after spending years in prison? **Please understand that this is happening as we speak.** People are serving time for crimes they did not commit.

It is perplexing that crime victims are compensated in all 50 states, yet those who were wrongfully imprisoned are not afforded the same respect and accommodation. This is patently unfair and unjust. We can only infer from this that the Aloha state will demand restitution on the victim's behalf for crime, but will ignore the pain and suffering of a person the state has caused. This hurts and heaps even more pain and suffering on the wrongfully imprisoned.

The state continues to put up barriers to ignore/deny/delay their own responsibility. The message this sends to our communities is so wrong. It is the opposite of what we teach our keiki about being responsible citizens: **You take responsibility for your actions; You clean up your mess; and You take whatever steps necessary to correct the wrong you have caused.**

HOW DOES THE STATE TAKE RESPONSIBILITY FOR RUINING SOMEONE'S LIFE?

How can such an egregious wrong be made right? Currently 30 states have compensation statutes for the wrongfully convicted. **It is embarrassing to say that Hawai'i doesn't even apologize or take any responsibility for the harm they have caused.**

The Innocence Project released a report¹ in 2009 with recommendations for compensation. Applicants must have documentation that demonstrates actual innocence, and a small number of people qualify.

The Innocence Project's Recommendations

For those few qualified applicants, the state should readily and generously offer assistance. No amount of money can make up for the lost years, the trauma of prison life, or the horrible experience of being falsely branded a murderer, rapist or thief. But compassionate state assistance can at least help bring the exoneree's struggle to an end by providing him with the finances to find a home, see a doctor, get job training and counseling, and attempt to make a new life for himself.

These recommendations for state compensation laws have been developed by the Innocence Project after years of working with exonerees and their families, legislators, social workers and psychologists:

- Provide a minimum of \$50,000, untaxed, per year of wrongful imprisonment and \$100,000, untaxed, per year on death row. This amount is based on the federal government's standard created through the Innocence Protection Act of 2004.
- Cover limited and appropriate attorney's fees associated with filing for compensation.
- Provide immediate services including housing, transportation, education, workforce development, physical and mental health care through the state employee's health care system and other transitional services.
- Issue an official acknowledgment of the wrongful conviction.

By fairly compensating those who have suffered under the criminal justice system, the state reassures its citizens that the government will attempt to rectify a wrong – whether the state is at fault or not. In short, it's the right thing to do.

Pages 27-31 of this report list the statutes, support services and restrictions of the states who offer some form of compensation. In summary, it is crucial to the integrity of our justice system and to the state that Hawai'i improves the quality of justice by first apologizing and then providing support and compensation to those individuals who have been wrongfully convicted and imprisoned because of the state's error. **JUSTICE DEMANDS THIS.**

Mahalo for this opportunity to testify.

¹ **Making up for Lost Time: What the Wrongfully Convicted Endure and How to Provide Fair Compensation**, December 2009. <http://www.innocenceproject.org/news-events-exonerations/executive-summary-making-up-for-lost-time-what-the-wrongfully-convicted-endure-and-how-to-provide-fair-compensation#sthash.ohjbgKpt.dpuf>

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HB1046

Submitted on: 2/1/2016

Testimony for JUD on Feb 2, 2016 14:00PM in Conference Room 325

Submitted By	Organization	Testifier Position	Present at Hearing
Heather Lusk	The CHOW Project	Support	No

Comments:

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Submitted By	Organization	Testifier Position	Present at Hearing
Leilani Maxera	The CHOW Project	Support	No

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HARRISON & MATSUOKA

Attorneys at Law

LATE

William A. Harrison

E-mail: wharrison@hamlaw.net

Keith A. Matsuoka

E-mail: kmatsuoka@hamlaw.net

Gene K. Lau, of Counsel

E-mail: glau@hamlaw.net

Davies Pacific Center

841 Bishop Street, Suite 800

Honolulu, Hawaii 96813

Telephone: (808) 523-7041

Facsimile: (808) 538-7579

Web: www.harrisonmatsuoka.net

www.hamlaw.net

February 1, 2016

Via: Web: www.capitol.hawaii.gov/submittestimony.aspx

COMMITTEE: COMMITTEE ON THE JUDICIARY

Chair: Rep. Karl Rhoads

Vice Chair: Rep. Joy A. San Buenaventura

DATE: Tuesday, February 2, 2016

TIME: 2:00 PM

PLACE: Conference Room 325

State Capitol

415 Beretania Street

Honolulu, Hawai'i 96813

BILL NO.: SUPPORT HB 1046/Proposed HD1

Honorable Representatives: Karl Rhoads, Joy A. San Buenaventura and members of the Committee on the Judiciary.

Thank you for providing me this opportunity to offer testimony on behalf of the Hawai'i Innocence Project ("HIP") in strident support of House Bill 1046.

As background to our support of the Bill, I am one of the founding attorneys of the "Hawai'i Innocence Project." The Hawai'i Innocence Project is an upper level clinical program at the William S. Richardson School of Law. The project provides individuals who have been wrongfully convicted, the last opportunity to seek exoneration, redress and release. The project is manned by law students who are supervised by Co-Directors Ken Lawson, Ronette Kawakami and practicing criminal defense attorneys, Brook Hart, Susan Arnett and the undersigned. The supervising attorneys have combined legal experience in excess of 120 years.

INTRODUCTION

On June 26, 2015, the American Judicature Society-Hawaii Chapter formed this Special Committee on Redress for Unlawful Imprisonment ["Task Force"]. The

COMMITTEE: **COMMITTEE ON THE JUDICIARY**

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two appointed

Co-Chairs of the Committee were The Honorable Jeannette H. Castagnetti and Mark J. Bennett, Esq. I was appointed as the Reporter. The members of the Committee represented a wide range of State and Federal judicial representatives, legal, educational and community representatives from all of the interested stakeholders in the community.

Attorney General Douglas S. Chin asked the AJS to “review, comment on, and make recommendations” regarding a possible compensation statute for wrongfully imprisoned individuals. The Committee was tasked with the duty to review and address four main issues: (1) the factual circumstances under which a person would be eligible for redress, (2) the legal standard and process for eligibility, (3) the types of redress that would be available, including damages, health care, tuition, child support payments, fees and costs, and (4) what the government entity would pay.

The first meeting of the Committee took place on July 9, 2015 at which time the charge was officially presented and the Committee began its discussion of the issues involved.

At the initial meeting, the Committee engaged in a preliminary discussion of the issues and was asked to offer comments and a response to the following questions:

1. Should persons "wrongfully" convicted and imprisoned be entitled to monetary or other redress?
2. If so, what should be the grounds for such redress (actual innocence, something less, etc.)?
3. Who should decide (court, agency, or board)?
4. What should the standard of proof be (clear and convincing, preponderance), and should there be anything that acts to shift the burden from the claimant (prior court ruling establishing innocence, etc.)?
5. Should there be any damages other than money (former HB 148 had a very long list)?
6. Should the damages be fixed based on time, should they be at the discretion of the court/entity awarding the damages, or should they be "not less than" or "not more than" a particular amount?

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7. Should there be additional avenues of redress (as former HB 148 seemed to allow), or should any new remedy be an exclusive remedy?
8. Should any statute make clear the limited nature of any waiver of sovereign immunity?
9. What should be the end product of the Committee, e.g., a report with recommendations, a proposed statute, or something else?

The committee addressed the above questions and reached consensus on each question. The committee decided to schedule a follow-up meeting to review compensation statutes from those jurisdictions which had passed such legislation, as well as available Innocence Project statistics and information. I volunteered to obtain, collate and disseminate the above information to the committee members.

The second meeting of the Committee took place on October 6, 2015 at which time the committee reviewed the compensation statutes from Alabama, California, Connecticut, District of Columbia, Florida, Illinois, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New York, North Carolina, Ohio, Oklahoma, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia and Wisconsin. Attached as Appendix D is a copy of the above statutes. The committee also reviewed the national Innocence Project Report "Making up for Lost Time: What the Wrongfully Convicted Endure and How to Provide Fair Compensation."

The committee then decided that a subcommittee be established to prepare a draft of proposed legislation to be reviewed by the committee as a whole. The subcommittee was comprised of the following volunteers: the Honorable Jeannette H. Castagnetti, Mark J. Bennett, Esq., Kenneth Lawson, Joshua A. Wisch, Esq., and the undersigned.

Members of the subcommittee met on November 4, 2015. The subcommittee considered language involving eligibility for compensation, evidence of innocence, evidence of a claim, burdens of proof, decision making entities, exclusions, amounts of compensation, types of eligible benefits, attorney's fees and tax implications, gleaned from the various statutes of Alabama, Colorado, Florida, Louisiana, Minnesota, Mississippi, New Hampshire, New Jersey, Texas, Vermont, Washington and Wisconsin. Attached as Appendix F is a composite of the various statutory provisions considered by the subcommittee. The subcommittee then proposed a draft statute. The draft was then circulated to the members as a whole for input, review, possible additions and amendments.

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Members of the committee as a whole met on November 23, 2015. There was much discussion as to various provisions of the draft statute. Subsequent to several agreed upon modifications and amendments to the proposed draft, the members reached a consensus on a final draft.

The draft AJS Task Force statute is virtually the same as HB 1046, except that the HB 1046 requires the compensation claim to be brought before the Circuit Court instead of a Commission as proposed in the AJS Draft.

CONCLUSION

The Hawai'i Innocence Project proposed legislation last term to compensate those wrongfully convicted. That legislation (HB 148) had a number of detractors including the Attorney General. The current proposed bill addresses all of the challenges to its predecessor. In short I believe this bill strikes the necessary balance between the needs of the wrongfully convicted, as well as the State, therefore the Hawai'i Innocence Project wholeheartedly supports this bill.

If you have any questions or need further clarification please feel free to contact me.

Sincerely,

A handwritten signature in black ink, appearing to read 'W. Harrison', is written over a horizontal line.

William A. Harrison, Esq.
Hawai'i Innocence Project

COMMITTEE ON THE JUDICIARY

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415 Beretania Street
Honolulu, Hawai'i 96813

**HB 1046 - RELATING TO WRONGFUL IMPRISONMENT
STRONG SUPPORT**

Honorable Chair Luke, Honorable Vice-Chair Nishimoto and Honorable Members of the Committee.

My name is Virginia Hensch, and I am the Founding Director of the Hawai'i Innocence Project and Co-ordinator of The Hawai'i Friends of the Innocence Movement, and I am here to testify in strong support of House Bill 1046.

In 1913, California and Wisconsin became the first states to create systematic financial restitution for citizens wrongly deprived of their liberty by wrongful convictions. For decades, they were the only states to provide this important safety net to help restore the wrongly convicted to a productive life. However, as exonerations began to be more publicized, more states began to enact statutory compensation. Between the turn of the 21st century and 2014, when Minnesota enacted a compensation statute, a total of 30 states (as well as the federal government and the District of Columbia) enacted compensation statutes. Not one of those jurisdictions has chosen to repeal a compensation statute.

As we begin the year 2016, however, Hawai'i remains among the minority of jurisdictions that fails to provide reasonable compensation to innocent persons who have been unjustly required to sacrifice their liberty and serve time for another person's crime.

In looking over the states with compensation, it is interesting to note that a majority of southern states, as well as a majority of "red" states over-all, have compensation statutes. This may be because compensation for the wrongly convicted is not just a liberal idea. It is sound policy, regardless of politics, and it makes fiscal sense.

A person who is imprisoned for another person's crime loses more than liberty and connections to family and community. The exoneree loses reputation, chances for education, earning power, credit towards a pension. They lose the chance to build equity in a house. The state loses the benefit of the taxes they would have paid on their earnings, had they not been wrongly incarcerated. Moreover, upon release, the exoneree's knowledge and skills are usually outdated. Many exonerees are diagnosed with post-traumatic stress disorders, which can further exacerbate their struggles in re-establishing a normal, productive life. Ironically, the exoneree does not even have access to the re-entry services available to a guilty person who has been released after serving their sentence.

Financial compensation, free tuition or job training, and other compensatory benefits can help the wrongfully convicted person make a smoother re-entry into society and increase their future self-sufficiency. It is not only simple justice to compensate the victims of wrongful incarceration, it makes economic sense to help put them in a position to contribute to society rather than leaving them in a position where they and their families are likely to be dependent on social services.

Compensation also allows government and citizens to make amends to the wrongly convicted person and, more generally, helps to repair damage to the state's public legitimacy and boost public faith in the good judgment and fairness of our system. It is a fundamental rule of good character to take responsibility when you hurt someone, and do what you can to make things right. This bill is an important step towards justice for the wrongfully convicted.

Hearing this bill is an important first step toward righting a wrong, and I thank you for the opportunity to testify. Please move this bill forward.

Yours sincerely,

/s/ Virginia E. Hench

Co-ordinator, Hawai'i Friends of the
Innocence Movement.

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HB1046

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Submitted By	Organization	Testifier Position	Present at Hearing
Dara Carlin, M.A.	Individual	Support	No

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HB1046

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Submitted By	Organization	Testifier Position	Present at Hearing
Kaelan	Individual	Support	No

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