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919 Ala Moana Boulevard, 4th Floor
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No. _____

TESTIMONY ON HOUSE BILL 1972, HOUSE DRAFT 2
RELATING TO MEDICAL RELEASE.
by
Nolan P. Espinda, Director
Department of Public Safety

House Committee on Finance
Representative Sylvia Luke, Chair
Representative Ty J.K. Cullen, Vice Chair

Wednesday, February 19, 2020; 2:00 p.m.
State Capitol, Conference Room 308

Chair Luke, Vice Chair Cullen, and Members of the Committee:

The Department of Public Safety (PSD) offers **comments** on House Bill (HB) 1972, House Draft (HD) 2, which seeks to codify, in statute, a medical release program for PSD, which would significantly alter the established and effective Medical Release Program that has existed in the policies and procedures of the Department and the Administrative Rules of the Hawaii Paroling Authority (HPA) since December 2014.

PSD had previously commented on and supported the intent of the measure, but with important caveats. Because these concerns were not addressed in HB 1972, HD 2, the Department respectfully requests the measure be deferred, based on the following.

First, the current Medical Release program, with well-established procedures under Chapter 353, Hawaii Revised Statutes (HRS) and Hawaii Administrative Rules (HAR) of the Hawaii Paroling Authority (HPA) is working effectively for inmates, PSD's medical staff, the HPA, and for concerns of the public's safety.

Second, the measure intends for the process to be open to a significantly larger pool of potential Medical Release candidates by allowing virtually anyone to submit an application on behalf of an inmate, whether or not there is any medical basis for the release, and PSD believes the bill will have that effect. The Department takes seriously its legally mandated requirement to humanely care for those in our custody and its procedures already require an exhaustive medical report be prepared for every application. However, PSD is gravely concerned that the anticipated large number of applications will overwhelm its understaffed and underbudgeted medical units. For the process under HB 1972, HD 2 to work efficiently, the Department will require a substantial increase in human and material resources.

APPROPRIATIONS NEEDED TO SUPPORT HB 1972, HD2

During the 2019 Legislative session, the Department submitted testimony on a similar measure in a joint hearing of the Senate Committees on Judiciary and Ways and Means that outlined an initial estimate of the fiscal impact of the bill on PSD's Health Care Division. In order to comply with the requirements of HB 1972, HD 2, the following provides an initial analysis of the resources needed for compliance. Anticipated staffing increases include a Physician Manager (1.0 FTE) position, which would be responsible for providing oversight, coordination, and review of the statewide medical release program. An additional 1.5 FTE Physician and 1.5 FTE Psychiatrist positions would be required to comply with the medical and psychiatric components of HB 1972, HD 2, including the development of a fast track procedure for the evaluation and release of rapidly dying prisoners.

As a component of the medical release program, HB 1972, HD2, also requires the development of a medical release plan for purposes of continuity of care. One barrier to the medical release plan process has been the absence of specialized nursing positions to provide case management and pursue guardianship for incapacitated inmates. Currently, nursing case management positions within the Health Care Division of the Department of Public Safety does not exist. Additional Advanced Practice Registered Nurse II (3.0 FTE) positions would be responsible for the development of the medical release plan, including serving as petitioner for

guardianship when needed. An additional Secretary II (1.0 FTE) position would provide the office support needed for the implementation of the medical release program.

The table below shows the anticipated staffing increases that the implementation of HB 1972, HD 2 would require. The total increase in payroll cost for the additional 8.0 FTE staffing requirement is estimated at $1.7 million each year. With an undetermined, yet expected increase, in requests for medical release from non-medical sources with a heightened possibility of litigation, an initial annual recurring estimate of $500,000 for specialized medical testing, studies, and specialty Provider referrals is requested. Should the Committee decide to advance the measure, PSD respectfully requests that it be amended to include an appropriation of sufficient funds to support the requirements of the revisions to the medical release program.

Position	**FTE**
Physician Manager	1.0
Physician	1.5
Psychiatrist	1.5
Advanced Practice R.N.	3.0
Secretary	1.0
Total FTE	**8.0**

Thank you for the opportunity to provide testimony on HB 1972, HD 2.

STATE OF HAWAII
HAWAII PAROLING AUTHORITY
1177 Alakea Street, First Floor
Honolulu, Hawaii 96813

No. _____

TESTIMONY ON HOUSE BILL 1972, HD2
A BILL FOR AN ACT RELATING TO MEDICAL RELEASE

BY

HAWAII PAROLING AUTHORITY
Edmund "Fred" Hyun, Chairman

House Committee on Finance
Representative Sylvia Luke, Chair
Representative Ty J.K. Cullen, Vice Chair

Wednesday, February 19, 2020; 2:00 p.m.
State Capitol, Conference Room 308

Chair Luke, Vice Chair Cullen, and Members of the Committee:

The Hawaii Paroling Authority (HPA) opposes House Bill 1972, HD 2, which seeks to broaden the criteria that the HPA follows to consider inmates for medical release. The HPA opposes this measure because it is duplicative as it seeks to codify in statute a process that the Department of Public Safety (PSD) and HPA currently has in place. This measure seeks to reinvent an established practice that works in the best interest of the offender/patient and public safety. Also, this measure is almost identical to last year's HB 629, HD2, SD2 that was vetoed by the Governor on July 9, 2019 (Gov. Message No. 1374).

While the HPA defers to the Department of Public Safety (PSD) for most of the provisions outlined in this measure, and staffing and cost requirements to implement this measure, the Authority has serious concerns regarding the requirement to hold a hearing within ten days of receiving a medical release report from the Department of Public Safety (Section 4(e), Page 6, Line 17). In particular, the requirement to "provide the victim of the criminal act for which the inmate was sentenced or the victim's family with the opportunity to be heard" (Section 4(e), Page 7, Lines 3 through 5). It should be noted, unless the victim or the victim's family notifies the HPA that they wish to be

notified of hearings held by the HPA for the offender, the Authority would need to contact and coordinate with the County Prosecutor and/or the Attorney General's Office to locate, contact, and allow for the victim or the victim's family to be heard.

The Authority notes no definition of "victim's family" and/or whom would be considered family members of the victim is provided. As written, the term "with the opportunity to be heard" as it relates to the victim's family, is not defined. In that, would the victim's family be able to provide written comments, appear in person, appear via video conferencing, by telephone, etc.? If the victim's family resides in another County or outside of Hawaii, who would be responsible for their transportation and associated costs if they wished to appear in person?

There needs to be clarification regarding the proposed medical release hearings process and timeline. The PSD and HPA already have procedures in place to address medical release consideration. As written, this measure does not appear to comply with HRS 706-670 (Parole procedures; release on parole; terms of parole, recommitment, and reparole; final unconditional release) as it relates to scheduling initial parole release consideration hearings.

Thank you for the opportunity to provide testimony on House Bill 1972, HD2.

OFFICE OF HAWAIIAN AFFAIRS
Legislative Testimony

HB1972 HD2
RELATING TO MEDICAL RELEASE
Ke Kōmike Hale o ka ʻOihana ʻImi Kālā

Pepeluali 19, 2020 2:00 p.m. Lumi 308

The Office of Hawaiian Affairs offers this testimony in **SUPPORT** of HB1972 HD2, which establishes streamlined guidelines and clarifies conditions for the compassionate release of prisoners who are disabled, senescent, or suffering from a debilitating or terminal illness. **This measure would facilitate the humane reunion of offenders—who pose little to no risk to society—with their ʻohana and community while reducing the costs of prison overcrowding to the state, taxpayers, and other inmates.** OHA notes that a nearly identical measure, HB629, passed out of both chambers in the 2019 session with overwhelming support, but was subsequently vetoed. OHA is reassured that the Legislature has prioritized this important proposal for reconsideration and remains committed to realizing the benefits it offers, for both taxpayers as well as eligible paʻahao and their families.

In OHA's 2010 report on the disparate treatment of Native Hawaiians in the criminal justice system, OHA recommended that the Hawaiʻi Paroling Authority "release older people from prison who are generally considered to be low risk, and utilize Hawaiʻi's medical parole policies to the fullest extent possible."[1] This recommendation sought to reduce the overrepresentation of Native Hawaiians in prison and provide relief to the burdens of overcrowded facilities and the continental relocation of paʻahao; OHA's report noted that "an overall reduction in the number of people in prison will support efforts to reduce racial disparities" identified in the report.[2] **OHA accordingly appreciates and supports this measure as a long-awaited step towards the implementation of our recommendation.**

OHA notes that this measure would also address findings in the 2018 report of the HCR85 Task Force on prison reform. The HCR85 Task Force expressed concerns regarding the exorbitant healthcare costs of aging prisoners, and the state's lack of capacity to handle our prisons' rapidly increasing aging population.[3] The Task Force delineated the precise guidelines

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[1] THE OFFICE OF HAWAIIAN AFFAIRS, THE DISPARATE TREATMENT OF NATIVE HAWAIIANS IN THE CRIMINAL JUSTICE SYSTEM 81 (2010), *available at* http://www.oha.org/wp-content/uploads/2014/12/ir_final_web_rev.pdf.

[2] The Native Hawaiian Justice Task Force report subsequently reaffirmed the racial disparities identified in the 2010 OHA report. *See generally,* OFFICE OF HAWAIIAN AFFAIRS, NATIVE HAWAIIAN JUSTICE TASK FORCE REPORT (2012), *available at* http://www.oha.org/wp-content/uploads/2012NHJTF_REPORT_FINAL_0.pdf.

[3] HCR 85 TASK FORCE, CREATING BETTER OUTCOMES, SAFER COMMUNITIES: FINAL REPORT OF THE HOUSE CONCURRENT RESOLUTION 85 TASK FORCE ON PRISON REFORM TO THE HAWAIʻI LEGISLATURE 7 (2018), *available at* https://19of32x2yl33s8o4xza0gf14-wpengine.netdna-ssl.com/wp-content/uploads/HCR-85-Task-Force-on-Prison-Reform_Final-Report_12.28.18.pdf (citing a 2011 study revealing that health care costs for selected elderly California prisoners averaged nearly $2 million per prisoner).

represented in this measure as its recommended course,[4] and it urged that humanity be the paramount consideration of all custodial decisions.[5] As the Task Force indicated, **it is humane to facilitate the medical release of individuals who are terminally ill, severely mentally ill or disabled, or have an illness that PSD cannot adequately treat**, to community care and to be with their families; further, **an effective medical release program would ease a significant burden on taxpayers, as well as reduce the strain on prison facilities** and other resources caused by overcrowding. Notably, such **substantial cost savings would enable more resources to be invested in programs and services for prisoner rehabilitation, reentry, and recidivism prevention.**

Insofar as the supervised parole of elderly, sick, and dying pa'ahao presents little to no risk to the public, the continued costly incarceration of this population cannot be justified both from either a budgetary or humanitarian perspective.

Therefore, OHA urges the Committee to **PASS** HB1972 HD2. Mahalo for the opportunity to testify on this important measure.

---

[4] *Id.* at 49-50.

[5] *See id.* at xiv. The foremost recommendation of the HCR85 Task Force was that, "**[t]o improve outcomes and bring costs under control, Hawai'i should transition from a punitive to a rehabilitative correctional system.** In a rehabilitative system, the conditions of confinement are humane, not punitive, and the prison staff are focused on helping prisoners deal with the issues that brought them to prison." (emphasis in original text)

COMMUNITY ALLIANCE ON PRISONS

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COMMITTEE ON JUDICIARY
Rep. Sylvia Luke, Chair
Rep. Ty Cullen, Vice Chair
Wednesday, February 19, 2020
2:00 pm – Room 325

SUPPORT w AMENDMENT for HB 1972 HD2 – COMPASSIONATE RELEASE

Aloha Chair Luke, Vice Chair San Cullen 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 in Hawai`i for more than two decades. This testimony is respectfully offered on behalf of the families of **JAMES BORLING SALAS, ASHLEY GREY, DAISY KASITATI, JOEY O`MALLEY, JESSICA FORTSON AND ALL THE PEOPLE WHO HAVE DIED UNDER THE "CARE AND CUSTODY" OF THE STATE,** including the eleven (11) people that we know of, who have died in the last six (6) months. We also remind the committee of the approximately 5,200 Hawai`i individuals living behind bars or under the "care and custody" of the Department of Public Safety on any given day, and we are always mindful that more than 1,200 of Hawai`i's imprisoned people are serving their sentences abroad thousands of miles away from their loved ones, their homes and, for the disproportionate number of incarcerated Kanaka Maoli, far, far from their ancestral lands.

HB 1972 HD2 creates a medical release program within the Department of Public Safety for certain ill, disabled, or impaired inmates who pose a low risk to public safety.

Community Alliance on Prisons is in support of this bill because it embodies the spirit of Aloha. The bill would conform both PSD and HPA rules on compassionate/medical release and builds upon the system that is already in place in which primary responsibility for initiating compassionate release rests with the department of public safety's medical personnel. PSD's system allows for what is essentially an appeal process if an inmate believes that the DPS had made a mistake.

To strengthen this legislation, Community Alliance on Prisons respectfully suggests that the committee incorporate an amendment to include the following section of the federal law[1]:

On page 7, line 18, add a new (h) with the following language:

> (h) "An incarcerated patient may file a motion **after fully exhausting all administrative rights to appeal a denial of compassionate release** by either the department of public safety or the Hawai`i Paroling Authority."

Reorder (h) p.7, line 18 – (k) p.8 – line 14 to (i) – (l)

[1] Compassionate Release in the First Step Act Explained, https://famm.org/wp-content/uploads/Compassionate-Release-in-the-First-Step-Act-Explained-FAMM.pdf

The HCR 85 Correctional Reform Task force recommended these provisions in their 2019 Final Report[2]:

C. Streamlining Federal Compassionate Release

Although federal compassionate release does not directly impact state prisoners, it is an important issue for Hawai'i citizens who are incarcerated in federal prisons. Senator Schatz introduced the Granting Release and Compassion Effectively (GRACE) Act to improve the United States Bureau of Prison's approval process for compassionate release and create an expedited process for terminally ill patients. (S. 2472, 115th Cong. (2018) The bill would make the compassionate release process fairer and more accountable and would, in in the long term, reduce overall federal prison spending without compromising public safety. The bill was included in the bipartisan criminal justice reform bill, the First Step Act, which passed the House of Representatives in 2018 and is expected to pass the Senate. (S. 3649, 115th Cong. (2018)

The amendment we suggest is from the First Step's section on Compassionate Release and Community Alliance on Prisons respectfully requests that the committee consider other changes made to the First Step Act as well:

Notification when a prisoner is diagnosed with a terminal condition

o Within 72 hours after a terminal diagnosis, the department of public safety must notify the prisoner's attorney, partner, and family and inform them they may submit a request for the prisoner's compassionate release;

o Within seven days the department of public safety must provide the partner and family members a visit;

o Department of public safety staff must assist an incarcerated patient with a compassionate release request if asked to do so by the prisoner, the attorney, partner, or family member; and

o The department of public safety must provide support for incarcerated patients who are physically or mentally unable to submit a compassionate release request on their own

o The department of public safety must inform the incarcerated patient's attorney, partner, and family that they can submit a request and must accept a request from people other than the prisoner; and

o Department of public safety staff must assist an incarcerated patient with a compassionate release request if asked to do so by the incarcerated patient, the attorney, partner, or family member.

Community Alliance on Prisons urges the committee to consider amending the bill with the good amendments made in the First Step Act by our own Senator Schatz! These amendments strengthen due process and allow a dispassionate review of an incarcerated patient's medical record. Humans all have implicit or unconscious bias and by granting the right to appeal a denial in court makes sense. Human make mistakes. These amendments seek to avoid them before they happen.

Mahalo for this opportunity to testify on this important measure that will uphold the incarcerated patient's, his/her attorney, partner, or family member's human rights.

[2] Creating Better Outcomes, Safer Communities, Compassionate Release, Chapter 12 C, page 60. https://www.courts.state.hi.us/wp-content/uploads/2018/12/HCR-85_task_force_final_report.pdf

HAWAIʻI HEALTH
& HARM REDUCTION CENTER
The New Chapter for Life Foundation and The CHOW Project

TESTIMONY IN SUPPORT OF HB 1972, HD 2

TO: Chair Luke, Vice-Chair Cullen, and House Finance Committee Members

FROM: Nikos Leverenz
Grants, Development & Policy Manager

DATE: February 19, 2020 (02:00 PM)

Hawaiʻi Health & Harm Reduction Center (HHHRC) **strongly supports** HB 1972, HD 2, which would create a medical release program within the Department of Public Safety for certain ill, disabled, or impaired inmates.

HHHRC works with many individuals who are impacted by poverty, housing instability, and other social determinants of health. Many have behavioral health problems, including those relating to substance use and underlying mental health conditions. Incarceration for any length of time for those with undiagnosed or undertreated behavioral health conditions compounds human suffering and is neither wise nor compassionate public policy.

As a general matter, the scope of this bill is far too narrow when compared to the compassionate release provisions of the First Step Act (FSA), passed by Republican congressional majorities and signed into law by President Trump in 2018.

This bill should be strengthened by incorporating some of the most salutary features of the federal First Step Act. Under the FSA, those who are eligible for compassionate release include those over the age of 65 who have served the greater of 10 years or 75 percent of their sentence; those whose minor children are impacted by the death or incapacitation of their caregiver; and those whose spouse or registered partner are incapacitated by a serious injury, debilitating illness, or cognitive defect.

Incarceration is latently injurious to a person's health. A 2019 report by the Robert Wood Johnson Foundation underscored the negative health impacts of incarceration:

> Incarceration is associated with adverse health effects that last far beyond the period of confinement. Longitudinal studies have documented strong, pervasive links between incarceration and multiple adverse health indicators across the lifespan, even after considering health before incarceration. On average, adult inmates are released from correctional facilities with more chronic medical problems than they had before admission….
>
> The most serious health consequences of incarceration may not manifest until after release. Individuals treated for chronic health conditions while incarcerated often face obstacles to accessing care after leaving the justice system. Among individuals who are incarcerated, future prospects for employment, economic stability, affordable housing, and education are curtailed and in many cases eliminated. ("Mass Incarceration Threatens Health Equity in America," at p. 3.)

The grave impacts of incarceration on individual health are of heightened concern for those currently incarcerated in Hawaiʻi and its contracted facilities in Arizona. Conditions in both states are such that they have been the subject of news reports in local, national, and international outlets in recent years. (*See, e.g.*, Cory Lum, "Prisoners in Hawaii Are Being Sent to Die in Private Prisons in Arizona," *Vice Magazine*, March 2017; Associated Press, "Official: Overcrowding, Inmate Woes Caused Maui Jail Riot," August 22, 2019; Elizabeth Whitman, "Inmate Says He Was Raped, Retaliated Against at CoreCivic Prison in Arizona," *Phoenix New Times*, December 17, 2019; Associated Press, "New Hawaii Law Shows Information Withheld in Prison Deaths," January 6, 2020; Hawaii News Now, "Investigation Launched After Apparent Beating Death of OCCC Inmate," January 18, 2020; Yoohyun Jung, "Lawsuit: Guards Had Suicidal Inmate Cuffed, Let Him Bleed to Death," *Civil Beat*, January 24, 2020.)

Thank you for the opportunity to testify on this measure.

the Drug Policy Forum of hawai'i

Dedicated to safe, responsible, humane and effective drug policies since 1993

TESTIMONY IN SUPPORT OF HB 1972, HD 2

TO: Chair Luke, Vice Chair Cullen & House Finance Committee Members

FROM: Nikos Leverenz
DPFH Board President

DATE: February 19, 2020 (2:00 PM)

Drug Policy Forum of Hawai'i **strongly supports** HB 1972, SD 2.

A recent supplement from the American Journal of Public Health notes the importance of having a compassionate release in statute as a "supportive, human rights-oriented strategy" and ensuring that correctional and parole authorities have the necessary direction, medical knowledge, and operational capacity to implement the policy though expeditious and thorough discharge planning:

> Many jurisdictions have introduced or reinvigorated legal mechanisms to release or parole people with life-limiting illness early to their communities. Nearly all states have some form of early release policies, including medical parole, medical release, and 'geriatric' parole, to name a few.... Such mechanisms are critical release valves for bloated US correctional facilities and can serve as supportive, human rights–oriented strategies for unifying families at the end of life and transferring persons to community-based health care systems that are better equipped to meet their complex health needs....
>
> Lack of knowledge about serious and terminal illness among parole board members can also pose a barrier if the board does not possess sufficient medical knowledge to understand the trajectory of serious illness.
>
> Profound barriers to discharge planning also exist. Few jurisdictions provide adequate discharge plan development, despite more than half of compassionate release policies requiring that robust plans be in place before release. In addition, difficulty identifying appropriate postrelease housing is common, as many long-term care settings are reluctant to accept persons released from prison.

Thank you for the opportunity to testify on this important reform measure.

HB-1972-HD-2
Submitted on: 2/14/2020 11:05:26 PM
Testimony for FIN on 2/19/2020 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Louis Erteschik	Hawaii Disability Rights Center	Support	No

Comments:

HB-1972-HD-2
Submitted on: 2/18/2020 2:14:27 AM
Testimony for FIN on 2/19/2020 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Lorenn Walker	Hawai'i Friends of Restorative Justice	Support	No

Comments:

Hawai‘i Friends of Restorative Justice strongly supports this bill. We also agree with Nikos Leverenz's February 11, 2020 testimony submitted for the Hawai‘i Health & Harm Reduction Center that the bill should be expanded and reach more people as the federal First Step Act does to: "include those over the age of 65 who have served the greater of 10 years or 75 percent of their sentence; those whose minor children are impacted by the death or incapacitation of their caregiver; and those whose spouse or registered partner are incapacitated by a serious injury, debilitating illness, or cognitive defect."

Mahalo for your service.

HB-1972-HD-2
Submitted on: 2/18/2020 8:43:59 AM
Testimony for FIN on 2/19/2020 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Monica Espitia	American Civil Liberties Union of Hawaii	Support	No

Comments:

ROBERT K. MERCE
2467 Aha Aina Place
Honolulu, Hawai'i 96821

phone: (808) 398-9594 (cell)
email: mercer001@hawaii.rr.com

February 17, 2020

TO: Committee on Finance
RE: HB 1972
HEARING: February 19, 2020
TIME: 10:00 a.m.
ROOM: Room 308
POSITON: Strongly Support

Chair Luke, Vice Chair Cullen, and members of the committee:

My name is Bob Merce. I am a retired lawyer and for the past nine years I have been assisting inmates seeking medical release. I participated in drafting the Department of Public Safety's medical release policy (COR.10.1G.11), and I drafted SB2306 (Twenty-Seventh Legislature 2014)[1] that is the predecessor to both HB629 (Thirtieth Legislature 2019) and SB1972. Many of the medical release cases I have worked on over the past nine years have been referrals from the Department of Public Safety (PSD) or the Hawaii Paroling Authority (HPA) and I am currently working with PSD o find housing for three prisoners who have been granted medical release;

I. INTRODUCTION

HB 1972 efficiently and economically accomplish the fundamental purposes of compassionate release. There are several provisions of the bill that are particularly important:

1. It establishes **a single criteria for compassionate release** that would apply to both the Department of Public Safety (PSD) and the Hawaii Paroling Authority (HPA). PSD and HPA currently have very different and inconsistent criteria that can create confusion and can lead to inconsistent and unjust outcomes.

2. The eligibility criteria for compassionate release are reasonable and clearly stated so that those who will have to apply it should have no difficulty doing so.

[1] SB2306 (Twenty-Seventh Legislature 2014) can be found here: https://www.capitol.hawaii.gov/session2014/bills/SB2306_.htm

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3. HB 1972 builds on the system that is already in place in which primary responsibility for initiating compassionate release rests with PSD medical personnel, but it allows an inmate who believes that he or she qualifies for medical release to initiate a request that would be reviewed by the HPA. Having a procedure for inmate-initiated requests is essential because it is inevitable that PSD will overlook some individuals who should receive compassionate release, and there must be a mechanism for correcting such mistakes (or affirming the decision of the DPS if no mistake has been make).

4. The bill specifies reasonable time limits for processing requests for compassionate release.

5. The bill makes a clear distinction between *eligibility* for compassionate release and *approval* for release and properly limits the role of the physician to determining eligibility while leaving approval decisions to appropriately designated correctional professionals and the Paroling Authority.

6. The bill incorporates all of the key recommendations Dr. Brie Williams made in her seminal article on compassionate release, including: (a) the use of evidence-based principles; (b) a transparent release process; (c) assignment of an advocate to help incapacitated prisoners navigate the compassionate release process; (d) a fast track procedure for rapidly dying inmates; and (e) a well-described and disseminated application procedure**.**

II. HB 1972 WOULD BRING THE HAWAII PAROLING AUTHORITY'S ANTIQUATED AND UNWORKABLE MEDICAL RELEASE CRITERIA INTO THE 21ST CENTURY AND MAKE IT CONSISTENT WITH THE POLICIES OF THE DEPARTMENT OF PUBLIC SAFETY

A. PSD's Medical Release Criteria.

PSD's medical release policy was adopted in December, 2014 and is based on Dr. Brie Williams' seminal article *Balancing Punishment and Compassion for Seriously Ill Prisoners*, published in the Annals of Internal Medicine.[2] Inmates meeting the PSD criteria are referred to the HPA for possible medical release. The criteria are part of PSD's policy No. COR.10.1G.11 (Medical Release) which states in pertinent part:

[2] Williams BA, Sudore RL, Greifinger R, et al. Balancing Punishment and Compassion for Seriously Ill Prisoners. Ann Intern Med. 2011;155:122–126. doi: https://doi.org/10.7326/0003-4819-155-2-201107190-00348

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Inmates will be considered for medical release if they meet one or more of the following criteria:

• The inmate has a terminal illness with a predictably poor prognosis

• The inmate as a seriously debilitating and irreversible mental or physical condition that impairs the inmate's functional ability to the extent that they would be more appropriately managed in a community setting

• The inmate is too ill or cognitively impaired to participate in rehabilitation and/or to be aware of punishment

• The inmate has s disease or condition that requires a complexity of treatment or a level of care that PSD is unable to provide on a long-term basis.

(PSD Policy No. COC.10.1G.11, *approved* December 29, 2014).

B. The HPA's Medical Release Criteria

The HPA's medical release criteria was adopted by administrative rule on August 22, 1992 and has never been updated. It allow for medical release in only two situations: (1) an inmate has a "**seriously debilitating medical condition for which treatment is not available in prison**" or (2**) "a terminal disease wherein competent medical authorities indicate death is imminent**." HAR §23-700-26(c) (1992)(emphasis added).

There is obviously a huge difference between the PSD and HPA's criteria. The PSD criteria is broad and covers situations in which release is in the best interests of the Department and the inmate. The HPA criteria is extremely narrow and virtually impossible to apply in a meaningful and consistent matter.

Both elements of the HPA medical release criteria are badly flawed. First, there are few, if any, medical condition for which "treatment is not available in prison" because PSD uses hospitals and doctors throughout the state to treat inmates, and Hawaii's health care providers are able to treat virtually any condition they encounter. As a practical matter, this criteria is meaningless because it is never applied.

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Second, the "imminent death" standard is meaningless because when death is "imminent" (i.e. "ready to take place", happening soon"[3]) there is not enough time to complete the complex arrangements for medical release. Those arrangements can take weeks or months under the best of circumstances, and include determining appropriate placement for the dying prisoner, getting HPA approval for the placement, obtaining health insurance (usually MedQuest) to cover end of life expenses, completing the paperwork required for admission to a hospital or hospice care (such as completion DHS level of care form 1147, PASSAR forms, advance health care directives, etc.), and arranging for transportation to the new facility.

Further, it is very difficult for doctors to predict when death is imminent[4], and in any event, granting medical release just before the prisoner dies completely negates the compassionate considerations that are the basis for medical release.

III. COMMENTS ON HPA'S PRIOR TESTIMONY ON HB 1972

In oral testimony to the House Judiciary Committee on February 11, 2020, HPA Administrator Tommy Johnson said that after years of delay, the Attorney General has finally drafted administrative rules that would conform the HPA's medical release criteria to PSD's criteria. But as of this moment, the medical release rules posted on the HPA's website are the ones that have been in place since 1992, and the Office of the Lieutenant Governor has not been able to direct me any changes or updates to the HPA's rules. Until the new administrative rules are adopted pursuant to Chapter 91, HRS, they have no force or effect, and there is no guarantee that they will be adopted.

Mr. Johnson also testified that the HPA has authority to grant medical release to prisoners under HAR § 23-700-26(b) HAR which states that the Authority may reduce a minimum sentence if "The Director of the Department of Public Safety submits a written request stating the reasons why the authority should reconsider its previously fixed minimum term."

HAR §23-700-26(b) HAR is a general rule that covers situations not covered by a specific rule, such as the medical release rule, HAR §23-700-26(c). The law is crystal clear that where there is specific language covering a given subject, and general language covering the same matter, **the specific language prevails over the general language**. *State v. Kamana'o*, 188 P.3d 724 (2008)(a specific statute controls over a general statute concerning a common matter). *See also Fourco Glass Co. v. Transmirra Products Corp.,* 353 U.S. 222, 228 (1957)(however inclusive may be the general

[3] Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/imminent

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language of a statute, it will not be held to apply to a matter specifically dealt with in another part of the same enactment).

HAR §23-700-26(b) is a general "catch-all" rule, not a rule governing medical release, and it cannot be applied to medical release cases.

In written testimony before the House Judiciary Committee the HPA said that HB 1972" does not appear to comply with HRS 706-670 ," but it does not explain about how or why it does not comply.

HPA's written testimony states that "clarification regarding the proposed medical release hearings process and timeline are needed" but it does not say what is unclear about the hearing process or timeline, so it is impossible to address their concerns.

And finally, HPA says it opposes HB 1972 "because it is duplicative and unnecessary as it seeks to codify in statute a process that the Department of Public Safety (PSD) and HPA currently has in place. " Nothing could be further from the truth. The current medial release process is fundamentally different from the process set out in HB 1972. and it is difficult to see how anyone could see them as being even remotely similar to or duplicative of the current process.

IV. COMMENTS ON PSD'S PRIOR TESTIMONY AND GOVERNOR IGE'S VETO OF HB 629 ((Thirtieth Legislature 2019)

HB 1972 is identical to HB629 HD2 SD2 (Thirtieth Legislature 2019) which was vetoed by Governor Ige on July 9, 2019 (GM 1374). The stated reason for the veto was:

> A Medical Release Program has been in existence in PSD and HPA policies since December 2014. This bill mandates that PSD and HPA complete certain tasks within short periods of time, but does not provide more funding for more staff. There are also concerns that this bill opens the referral process for medical release to an inmate or an inmate representative, who may or may not be medically trained. The PSD Health Care Division would be required to provide a detailed, comprehensive medical assessment within 20 days of receipt of each referral. (GM 11274, July 9, 2019).

The Governor's veto is apparently linked to PSD's April 3, 2019 testimony before the Senate Judiciary and Ways and Means committees stating that it does not have enough doctors to comply with the reporting requirements of HB629 (and which are part of HB1972), and that it would need "an appropriation of $2.1 million and the addition of 7.0

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FTE (Full Time) professional staffing positions for each year of the fiscal biennium be inserted in order to effectuate the purposes of this bill."

The reporting requirements of SB629 and HB1972 are very simple and **I do not see how they could possibly require additional staff.**

SB1972, like HB629, requires PSD to prepare two brief reports for all inmates seeking medical release and to forward the reports to the Hawaii Paroling Authority within 20 days so that the Authority has a factual basis for its medical release decisions.

The first report is prepared by a PSD physician and must state:

(1) Whether the inmate meets the criteria for medical release and the basis for the opinion;

(2) Each diagnosis that applies to the inmate, the prognosis for each condition, and ***where practicable*** a discussion of the results of any tests, studies, or physical findings that support the diagnosis; and

(3) The nature and extent of the medical treatment that will most likely be required to manage the inmate's condition while incarcerated;

The second report is prepared by the PSD director, or his designee and must discuss:

(A). 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, and the inmate's prison record; and

(B). A medical release plan that provides for continuity of care.

The medical report is very basic. The physician simply has to state whether the inmate meets the criteria for medical release (yes or no) and lists the illnesses or other medical conditions that have been diagnosed, such as diabetes, coronary artery disease, lung cancer, etc., and the prognosis for each condition (excellent, good, fair, poor). The physician only has to provide further information "*if practicable",* and even then, the comments can be very brief. For example, in a case I am presently working on, the inmate has been diagnosed with severe pulmonary fibrosis. In the medical release report the physician might note something like: "patient has hacking cough and

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shortness of breath. CT scan shows diffuse peripheral scarring of both lungs". That's all that is needed.

The question about the nature and extent of the required medical treatment can likewise be very brief. For example, again using the example of pulmonary fibrosis, the physician might say: "patient should be started on pirfedidone, also recommend oxygen therapy three times a week and pulmonary rehabilitation." Or for a diagnosis of kidney failure the comment might be: "patient will probably require hemodialysis within the next 3-6 months." One or two sentences is enough.

The risk assessment can easily be provided by the inmate's counsellor who should be up to date on the inmate's short- and long-term behavior. The assessment could be as brief as:
"This inmate is elderly and wheelchair bound. He is serving a 10-year sentence for various drug offenses. He does not have a history of violence. He has completed the Kashbox program and has a positive outlook."

The medical release plan could be as brief as: "Inmate will be discharged to Leahi Hospital. Medicaid forms have been completed and coverage as soon as inmate is released. Inmate will be released with a two-week supply of meds. Transportation to Leahi will be arranged by the MedQuest insurance carrier."

The information required by SB1972 is far less burdensome than is required by Department of Human Services (DHS) Form 1147 which is used to determine the appropriate level of care for an inmate who is being released to a residential care facility. Exhibit 1 which attached hereto is a true and correct copy of DHS Form 1147 which PSD routinely completes for inmates who have been granted medical release and are transitioning to a care facility. The information required by DHS form 1147 would more than meet the requirements of SB1972.

I do not know how the Paroling Authority can make a rational decision on medical release unless they know the inmate's diagnosis and prognosis. And if that's all that the parole board wants to know, I have no objection to amending HB1972 to limit the medical report to those two items.

Further, if the Hawaii Paroling Authority does not want a report on whether the risk of violence and recidivism, I have no objection to striking that requirement from HB1972.

The goal of HB 1972 is not to create unnecessary work for PSD or the Paroling Authority, but to create a fair, efficient, and transparent process for evaluating medical release requests that will save he state millions in end of live medical expenses, and allow inmates to die with dignity outside of prison.

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Thank you for allowing me to testify on this matter.

Rep. Sylvia Luke, Chair
Rep. Ty Cullen, Vice Chair
Finance Committee
Wednesday, February 19, 2020
2:00 p.m.
Conference Room 308

Re: Support for HB 1972 HD2 Relating to Medical Release

Aloha Chair Luke, Vice Chair Cullen and Committee Members:

My name is Carrie Ann Shirota, and I am writing in strong support of HB 1972 HD2 that creates a medical release program within the Department of Public Safety for certain ill, disabled or impaired inmates who pose a low risk to public safety.

As background, I have past experience as Director for MEO's Reintegration Program on Maui, Public Defender, as a University Counselor working with students with criminal justice histories, and as an person whose family has been impacted by the criminal justice system.

It is undisputed that Hawaii's jails and prisons overcrowded, creating inhumane conditions of confinement and limited opportunities for meaningful rehabilitation. For over twenty years, Hawai'i has earned the dubious distinction of transferring the highest percentage of prisoners to out-of-state prisons. What started as a "temporary solution" has become a standard practice that further disconnects individuals from their families, homes, community and culture, has given rise to bona fide security threat groups (gangs) that had previously not existed, and makes successful reintegration even more difficult.

In order to reduce overcrowding in our jails and prisons and to stop our banishment policies to out-of-state prisons, we must implement Justice Reinvestment strategies at different entry and exit points within the criminal justice system.

As noted in the HCR 85 Task Force Report, we have approximately 650 individuals in Hawai'i confined to prisons that are age 55 years or older. Research proves that this segment of the incarcerated population increasingly experience health problems. **Similarly, research confirms that sick, dying and elderly prisoners are the least likely to re-offend and the most expensive to house.**

This proposed measure would create a procedural process to identify the sick and dying with the support of physicians and other medical professionals with unique expertise to ensure that medical criteria for compassionate release is evidence-based.

The implementation of this bill would serve many goals:
1) reduce the costs associated with incarcerating individuals who are sick and dying and therefore the most expensive to house;
2) contribute to reducing overcrowding in our jails and prisons as one of many strategies to decrease the incarcerated population;
3) reflect our values of aloha and compassion for those sick and dying; and
4)allow the families of incarcerated persons to be able to personally comfort and care for their loved ones who are seriously ill and dying.

Hawai'i Paroling Authority and the Department of Public Safety have repeatedly stated that the current process for medical release works as demonstrated by data. In 2019, PSD submitted twelve (12) requests for medical release to HPA. According to PSD, 92% qualified for and were granted medical release.

Committee Members - I strongly encourage you to QUESTION PSD and HPA's data. Do these numbers demonstrate "success?" Given that we have over 5000 men and women incarcerated in our jails and prisons on any given day, and the many medical and mental health challenges that this population experiences, submitting 12 requests and achieving a 92% medical release rate in a year when our jails and prisons are severely overcrowded is not a success story.

In closing, I trust that you will do the right thing and support HB 1972 HD2. This measure would create a compassionate release process that not only makes fiscal sense, but also reflects our values of compassion for the infirm and dying that transcends time, space, and prison walls.

Thank you for the opportunity to submit testimony.

Sincerely,

Carrie Ann Shirota

Carrie Ann Shirota
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CAMPAIGN FOR COMPASSIONATE RELEASE STATEMENT OF PRINCIPLES

We believe and affirm that All human beings, including those convicted of and imprisoned for crimes, have inherent dignity and value.

A prisoner's family and other loved ones also serve the sentence and suffer emotional, financial, and relational hardship. They deserve compassion and care.

Circumstances sometimes change after a person is sentenced to prison. An unforeseen illness, onset of a disability, or change in one's family situation should prompt reconsideration of whether a person's original prison sentence is still necessary to achieve the purposes of punishment.

Like all human beings, prisoners should have appropriate medical treatment when they are seriously ill or have disabilities. The families of prisoners should be able to personally comfort and care for their incarcerated loved ones who are seriously ill.

Whenever public safety permits it, elderly prisoners and those with physical or mental disabilities that limit their ability to provide self-care in prison should be released to the care of their families or other loved ones. These prisoners are expensive to incarcerate, often pose a low risk to public safety, and have special health care needs that challenge prison management.

States and the federal government lack or under-utilize compassionate release mechanisms that permit prisoners facing old age, physical or mental disabilities, or terminal illness, as well as those facing excessive family hardship or other extraordinary and compelling circumstances, to be considered for and granted early release from prison on those grounds.

HB-1972-HD-2
Submitted on: 2/17/2020 5:54:24 AM
Testimony for FIN on 2/19/2020 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Steven Costa	Individual	Support	No

Comments:

HB-1972-HD-2
Submitted on: 2/17/2020 12:03:27 PM
Testimony for FIN on 2/19/2020 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Lena Mochimaru	Individual	Support	No

Comments:

HB-1972-HD-2
Submitted on: 2/18/2020 8:55:06 AM
Testimony for FIN on 2/19/2020 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
M. Verdine Kong	Individual	Support	No

Comments:

LATE

HB-1972-HD-2
Submitted on: 2/19/2020 12:27:56 PM
Testimony for FIN on 2/19/2020 2:00:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Diana Bethel	Individual	Support	No

Comments:

Aloha Representative Luke, Senator Cullen, and Committee Members,

HB1972 enables an incarcerated person to request medical release and requires the PSD to prepare a medical report on the inmate within 20 days and forward it to the Paroling Authority, upon with the Paroling Authority must give the inmate a hearing within 10 days.

Dept of Public Safety (PSD) must appoint an advocate for any inmate who requests medical release and is unable, due to incapacitation or debilitation, to advocate for themselves.

The released person would be under parole supervision and subject to conditions of release.

This bill would align the Department of Public Safety & Hawai`i Paroling Authority guidelines.

They say that a society can be judged by how it treats its most vulnerable. Compassionate/Medical release is the humane thing to do. Please pass HB1972.

Mahalo for your consideration.

Diana Bethel

Honolulu