

**SECOND INTERIM REPORT OF THE  
HCR 85 TASK FORCE (ON EFFECTIVE  
INCARCERATION POLICIES AND IMPROVING  
HAWAII'S CORRECTIONAL SYSTEM) TO THE  
LEGISLATURE FOR THE REGULAR SESSION  
2018**

**Prepared by the HCR 85 TASK FORCE with editorial assistance by the  
Legislative Reference Bureau**

**STATE OF HAWAII**

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## FOREWORD

House Concurrent Resolution No. 85, House Draft 2, Senate Draft 1 (2016 Legislature), requested the Chief Justice of the Hawaii Supreme Court to establish a task force to study effective incarceration policies and best practices used in other states and countries, and their costs, and to make recommendations to the Legislature on ways to improve Hawaii's correctional system, including recommendations for the design of future correctional facilities. The Task Force's final report, including any proposed legislation, was initially due twenty days prior to the 2018 legislative session, but the Task Force was extended by HCR 157, HD 1 (2017 Legislature), and the final report, with continued findings and proposed legislation, are now due twenty days prior to the convening of the 2019 Regular Session.

In February, 2017, the Task Force issued an Interim Report that provided a broad outline of the direction we think Hawaii's correctional system should take in the coming weeks, months, and years, along with six recommendations to reduce Hawaii's recidivism rate and makes our communities safer:

1. The State should transition from a punitive to a rehabilitative, restorative, and therapeutic correctional system;
2. Hawaii's core values should serve as the foundation for transforming the correctional system;
3. The Norwegian/European correctional model should also guide and inform the transformation of Hawaii's correctional system;
4. The State should establish an academy to educate and train correctional workers at all levels and establish the highest levels of professionalism for correctional workers;
5. The State should establish numerical goals for reducing the prison population and recidivism rates through non-custodial alternatives to incarceration and focused, evidenced based rehabilitative programs for those in prison;
6. The legislature should defer action on a new jail to replace OCCC until the Task Force issues its final report.

While the Task Force continues to study best practices, and develop evidence based recommendations for the 2019 final report, we wish to take this opportunity to expand on some of the themes, ideas, and recommendations contained in our 2017 Interim Report. In this report, we focus on a new vision and guiding principles for Hawaii's judicial and correctional systems, discuss our concerns about the state's plans to build a new, 1255 bed jail, and discuss the need for a Training Academy and a Correctional Oversight and Implementation Commission. The Task Force remains committed to enhancing public safety through a smarter and more humane correctional system that recognizes, as justice advocate Bryan Stevenson has said, "each of us is more than the worst thing we've ever done."

I wish to thank Chief Justice Mark E. Recktenwald for his continued support and counsel, Charlotte Carter-Yamauchi, Devin Choy, Lance Ching, and the staff of the Legislative Reference Bureau for their assistance in preparing this report, retired Judge Michael Town for his sound advice and work in organizing the faith subcommittee, the many people who regularly attend the Task Force Meetings and subcommittee meetings and shared their mana‘o with us, and of course, my most sincere mahalo nui to the members of the HCR 85 Task Force for their dedication and hard work as we search for ways to improve Hawaii's correctional system.

Justice Michael D. Wilson, Chair  
HCR 85 Task Force

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## EXECUTIVE SUMMARY

The single most important recommendation of the HCR 85 Task Force is that Hawaii should transition from a punitive to a rehabilitative, restorative, and therapeutic correctional model. The first step in that transition is to create a new vision for Hawaii's justice system. The Task Force envisions a justice and correctional system that "restores communities and makes them safer, is rooted in our cultural and social values, and promotes wellness, healing and human potential."

The Task Force has also developed principles, goals, and objectives to guide the State in reforming and improving its justice and correctional systems. The guiding principles include: (1) addressing the root causes of crime, not just the symptoms; (2) reaffirming each inmate's inherent humanity and continuity of citizenship despite his or her loss of freedom; and (3) focusing on accountability and rehabilitation instead of retribution.

The goals for the re-envisioned correctional system include: (1) reducing the over-reliance on incarceration as a response to social, economic, and public health issues; (2) eliminating the overrepresentation of native Hawaiians in the criminal justice system; (3) breaking the cycle of intergenerational incarceration; (4) creating a system of rehabilitation grounded in the culture and values of Hawaii; (5) improving community safety by reducing recidivism; and (6) establishing strong and independent oversight to ensure a just and humane correctional system, and effective implementation of legislative initiatives.

As we noted in our 2017 Interim Report, even a few days in jail can increase the likelihood of a prison sentence and promote future criminal behavior – making jail a gateway to deeper and more lasting involvement in the criminal justice system. It is therefore imperative that the state focus on ways to significantly reduce the jail population. This can be done through bail reform (which a separate task force is studying), diversion of low-level, non-violent offenders to community treatment centers, improved pretrial and case processing procedures, non-jail sanctions for some probation and parole violators, eliminating short jail sentences in favor of community based alternatives, and moving mentally ill offenders to facilities where they can be treated by mental health professionals. By utilizing best practices in each of these areas, the State can build a significantly smaller jail than is now being planned, and save hundreds of millions of dollars in construction costs, and millions more in operating and maintenance costs. Building a large new jail like the one now being planned by the Department of Public Safety would be a monumental policy mistake: It would all but guarantee that the poor outcomes and spiraling costs the state is now experiencing will continue for decades to come, and that our communities will not become safer.

Last year the Task Force recommended that the state create an academy to train correctional workers, including probation officers, parole officers, counsellors, and judiciary staff. We believe that the best next step in creating the academy is for the

legislature to create a working group of stakeholders, experts, and community members to flesh out the details of how the academy should be organized, whether it should be independent or attached to a governmental entity, its vision, scope of work, staffing requirements, and projected cost. We envision an academy that, in addition to training, would evaluate correctional programs, conduct research into best practices, and obtain grants to study ways to continually improve our correctional system.

Finally, we recommend that the State create and fund a strong, independent and permanent prison oversight and implementation commission to provide oversight of the correctional system and implement legislative initiatives.

## Chapter 1

### RETHINKING INCARCERATION: A NEW VISION FOR HAWAII'S CORRECTIONAL SYSTEM

Every journey begins with a dream, a vision that can unite others. When people come together around a set of shared values, they can achieve extraordinary things.

- *Nainoa Thompson*

#### **A. Recap: Hawaii's Correctional System Is Not Producing Acceptable, Cost Effective, or Sustainable Outcomes**

In its 2016 Interim Report, the Task Force presented data that clearly shows that Hawaii's correctional system is not producing acceptable, cost effective, or sustainable outcomes, and is not making our community safe.<sup>1</sup>

To briefly recap some of the data:

■ In the past forty years Hawaii's prison population has increased 1,357% and our incarceration rate has increased 841%. These numbers mean that if Hawaii was a country, it would rank in the top 20 incarcerators in the world. We also have 1,500 people on parole and 21,000 people on probation, bringing the total number of people under some type of correctional supervision to 28,000, which is more than the population of Kahului, Maui (pop. 26,000).

■ Our jails and prisons are falling apart and badly overcrowded. Conditions are so bad that the Hawaii chapter of the ACLU has asked the Department of Justice to investigate what it says are violations of the U.S. Constitution and the Civil Rights of Institutionalized Persons Act, 42 U.S.C. § 1997a.

■ The recidivism rate is the real test of a successful correctional system, and by any standard Hawaii fails that test. The average three-year recidivism rate in Hawaii is over 50%. For parolees, the rate is 47.1%, with more than 60% reoffending within the first 12 months, and more than 85% reoffending within 24 months. The recidivism rate for prisoners who serve their maximum term, and thereby avoid parole, is 61.9%. On any given day, we also have close to 300 probation violators locked up at OCCC.

■ Hawaii has 650 inmates who are age 55 or older. These prisoners are a fiscal time bomb because they are beginning to require costly medical care for age related diseases, and the cost of that care will consume large part of the of the prison system's health care budget.

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<sup>1</sup> Interim Report of the HCR 85 Task Force (On Effective Incarceration Policies and Improving Hawaii's Correctional System) To the Legislature For the Regular Session 2017 (hereinafter "2017 Interim Report") p. 1-5.

■ The Department of Public Safety (PSD) is planning a new 1255 bed jail to replace OCCC at a projected cost of up to \$673 million, but it has not given any thought to how we can reduce our jail population.

One important fact that was not in the 2016 Interim Report is that Hawaii is second lowest among all states in per capita spending on corrections,<sup>2</sup> and ranks last among the 50 states in the percentage of justice spending allotted to corrections.<sup>3</sup>

If Hawaii continues on the path it has been on for the past four decades, we can expect the same poor outcomes and high recidivism rates we have experienced in the past, and our communities will not be safer despite the hundreds of millions of dollars we will spend on corrections. The Task Force recommended that Hawaii adopt a new and more sustainable correctional model that will significantly reduce the prison population and recidivism rate, and make our communities safer. The model we briefly described in our prior report focused on rehabilitation rather than punishment:

Prison reform is bringing liberals and conservatives together to an unprecedented consensus that helping prisoners overcome the habits, thinking, impulses, and poor decision-making that landed them in prison stands a far better chance of making a good citizen than a retributive and punitive approach. The transformation from a punitive to a rehabilitative culture based on proven models of combined sanctions and treatment will reduce recidivism and the prison population and significantly reduce the cost of administering Hawaii's criminal justice system.<sup>4</sup>

In the following section, we discuss in greater detail our vision for a more just, humane, and effective correctional system, and the guiding principles that should inform every aspect of the system.

## **B. The New Vision Must Take Account of Hawaii's Colonial History**

Scholars in various disciplines have documented the historical and cultural trauma to Native Hawaiians following contact with the West in the later part of the 18<sup>th</sup> century. Disease decimated the population<sup>5</sup>, the social and economic structures that had supported a vital and

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<sup>2</sup> Diane Schanzenbach, et. al., "Twelve Facts about Incarceration and Prisoner Reentry," The Hamilton Project, (October 2016) available at [http://www.hamiltonproject.org/assets/files/12\\_facts\\_about\\_incarceration\\_prisoner\\_reentry.pdf](http://www.hamiltonproject.org/assets/files/12_facts_about_incarceration_prisoner_reentry.pdf).

<sup>3</sup> Bureau of Justice Statistics, "Justice Expenditures and Employment Extract 2013," available at <https://www.bjs.gov/index.cfm?ty=pbdetail&iid=5239>.

<sup>4</sup> 2017 Interim Report, supra. p. 6.

<sup>5</sup> David Stannard, *Before the Horror: The Population of Hawaii on the Eve of Western Contact*, University of Hawaii Press: Honolulu 1989. See also, "Interview: David Stannard" available at <http://www2.hawaii.edu/~johnb/micro/m130/readings/stannard.html>. Stannard argues that Hawaii had a population of between 800,000 and one million prior to the arrival of Captain Cook in 1778, half of whom were dead 25 years later from syphilis, tuberculosis and other diseases they caught from Cook's crewmembers. A century later, due to subsequent epidemics, there were less than 50,000 Native Hawaiians in the islands. David Swanson, a professor at the University

vibrant Hawaiian culture for centuries broke apart<sup>6</sup>, the Hawaiian language was displaced by English<sup>7</sup>, the Hawaiian religion was displaced by Christianity<sup>8</sup>, foreign laws were introduced<sup>9</sup>, and constitutional provisions that limited the political power of Native Hawaiians and the Hawaiian monarch were forced on the government by an armed militia.<sup>10</sup> At the same time, land tenure underwent radical changes with the Great Mahele, and passage of the Alien Land Ownership Act of 1850, the Kuleana Act of 1850, and the Adverse Possession law of 1870, all of which, in one way or another, facilitated the transfer of land from Native Hawaiians to foreigners.<sup>11</sup>

By 1893 Native Hawaiians had lost much of their land, culture, laws, religion, political power, and language. About all that remained was their sovereignty, and that was taken away on January 17, 1893, when a small group of wealthy businessmen and sugar plantation owners, aided by the U.S. Navy, overthrew the government of Queen Liliuokalani.<sup>12</sup>

Colonialism, oppression, and the loss of sovereignty have had a continuing impact on the Native Hawaiian community. In 2010 the Office of Hawaiian Affairs (OHA) published a three-year collaborative study which showed that Native Hawaiians are overrepresented at every stage

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of California at Riverside, has calculated a much lower pre-contact population (683,000) but estimates that 1 in 7 Hawaiians died within two years of Cooks arrival, by 1800 the native population had declined by 48%, by 1820 it had declined 71%, and by 1840 it had declined 84%. Sara Kehaulani Goo, *After 200 years, Native Hawaiians make a comeback*, Pew Research Center, April 6, 2015, available at <http://www.pewresearch.org/fact-tank/2015/04/06/native-hawaiian-population/>

<sup>6</sup> See generally, Gavin Daws, *The Shoal of Time: A History of the Hawaiian Islands*, University of Hawaii Press, Honolulu: 1974.

<sup>7</sup> Keiki K.C. Kawai‘ae‘a, Alohlani Kaluhiokalani (Kaina) Housman, et. al, Pū‘ā I ka Ōlelo, Ola ka ‘Ohana: Three Generations of Hawaiian Language Revitalization, Hūlili: Multidisciplinary Research on Hawaiian Well-Being, Vol. 4, No. 1 (2007).

<sup>8</sup> Ralph Kuykendall, *The Hawaiian Kingdom*, Vol. 1, University of Hawaii Press (Honolulu: 1938) p. 116 (“By 1840 Hawaii was officially a Christian nation.”).

<sup>9</sup> See e.g. Jane Silverman, *Imposition of a Western Judicial System in the Hawaiian Monarchy*, available at

<https://evols.library.manoa.hawaii.edu/bitstream/handle/10524/197/JL16052.pdf?sequence=2>

See also Penal Code (and) Session Laws, 1850. Kamehameha III, May 3 - Aug. 20, 1850.

<sup>10</sup> Ralph Kuykendall, *The Hawaiian Kingdom*, Vol. 3, University of Hawaii Press (Honolulu: 1938) pp. 347-372. The Constitution of 1887 was called the “Bayonet Constitution” because of the way it was brought into existence. According to Kuykendall, the constitution “reduced the Hawaiians to a position of apparent and, for while, actual inferiority in the political life of the county” and was a “drastic reduction of the powers of the [Hawaiian] sovereign”.

<sup>11</sup> The Hawaiian Kingdom, supra. Note 4, pp. 287-298. See also Jocelyn Garovoy, *Ua Koe Ke Kuleana O Na Kanaka (Integrating Kuleana Rights and Land Trust Priorities in Hawaii)*, 29 Harvard Environmental L. Rev. 523-571 (2005).

<sup>12</sup> See generally *The Hawaiian Kingdom* Vol. 3, note 6 supra, pp. 582-647. See also Liliuokalani, *Hawaii’s Story By Hawaii’s Queen* (annotated ed.), University of Hawaii Press (Honolulu 2014).

of Hawaii's criminal justice system.<sup>13</sup> The disproportionality begins with arrest and accumulates at each stage in the system.<sup>14</sup> Hawaiians make up 24% of the state's population but account for 33% of pretrial detainees, 39% of the prison population, and 41% of parole revocations.<sup>15</sup> Hawaiians receive longer prison sentences than most other racial or ethnic groups, they are more likely to go to prison if they are found guilty of a crime, and they are disproportionately represented in the out-of-state prison population.<sup>16</sup> They serve more time on probation than any other ethnic group except Hispanics, and they make up the largest percentage of people who return to prison for parole violations<sup>17</sup>.

The OHA study cites several probable causes for the overrepresentation of Hawaiians in the criminal justice system, beginning with their marginalization through colonialism and racism and continuing to the present where Hawaiians have disproportionately high levels of childhood trauma and abuse, high unemployment, high underemployment, low educational attainment levels, low income status, and significant involvement in the juvenile justice system.<sup>18</sup>

In 2011 the Legislature created the Native Hawaiian Justice Task Force (NHJTF) to make recommendations on how to address the overrepresentation of Native Hawaiians in the criminal justice system.<sup>19</sup> The NHJTF held hearings throughout the state, and in 2012 issued a report that contained 48 findings, and 38 recommendations ranging from state support for early intervention programs to assist Native Hawaiians, to dozens of changes to the criminal justice and correctional systems.<sup>20</sup>

Only one of the 38 NHJTF recommendation has been implemented, and the State has resisted efforts by the Native Hawaiian Legal Corps to expand religious and culturally based programs and activities for Native Hawaiians incarcerated at private prisons in Arizona. Incredible as it may seem, as of today, Native Hawaiians at the Saguaro Correctional Center in Eloy, Arizona are not allowed to correspond with their families in the Hawaiian language, even though Hawaiian is one of the State's two official languages.<sup>21</sup>

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<sup>13</sup> Office of Hawaiian Affairs (OHA), *The Disparate Treatment of Native Hawaiians in the Criminal Justice System* (2010), available at [http://www.justicepolicy.org/uploads/justicepolicy/documents/10-09\\_exs\\_disparatetreatmentofnativehawaiians\\_rd-ac.pdf](http://www.justicepolicy.org/uploads/justicepolicy/documents/10-09_exs_disparatetreatmentofnativehawaiians_rd-ac.pdf)

<sup>14</sup> *Id.* p. 10

<sup>15</sup> *Id.* p. 11

<sup>16</sup> *Id.* p. 14

<sup>17</sup> *Id.*

<sup>18</sup> OHA *supra*. fn. 7 p. 65-67.

<sup>19</sup> Act 170, Session Laws of Hawaii 2011.

<sup>20</sup> NHJTF Report 2012, available at

[http://lrbhawaii.info/reports/legreports/oha/2013/act170\\_slh11.pdf](http://lrbhawaii.info/reports/legreports/oha/2013/act170_slh11.pdf)

<sup>21</sup> Corrections Corporation of American (now known as CoreCivic) Correspondence Procedures, Section G (1)(g) (Saguaro Correctional Center February 1, 2010); See also Complaint, Arthur

The 2010 OHA study found that to reduce the harmful effects of the criminal justice system on Native Hawaiians, and all other people, Hawaii must:

[T]ake action, and seek alternative solutions to prison. Assistance and training is needed in law enforcement, holistic interventions need to be implemented and evaluated, ***and a cultural shift in the way we imprison a person must change.*** If not, we will exacerbate prison over-crowding, and continue to foster the incarceration of generations to come.<sup>22</sup>

The HCR 85 Task Force fully supports the above recommendation and strongly recommends that Hawaii adopts a new vision for corrections and repatriates traditional Hawaiian cultural practices that can restore harmony with ‘ohana, community, akua, and ‘āina.<sup>23</sup> Only by supporting intrapersonal healing can we successfully reintegrate pa’ahao (prisoners) and break the intergenerational cycle of incarceration.

### C. The Vision Statement

*Mālama kō aloha* (Keep Your Aloha  
no matter what the obstacles)

Task Force members, led by the Native Hawaiian subcommittee, spent many hours looking at correctional models and best practices from other states and countries, reflecting on our island heritage and values, and bringing together our disparate experience to create a shared vision of the future. The vision statement that emerged from this collective effort encompasses goals for the correctional system and the broader society.

**Vision Statement:** A justice system that restores communities and makes them safer, is rooted in our cultural and social values, and promotes wellness, healing and human potential.

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Vinhaca v. The Department of Public Safety, et. al., Civil No. 16-1-1063, First Cir. Ct. State of Hawaii, filed June 2, 2016. Regarding Hawaii’s official languages, see Haw. Const. art. I, § 4].

<sup>22</sup> OHA Study, fn. 9 supra. at \_\_\_.

<sup>23</sup> On the issue of repatriating traditional Hawaiian cultural practices, see Lezlie Kī‘aha, “Thinking Outside the Bars: Using Hawaiian traditions and Culturally-Based Healing to Eliminate Racial Disparities Within Hawaii’s Criminal Justice System”, 2 Asian Pacific Law & Policy J., Vol. 17, Issue 2 (date?). Anita Hurlburt, a student at the University of Hawaii’s William S. Richardson School of Law has written an excellent paper on how humane, evidence based rehabilitation principles of the Norwegian correctional system can be applied in Hawaii. See Anita Hurlburt, “Building Constructive Prison Reform on Five Pillars Supported by Aloha,” (Law Thesis, William S. Richardson School of Law, 2017).

## **Commentary on The Vision Statement:**

A. The justice system should not just administer laws and maintain order, its policies should focus on building, strengthening, and repairing communities and making them safer.

B. Every aspect of the justice system – both courts and corrections - should grow out of and reflect the values of the people of Hawaii.

C. The justice system should be a framework for promoting social progress. Such progress is achieved by recognizing and promoting the value of every member of society, including those who have committed crimes.

### **C. Guiding Principles, Goals, and Objectives**

The Task Force has developed a set of principles, goals, and objectives to guide the state in reforming and improving its justice and correctional systems.

**Guiding Principle 1.** Our justice system should focus on the causes of crime, not just on the symptoms. Among the many causes of crime in our community are poverty, unemployment, underemployment, racism, lack of affordable housing, substandard housing, lack of education, mental illness, broken families, and childhood trauma, abuse and neglect which lead to drug and alcohol abuse.

**A. Overarching Goal:** Reduce over-reliance on incarceration as a response to social, economic, and public health issues.

**i. Objective:** Create and expand programs that divert low-level offenders to community based treatment programs. Reduce prison admissions by using incarceration as a last resort, and only when necessary to protect public safety.

**ii. Objective:** Reduce the imprisoned population at every possible opportunity by reevaluating, restructuring, and expanding early release and compassionate release programs.

**B. Overarching Goal:** Eliminate the overrepresentation of Native Hawaiians in the criminal justice and correctional system.

**C. Overarching Goal:** Break the cycle of intergenerational incarceration by providing support for children of incarcerated parents and intervention programs that target at risk youth.

## **Commentary on Guiding Principle 1.**

A. As we focus on prison reform we should not lose sight of the fact that the best way to make our communities safer is to prevent crime from happening in the first place. To do that, we need to eliminate the causes of crime in our communities.

B. Jails and prisons tend to produce poor outcomes. They may be necessary, but they should be used only as a last resort and for the shortest time possible. Reducing the prison population should be a top priority with clearly stated and achievable goals.

C. Despite numerous studies and reports on the over-representation and disparate treatment of Native Hawaiians in the criminal justice and correctional systems,<sup>24</sup> few, if any, steps have been taken to address this problem. A concerted strategy should be developed, funded and implemented without further delay.

D. Children of incarcerated parents are an extremely vulnerable group. Having a parent in prison or jail has been linked to a greater incidence of poor health, attention deficit disorder (ADD), attention deficit hyperactivity disorder (ADHD), behavioral problems, learning disabilities, anxiety, and developmental delays.<sup>25</sup> To protect our children it is imperative that we break the cycle of intergenerational incarceration.

**Guiding Principle 2.** Our justice system must reaffirm each inmate's inherent humanity and continuity of citizenship despite his or her loss of freedom.

**A. Overarching Goal:** Create a system of rehabilitation grounded in the culture and values of Hawaii.

**i. Objective:** Provide corrections officers with comprehensive training that reinforces their purpose to positively motivate change and promote inmate well-being, healing and rehabilitation.

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<sup>24</sup> As we have previously noted, the overrepresentation of Native Hawaiians in the criminal justice system has been the subject of studies, reports, action plans, conferences and task force reports for the last 35 plus years. See 2017 Interim Report, *supra*. p. 3, fn. 19.

<sup>25</sup> Kristin Turney, "Stress Proliferation Across Generations? Examining the Relationship Between Parental Incarceration and Childhood Health," *Journal of Health and Social Behavior*, Vol. 55, No.3 (2014): 302-19. See also Bryan Sykes, et. al., "How Mass Incarceration Hurts Children," U.S. News and World Report, (August 16, 2014) available at <https://www.usnews.com/news/articles/2014/08/15/study-children-pay-the-price-of-a-parents-incarceration-with-their-health>

**ii. Objective:** Support continuity in relationships between inmates and their families by providing services and spaces to heal and improve relationships with primary support networks.

**iii. Objective:** Provide culture-based and culturally competent programming

### **Commentary on Guiding Principle 2.**

A. Loss of freedom should be the only punishment for those who go to prison. Prisoners should retain all other rights of citizenship, including the right to vote. Conditions in prison should not be punitive; they should resemble life on the outside to the greatest extent possible, and the focus of the correctional system should be on rehabilitation.

B. Correctional staff should receive extensive training on rehabilitative philosophy, programs, practices and should serve as role models, mentors, and counselors for inmates.

C. Contact with family and friends is important for social reintegration of prisoners.<sup>26</sup> Prison administrators should encourage communication with the outside world. Prisoners' contacts should be an entitlement, not a privilege, and should not be used as a reward or punishment.

**Guiding Principle 3.** Our justice system should focus on accountability and rehabilitation instead of retribution.

**A. Overarching Goal:** Promote community safety by reducing recidivism

**i. Objective:** Adopt the “Normality Principle”, which states that Life inside prison should resemble life in the community to the greatest extent possible. The loss of freedom should be the only punishment, and no prisoner should serve a sentence under a higher security regime than is necessary.

**ii. Objective:** Adopt the “Import Model”. Partner with community service providers, medical, educational, and faith-based resources to support prison operations, programs, rehabilitation, and reentry.

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<sup>26</sup> Minnesota Department of Corrections, “The Effects of Prison Visitation on Offender Recidivism” (November 2011) [https://mn.gov/doc/assets/11-11MNPrisonVisitationStudy\\_tcm1089-272781.pdf](https://mn.gov/doc/assets/11-11MNPrisonVisitationStudy_tcm1089-272781.pdf)

**iii. Objective:** Ensure stable community reintegration by providing comprehensive post-release services.

**iv. Objective:** Adopt “Dynamic Security” Model. The best security is based on close and frequent interaction between staff and inmates.

**B. Overarching Goal:** Establish strong, thorough, and independent oversight to ensure effective implementation of Task Force initiatives and continued progress in perpetuity.

### **Commentary on Guiding Principle 3:**

A. The logic of the normality principle is that the smaller the difference between life inside and outside of prison, the easier the transition from prison to freedom.<sup>27</sup> Normality is also consistent with the principle that loss of freedom is the only punishment. The normality principle recognizes obvious exceptions for security and control that are necessary in institutions like prisons.

B. The import model supports normality in that the agencies that provide services to people outside of prison also provide them to those on the inside.<sup>28</sup> Importing medical, educational, social and other services from the community is an efficient model and ensures that prisoners receive the same quality of services as those who are not in prison.

C. Comprehensive post-release services should include decent housing, employment, education, medical care, and mental health and addiction services, if needed.

D. Dynamic security means that correctional interact closely with inmates and serve as counselors, mentors, role models, and life coaches.<sup>29</sup> For extended commentary on oversight see Chapter 5, *infra*.

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<sup>27</sup> Norwegian Ministry of Justice and the Police, “Punishment that works –less crime – a safer society, Report to the Storting on the Norwegian Correctional Services” (English summary) (October, 2008) p. 5 (referring to the normality principle as “the lodestar for penal implementation policy”).

<sup>28</sup> About the Norwegian Correctional Service, “Kriminalomsorgen, Information in English,” available at <http://www.kriminalomsorgen.no/information-in-english.265199.no.html>

<sup>29</sup> Ole Stageberg, “Dynamic Security, Four Forms of Offender Rehabilitation: Towards an Interdisciplinary Model,” Latvia Final Conference (December 14, 2016) available at [http://www.probacija.lv/upload/norway\\_grants/LV08\\_prezentacijas/Ole\\_Stageberg\\_Dynamic\\_security.pdf](http://www.probacija.lv/upload/norway_grants/LV08_prezentacijas/Ole_Stageberg_Dynamic_security.pdf). See also Dashka Slater, “North Dakota’s Norway Experiment,” Mother Jones, (July/August 2017).

#### **D. The Task Force's Vision, Principles, Goals, and Objective Are Consistent with The European Prison Rules**

Although the Task Force's vision, principles, goals and objectives were developed independently and without consulting international standards, the Task Force's recommendations are similar to the Basic Principles of the European Prison Rules.<sup>30</sup>

1. All persons deprived of their liberty shall be treated with respect for their human rights.
2. Persons deprived of their liberty retain all rights that are not lawfully taken away by the decision sentencing them or remanding them in custody.
3. Restrictions placed on persons deprived of their liberty shall be the minimum necessary and proportionate to the legitimate objective for which they are imposed.
4. Prison conditions that infringe prisoners' human rights are not justified by lack of resources.
5. Life in prison shall approximate as closely as possible the positive aspects of life in the community.
6. All detention shall be managed so as to facilitate the reintegration into free society of persons who have been deprived of their liberty.
7. Co-operation with outside social services and as far as possible the involvement of civil society in prison life shall be encouraged.
8. Prison staff carry out an important public service and their recruitment, training and conditions of work shall enable them to maintain high standards in their care of prisoners.
9. All prisons shall be subject to regular government inspection and independent monitoring.

Our vision statement, guiding principles, overarching goals and objectives provide a sound foundation for a more just, humane, effective, and sustainable correctional system. Adopting these core principles is, in our view, the first step in reforming our correctional system,

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<sup>30</sup> European Prison Rules (January 11, 2006), available at <https://rm.coe.int/european-prison-rules-978-92-871-5982-3/16806ab9ae>

reducing recidivism and making our communities safer.

**HAWAII DOES NOT NEED A NEW 1255 BED JAIL. WITH BAIL REFORM, DIVERSION, AND IMPROVED PRETRIAL PROCEDRES WE CAN BUILD A MUCH SMALLER AND MORE SUSTAINABLE JAIL THAT WILL ENHANCE REHABILITATION AND MAKE OUR COMMUNITES SAFER**

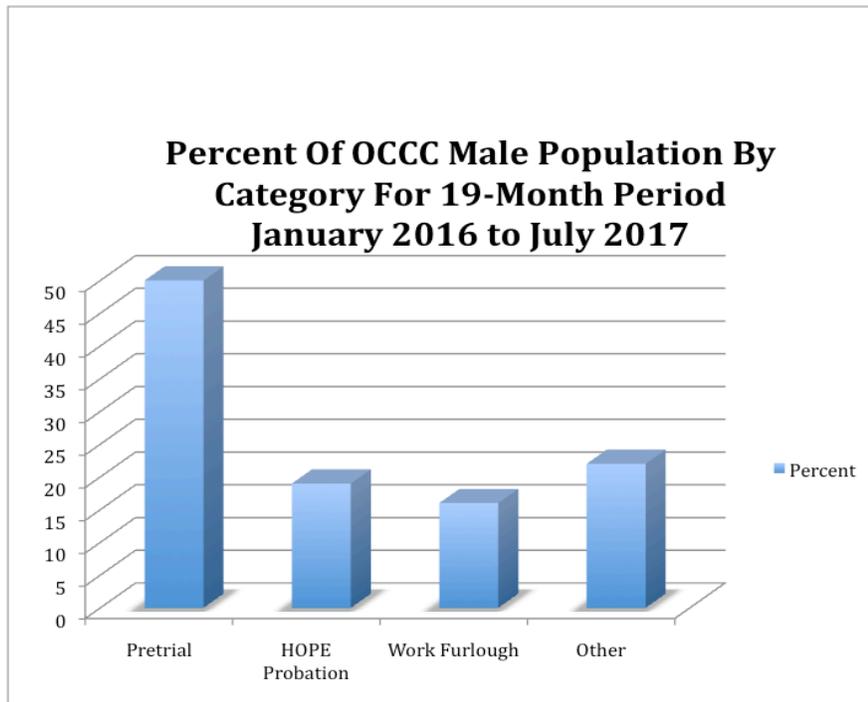
We can't solve problems by using the same kind of thinking we used when we created them.

- *Albert Einstein*

**A. The Difference Between Jails and Prisons**

It is important to understand the difference between jails and prisons. Prisons are secure facilities that typically house people who have been convicted of a felony and are serving a sentence of more than one year. Jails, in contrast, do not house long-term prisoners. They house: (1) pretrial detainees, i.e. people who are presumed innocent and awaiting trial; (2) probation violators; (3) convicted persons serving sentences of one year or less; and (4) those who have a year or less on their prison sentence and are preparing to re-enter society (including those on work furlough).

On Average, for the past 19 months (all of 2016 plus the first 7 months of 2017) 50% of the male inmate population at OCCC have been pretrial detainees.<sup>31</sup> They are the largest category of the jail population by far:



<sup>31</sup> Department of Public Safety Monthly Population Reports, available at <http://dps.hawaii.gov/about/divisions/corrections/>

## B. PSD's Plans for A New Jail to Replace OCCC

The Departments of Public Safety (PSD) and Accounting and General Services (DAGS) and their consultants<sup>32</sup> are moving ahead with its plans to build a 1255 bed jail to replace OCCC.<sup>33</sup> The new jail is intended to house men only.<sup>34</sup> The roughly 170 women currently housed at OCCC will be reassigned to the Women's Community Correctional Center (WCCC) in Kailua, which will be expanded to accommodate them.<sup>35</sup> Current plans also call for the 96-bed Laumaka Work Furlough Center to continue to operate at its present location on Kamehameha Highway.<sup>36</sup> Cost projections for the new jail range from a high of \$673 million to a low of \$433 million depending on the site and layout.<sup>37</sup>

One of the most important elements of the jail planning process is the inmate population forecast which attempts to project the number of beds that the new facility will need at a specified time in the future. PSD is using a 10-year population forecast (to FY 2026) because that is near the time when the new facility is expected to open.<sup>38</sup>

PSD's forecast divides the jail population into two categories: *detention inmates* – those who have been charged with a crime and are “still going through the court process” (typically awaiting trial), and *pre-release inmates* – those who are near the end of a lengthier sentence and are transitioning from prison back to the community.<sup>39</sup> PSD forecasts a *declining detention population* ending with 959 inmates in FY 2026.<sup>40</sup> The pre-release forecast is for 296 inmates in FY 2026, bringing the total projected jail population in FY 2026 to 1255 (959 + 296).<sup>41</sup>

The basic steps in PSD's forecasting were to: (1) Calculate a three-year trend based on the actual OCCC population; (2) Subtract the work furlough inmates at Laumaka based on the assumption that they will remain in Kalihi; (3) Factor in the growth of the City and County of Honolulu; (4) Add a “peaking factor” of 2.5 percent to account for population fluctuations; and

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<sup>32</sup> The consultants include Architects Hawaii, Ltd., Louis Berger U.S., Integrus Architecture, Criminal Justice Planning Services, Communications Pacific, Cumming, PBR Hawaii, and Nemark Grubb CBI. See *Planning for the Future of the Oahu Community Correctional Center, Progress Report to the Hawaii State Legislature*, February 1, 2017 (Hereinafter “PSD Progress Report”) p. ii.

<sup>33</sup> Id. p. 2.

<sup>34</sup> Ibid.

<sup>35</sup> Ibid, p. 6. See also *Future of the Oahu Community Correctional Center, Vol. 9, Progress Report Delivered to State Legislature, March 2017*, p. 2, available at OCCC-Newsletter\_Vol9\_MARCH-2017.pdf

<sup>36</sup> PSD Progress Report, supra. fn. 13, p. 2.

<sup>37</sup> Ibid p. 4.

<sup>38</sup> Ibid. Appendix A, p. 1.

<sup>39</sup> Id.

<sup>40</sup> Ibid. fn. 11 supra.

<sup>41</sup> Ibid. Appendix A, p. 2.

(5) Calculate the potential effect of the early release legislation adopted in 2016 (House Bill 2391, 2016 legislative session).<sup>42</sup>

PSD and its consultants did not explore ways to reduce the jail population between now and 2026 when the new jail is expected to open. Its forecast assumes that there will be no new policy or program changes in the next 10 year that would cause a decline in the jail population.<sup>43</sup>

### **C. The Impact of Criminal Justice Policies on Jail Population**

Jail populations are determined, in large part, by criminal justice policies. Policies that favor incarceration drive jail populations up; policies that favor alternatives to incarceration drive populations down. The policies that have the greatest effect on jail population include: the presence or absence of diversion programs for non-violent, low-level offenders; bail policies and procedures that affect the release of pretrial detainees; the validity of the pretrial risk assessment instruments that are being used to make pretrial release decisions; how efficiently paperwork is processed; the use of drug, mental health, and veterans courts; prosecutorial policies; probation violation policies; the extent to which citations instead of arrest are used for low level offences; the extent to which judges impose sentences of one year or less; and policing policies. A clear understanding of the policies that drive the jail population up or down is absolutely critical to good jail planning.

### **D. The First Question Any Community Contemplating A New Jail Should Ask Is Not How Big It Should It Be, But How Small Can We Make It**

The goal of every community should be to reduce its reliance on jails and develop policies and procedures that drive jail populations down. This is important because it is now well established that jails are the gateway to a greater involvement in the criminal justice system:

Just a few days in jail can increase the likelihood of a sentence of incarceration and the harshness of that sentence, reduce economic viability, promote future criminal behavior, and worsen the health of those who enter—making jail a gateway to deeper and more lasting involvement in the criminal justice system at considerable costs to the people involved and to society at large. These costs are also borne by their families and communities, depressing economies, contributing to increased crime, and breaking familial and social bonds. For the disproportionately high number of those who enter jails from minority communities, or who suffer from mental illness, addiction, and homelessness, time spent in jail exacerbates already difficult conditions and puts many on a cycle of incarceration from which it is extremely difficult to break free.<sup>44</sup>

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<sup>42</sup> Ibid. Appendix A, p. 6.

<sup>43</sup> PSD recommends, however, that the population forecast be updated annually to, *inter. alia*, account for policy changes that could produce an excess or insufficiency of beds. See PSD Progress Report, *supra*. fn. 13, Appendix A, p. 17.

Because jails have such harmful effects and produce poor outcomes, the most important question a community can ask when planning a jail, is not “how it need to be”, but “*how small can we make it*”.<sup>45</sup> Answering that question must engage the whole community, which is why virtually every jurisdiction that is considering a new jail brings together stakeholders and interested parties in a collaborative process to address the conditions that are driving jail populations up. Community engagement in the planning process is not merely a national trend, it is common sense best practice that is almost universally followed. It is the first thing a community contemplating a new jail must do, and the experience of the MacArthur Safety and Justice Challenge illustrates how it is done.

#### **E. The MacArthur Safety and Justice Challenge: A Case Study on How Communities Collaborate to Reduce Their Jail Populations**

Reducing jail populations is such an important public policy issue nationwide that the influential John D. and Katherine T. MacArthur Foundation has made it one of their highest priorities. In 2015 the foundation announced a five-year \$75 million initiative to change the way America thinks about and uses jails. The initiative is designed to support states, cities and counties that want to create smarter and more effective justice systems that improve public safety, save taxpayer money, and lead to better social outcomes. In announcing the initiative, MacArthur President Julia Stasch said:

Jails are where our nation’s incarceration problem begins; there are nearly 12 million jail admissions every year, and jails too often serve as warehouses for those too poor to post bail, nonviolent offenders, or people with mental illness. With this substantial, long-term commitment and investment, MacArthur hopes to support and demonstrate alternatives to incarceration as usual, and to create demand and momentum for change across the country.<sup>46</sup>

The core of the MacArthur initiative is a competition called the Safety And Justice Challenge through which the Foundation has channeled millions of dollars to communities that have demonstrated a commitment to reducing their reliance on jails and create improved justice systems through innovative, collaborative, and evidence-based solutions.

After a highly competitive selection process that drew applications from nearly 200 jurisdictions in 45 states and territories (Hawaii was not one of them) the Foundation chose twenty jurisdictions for initial grants to develop jail reform plans. Out of the twenty

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<sup>44</sup> Ram Subramanian, et. al., “Incarceration’s Front Door: The Misuse of Jails in America,” Vera Institute of Justice, February 2015, available at <http://www.safetyandjusticechallenge.org/wp-content/uploads/2015/01/incarcerations-front-door-report.pdf>

<sup>45</sup> Ken Ricci interviewed by Alice Hagen, August 26, 2008.

<sup>46</sup> MacArthur Launches \$75M Initiative to Reduce America’s Use of Jails. The MacArthur Foundation, February 10, 2018, available at <https://www.macfound.org/press/press-releases/macarthur-launches-75m-initiative-reduce-americas-use-jails/>

jurisdictions that received initial grants, the Foundation selected 11 jurisdictions for grants of between \$1.5 to \$3.5 million to reduce their jail populations and address racial and ethnic disparities in their justice systems.

The 11 jurisdictions that received grants of between 1.5 to \$3.5 million were selected, in part, because they placed strong emphasis on “community engagement and collaboration with local law enforcement, corrections officials, prosecutors, defenders, judges, and other stakeholders” and developed an expansive array of alternatives to incarceration. For example, Philadelphia, Pennsylvania, developed a range of strategies to reduce jail admissions by creating alternatives to cash bail, reducing case processing time, increasing pretrial releases, developing non-incarceration sanctions for parole violators, and improving access to defense counsel. It also initiated a program to divert first-time, low level, offenders with treatment needs to a community based site for clinical assessment and referral. Philadelphia also plans to develop and validate a new risk assessment tool for use in pre-trial decision-making.

The plan in Milwaukee, Wisconsin, is somewhat different. It calls for expansion of the county’s mental health diversion program and a new post-booking mental health stabilization program to remove people with mental health issue from jail and connect them with services within 48 hours. For those who continuously cycle through the criminal justice system on public nuisance offenses, a new strategy was developed to foster improved information-sharing, prompt and effective interventions, and minimum use of jail. Milwaukee has also started work on a system-wide trauma-informed response to justice system involvement, including diversion and sentencing options initiated by the county prosecutor.

New Orleans, Louisiana, is reducing its jail population by expanding the use of summons in lieu of arrest; deploying a newly trained Crisis Intervention Team to increase pre-booking diversion of people with mental health or substance abuse problems; and instituting a variety of measures to increase pretrial release, such as new risk-based decision-making protocols, strengthening defense representation at first appearance hearings, initiating a new round of bond review hearings for any person detained after seven days, and implementing implicit bias training for criminal justice employees.

All of the proposals funded by the MacArthur Foundation had two things in common: (1) They focused on the conditions within the community that are driving up jail admissions; and (2) The jail reduction strategies were developed in a collaborative manner by a wide range of stakeholders. For example, the successful Milwaukee proposal was developed by a planning group that was comprised of nearly 50 stakeholders from the city, the county, the federal government, and private organizations including the Urban League, the Legal Aid Society, the NAACP, and the Milwaukee Area Workforce Investment Board. Exhibits 2 and 3 provide a brief description of the 11 successful proposals and the government entities and community groups that partnered to develop the proposals.

One of the lessons of the MacArthur Safety and Justice Challenge is that there are many ways for a community to reduce its jail population. The main thing is for communities to understand that reducing their jail populations is a smart strategy for improving public safety, saving taxpayers money, and creating better social outcomes:

Potential solutions to the nation’s over reliance on jails include policing and arrest practices, using citations in lieu of arrests, risk and needs assessments, improved case processing, problem solving courts, specialty dockets, pretrial diversion, jail programming and case management services, sentencing to alternatives to jail, deferred prosecution, violation response matrices, transitional housing programs, and reentry programming to decrease the odds that exiting inmates will reoffend and return to jail. *It is essential that these reforms are implemented in accordance with a strategic planning process for system-wide change.* (emphasis added).<sup>47</sup>

## **F. Strategies to Significantly Reduce Honolulu’s Jail Population**

### **1. Bail Reform**

HCR 134, Regular Session 2017, calls on the judiciary to convene a task force to recommend ways to improve Hawaii’s criminal pretrial practices and procedures in ways that will maximize the pretrial release of those who do not pose a danger to society or a flight risk, and to define” best practices metrics to measure the relative effectiveness of the criminal pretrial system.” Chief Justice Recktenwald appointed First Circuit Judge Rom A. Trader to chair the task force.

We cannot predict what the HCR 134 Task Force will recommend, but we are confident that it will propose alternatives to money bail, at least for indigent defendants who do not pose a danger to society and are not a flight risk. This is significant because, as shown in the chart on page \_\_, approximately half of the male inmates at OCCC are pretrial detainees. PSD does not have data on why these inmates are being held at the jail, but we do know that approximately 70% of the total OCCC population is classified as either minimum or community custody (the two lowest classifications) and that over 80% of the total OCCC population are charged with a class C felony or below (i.e. a misdemeanor, petty misdemeanor, violation, or technical offense).<sup>48</sup> This data strongly suggests that the vast majority of pretrial detainees are charged with relatively low-level offenses, have low level security classifications, and could be safely released into the community to await trial. The fact that they remain in jail is most likely because they cannot make bail, they are awaiting a court hearing date on bail reduction, or they are waiting for assessments or paperwork to be completed so they can be released on their own recognizance or on supervised release.

It costs \$152 per day to house a prisoner at OCCC<sup>49</sup>. In the first seven months of this year there were, on average, 497 male pretrial detainees at the jail.<sup>50</sup> Those detainees cost the

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<sup>47</sup> Lindsey Cramer, Cybele Kotonias, “Reducing Reliance on Local Jails”, The Urban Institute White Paper (February 2014): 4. available at [http://www.safetyandjusticechallenge.org/wp-content/uploads/2015/05/Reducing-Reliance-Local-Jails\\_Urban\\_Commissioned\\_2014.pdf](http://www.safetyandjusticechallenge.org/wp-content/uploads/2015/05/Reducing-Reliance-Local-Jails_Urban_Commissioned_2014.pdf)

<sup>48</sup> Data provided by George King, PSD statistician, September 5, 2017.

<sup>49</sup> George King, PSD statistician, email to Robert Merce, September 11, 2017.

<sup>50</sup> PSD End of Month Population Reports, January-July 2017, available at <http://dps.hawaii.gov/about/divisions/corrections/>

State \$75,533 *per day* (\$152/day x 497 inmates). If 95 percent, or 472 of the 497 pretrial detainees were released through bail reform, there would only be, on average, 23 pretrial detainees at the jail, and the cost of housing the OCCC pretrial population would go from \$75,553 a day to \$38,000 a day, a savings of \$71,753 per day.

Reducing the number of pretrial detainees by 95 percent would also reduce the projected population of the new jail by almost half<sup>51</sup> and presumably reduce the number of beds needed by about half, thereby saving the state hundreds of millions in construction costs, not to mention hundreds of millions more in savings from reduced maintenance and operating costs over the life of the new jail.

## 2. The HOPE Probation Program

As of July 31, 2017, there were 234 male HOPE probation violators at OCCC.<sup>52</sup> HOPE is a program started by former First Circuit Judge Steven Alm in 2004. It seeks to reduce the recidivism rates of high-risk probationers through the use of swift, certain, and proportional sanctions for any violation of the conditions of probations.<sup>53</sup>

Probationers enrolled in HOPE are subject to frequent, random drug testing. A positive drug test results in jail time, which could be as short as a few hours or days, or as long as a month, depending on the nature of the violation and the circumstances.

The initial evaluation of Hawaii's HOPE program in 2009 showed positive results.<sup>54</sup> HOPE participants had large reductions in positive drug tests and missed appointments, and were significantly less likely to be arrested during follow-up at 3 months, 6 months, and 12 months. They averaged approximately the same number of days in jail for probation violations, serving more but shorter terms. They spent about one-third as many days in prison on revocations or new convictions. A follow-up study published in 2016 showed positive results in terms of reducing drug use, but there was no statistical difference between the control and experimental group in terms of new charges for violent and property crimes and crimes of social disorder.<sup>55</sup>

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<sup>51</sup> The average male inmate population at OCCC for 2016 and the first seven months of 2017 was 1192, including 196 work furlough inmates, who would not be housed at the new jail. If we subtract the work furlough inmates, the OCCC male population has averaged around 996 inmates, of which 497 or 48 percent were pretrial detainees. If bail reform reduced the pretrial population by 95 percent, the state would presumably realize roughly a 47 percent savings on the construction, operation, and long-term maintenance costs.

<sup>52</sup> Email, George King, PSD statistician, to Robert Merce, September 11, 2017.

<sup>53</sup> State of the Art of Hope Probation, Institute for Behavior and Health, Inc., 2015, available at <http://hopehawaii.net/assets/state-of-the-art-of-hope-probation-w-c.pdf>

<sup>54</sup> Angela Hawken and Mark Kleiman, "Managing Drug Involved Probationers with Swift and Certain Sanctions: Evaluating Hawaii's HOPE," Washington, D.C., National Institute of Justice, (2009).

<sup>55</sup> Angela Hawken, et. al., "HOPE II: A Follow up Evaluation of Hawaii's HOPE Probation," National Institute of Justice, Washington, D.C. (2016).

After its initial success in Hawaii, Hope spread to many jurisdictions on the mainland. Evaluations of the mainland programs, for the most part, were negative.<sup>56</sup> They showed little difference between those in “swift and certain” (SAC) programs, and those in probation-as usual (PAS) programs.

The most successful program on the mainland was in Washington State where a large number of offenders were followed for one year. The SAC participants showed a consistent pattern of reduced crime, but “the differences between the SAC group and the supervision-as-usual control group were small.”<sup>57</sup> Additionally, the SAC group received cognitive behavior therapy, and it’s possible that the differences in reconvictions could be attributable to the therapy rather than to the punitive-based deterrent effect of SAC. [fn. Cullen].

Evaluation of programs following the HOPE model in Delaware Arkansas, Massachusetts, Oregon, and Texas reported no better recidivism outcomes for HOPE than for probation as usual. [fn. Cullen].

The main criticisms of the HOPE model are: (1) it has not been shown to produce long-term behavioral changes; (2) there is no persuasive body of evidence that complying with supervision conditions is associated with lower recidivism rates; and (3) HOPE punishes, but punishment does not address the main factors related to criminogenic behavior. A recent essay, summarizing the failings of HOPE put it this way:

We believe that the future for Project HOPE is hopeless—that, eventually, the weak findings in support of the program effectiveness and the unpleasantness of administering zero-tolerance supervision will lead to its demise. HOPE seems to be a correctional anachronism, better suited for the ideologically driven punitive era that the United States is leaving behind than for the emergent evidence-based era emphasizing offender rehabilitation and redemption that we are moving toward. Regardless, the future of HOPE ultimately lies in the data. At present, the evaluation research shows that this intervention has weak-to-null effects. Until subsequent evaluations yield an opposite set of findings, Project HOPE should be shelved.<sup>58</sup>

Several Task Force members have expressed concerns about the HOPE program because those who fail to comply with the terms of probation and are given an “open” prison term followed by probation, which, in some cases, can result in some offenders being under some form of correctional supervision for many years.

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<sup>56</sup> Francis Cullen, Travis Pratt, Jillian Turanovic, “The Failure of Swift-and-Certain Supervision: Choosing A More Hopeful Future,” *Perspectives* (American Probation and Parole Association), Vol. 41 (September, 2017): 66-78.

<sup>57</sup> Id.

<sup>58</sup> Francis Cullen, Travis Pratt, Jillian Turanovic, “It’s Hopeless, Beyond Zero Tolerance Supervision”, *Criminology & Public Policy*, Volume 15, Issue 4 (2015).

The bottom line is that the HOPE Probation program continues to have staunch supporters, and staunch critics. The Task Force's concern is that HOPE probation violators constitute a large part of the jail population, and if the state builds a new jail, it will have to build at least 234 beds *just for the HOPE population*. We are also concerned that it costs around \$36,000 a day to house the 234 HOPE violators at OCCC (and presumably that much or more at a new jail). The Task Force questions whether it is necessary and cost effective, to put probation violators in jail. We recommend using minimum security, non-jail, sanctions for HOPE parole violators. We also note that the Halawa Correctional Center has around 476 parole violators. We recommend building at least 150 minimum security, non-jail beds that the Hawaii Paroling Authority use as an alternative to incarcerating low risk parole violators.

### 3. The LEAD Program

Hawaii is in the process of starting a jail diversion pilot program in Chinatown based on the highly successful LEAD (Law Enforcement Assisted Diversion) program that was started in the Seattle area in 2011. The pilot project is popular with residents and has received unanimous support from the Downtown/Chinatown Neighborhood Board.

LEAD gives law enforcement officers discretion to redirect low-level, non-violent offenders to community-based services instead of jail and prosecution. Evaluations of the Seattle's LEAD program show that participants were 58% less likely to be arrested after enrollment<sup>59</sup>, and were significantly more likely than the control group to obtain housing, employment and legitimate income in any given month subsequent to their LEAD referral.<sup>60</sup> LEAD has been established or is under consideration in more than forty jurisdictions across the continental United States and has proven to be effective in offering individual case management services that are non-coercive and non-punitive.<sup>61</sup>

About half of OCCC's inmates are charged with misdemeanors or lower offenses, i.e. petty misdemeanors, technical offenses, or violations.<sup>62</sup> LEAD will divert these individuals so they will not even enter the criminal justice system and therefore will not be admitted to the jail.

LEAD has strong leadership and broad community support. There is every reason to believe that it will be a success and will expand to in many neighborhoods on Oahu and

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<sup>59</sup> Susan Collins, Heatehr Lonczak, Seema Clifasefi, "LEAD Program Evaluation: Recidivism Report," University of Washington-Harborview Medical Center, March 27, 2015, available at [http://static1.1.sqspcdn.com/static/f/1185392/26121870/1428513375150/LEAD\\_EVALUATION\\_4-7-15.pdf?token=%2Bi5gSTSMLYUHZVNP24kWLcKUU%3D](http://static1.1.sqspcdn.com/static/f/1185392/26121870/1428513375150/LEAD_EVALUATION_4-7-15.pdf?token=%2Bi5gSTSMLYUHZVNP24kWLcKUU%3D).

<sup>60</sup> Seema Clifasefi, Heather Lonczak, Susan Collins, "LEAD Program Evaluation: The Impact of LEAD on Housing, Employment and Income/Benefits," University of Washington-Harborview Medical Center, March 31, 2016, available at [http://static1.1.sqspcdn.com/static/f/1185392/27047605/1464389327667/housing\\_employment\\_evaluation\\_final.PDF?token=8NZ6qBZXtM1rfoxDAfSIADxr7LI%3D](http://static1.1.sqspcdn.com/static/f/1185392/27047605/1464389327667/housing_employment_evaluation_final.PDF?token=8NZ6qBZXtM1rfoxDAfSIADxr7LI%3D)

<sup>61</sup> LEAD National Support Bureau, available at <https://www.leadbureau.org>

<sup>62</sup> Data provide by George King, PSD statistician. See fn 27 infra.

significantly reduce the number of beds needed for any new jail. It is worth noting that after hearing a presentation on LEAD, Police Chiefs on other islands expressed an interest in establishing LEAD on their islands.

#### 4. The Jail Population Can Be Reduced Further by Improved Pretrial Procedures and Case Processing

A critical factor in reducing jail populations is reducing the length of stay (LOS) for those who are admitted to jail. The Justice Reinvestment-Hawaii Initiative (JRI) studied case processing in Hawaii and found that between 2006 and 2011 the average length of stay for felons released on their own recognizance (ROR) increased from 38 days to 59 days, and the average length of stay for felons who received supervised release (SR) increased from 84 days to 102 days.<sup>63</sup>

##### FY 2006 Releases

	<u>Average LOS</u>
■ Bail (33%) .....	31 days
■ ROR (8%) .....	31 days
■ Supv Rel (34%) .....	84 days

##### FY 2011 Releases

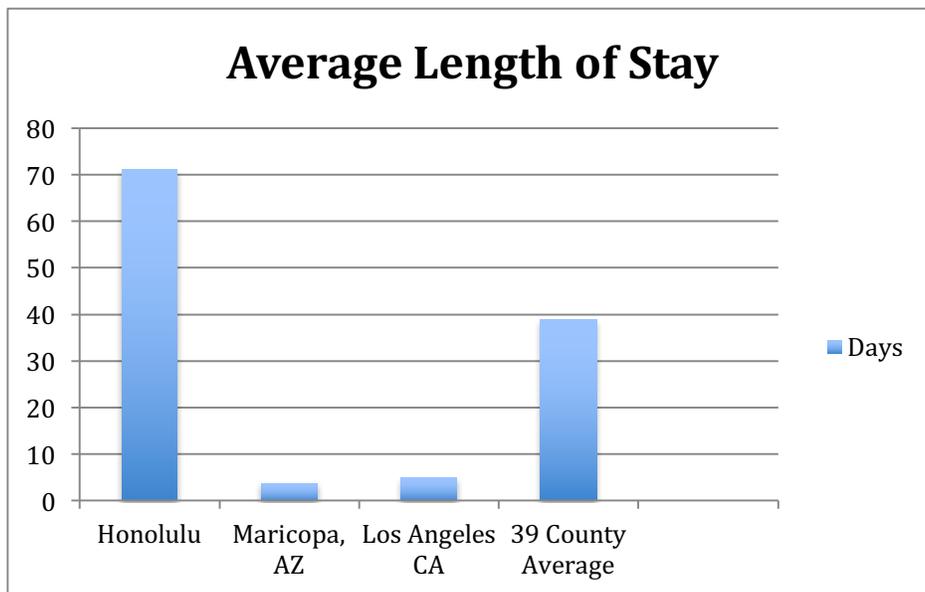
■ Bail (33%) .....	31 days
■ ROR (8%) .....	59 days
■ Supv Rel (34%) .....	102 days

They also found that the length of stay for Honolulu county compared unfavorably with other counties. A 2008 study comparing data on 39 large U.S. counties, found that Honolulu had *the longest average length of stay in jail for those ultimately released during the pretrial stage*. Of the 39 counties, 32 were able to release defendants under non-financial conditions in 15 days or fewer, but Honolulu’s average length of stay for the same type of defendants was 71 days.<sup>64</sup>

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<sup>63</sup> Justice Reinvestment in Hawaii, “Analysis and Policy Options to Reduce Spending on Corrections & Reinvest in Strategies to Increase Public Safety,” August 2014, p. 4, available at <https://csgjusticecenter.org/wp-content/uploads/2014/08/JR-in-HI-Analyses-and-Policy-Options.pdf>. See also Marshall Clement, Andy Barbee, Robert Coombs, “Justice Reinvestment in Hawaii, Analyses & Policy Framework,” pp. 7-8, January 17, 2012, available at [https://csgjusticecenter.org/wp-content/uploads/2012/12/JR\\_HI\\_Policy\\_Rollout\\_Handout.pdf](https://csgjusticecenter.org/wp-content/uploads/2012/12/JR_HI_Policy_Rollout_Handout.pdf)

<sup>64</sup> Id.



Source: *Justice Reinvestment in Hawaii*, August 2014

JRI recommended, among other things, that Hawaii require the use of an objective risk assessment tool to inform pretrial detention and release decisions and that it conduct risk assessments within three days of admission to jail.<sup>65</sup> [JRI Aug. 2014]. These recommendations were enacted into law in 2012 (See HRS §353-10) and were expected to reduce the length of stay at OCCC by identifying low risk individuals who could be released quickly.

In May, 2017, the Task Force’s Program subcommittee met via Skype with Bree Derrick, Program Director of the Council of State Governments whose analysts built the data collection platform for Hawai’i’s Justice Reinvestment Initiative. In preparation for the meeting Ms. Derrick obtained data from PSD which shows that between December 2011 and December 2016 the pretrial population for Honolulu increased by 8 percent. The data also showed that the prisoners who were released on their own recognizance or on supervised release, spent almost twice as many days in jail as those released on bail or bond:

<u>Type of Release</u>	<u>Percent</u>	<u>Days To Release</u>
■ Bail/Bond	48%	38 Days
■ ROR	16%	85 Days
■ Supervised Release	37%	97 Days

Ms. Derrick did not speculate on why the pretrial population was increasing, but she mentioned that JRI had some concern that Hawai’i’s risk assessment instrument tended to put an unusually high number of inmates in the “high risk” category. She also noted that the instrument had a number of “overrides” that could be affecting risk levels. She recommended taking a hard look at the risk assessment instrument to find out whether it is contributing to the increase in

<sup>65</sup> Justice Reinvestment in Hawaii, “Analysis and Policy Options” supra. fn. 41

pretrial detainees, and more particularly, whether “overrides” were also contributing to the problem.

The Task Force concurs with those recommendations and also recommends that the state undertake a concerted effort to significantly reduce the length of stay at OCCC. Improving case processing and expediting releases will significantly contribute to reducing the jail populations.

## **5. Eliminate Short Sentences in Favor of Community Based Alternatives**

A growing body of research suggests that even short-term incarceration may increase the likelihood of future criminal justice involvement, especially for individuals who pose a low risk of re-arrest.<sup>66</sup> Currently, a little more than half of the misdemeanants at OCCC are serving a sentence of one year or less.<sup>67</sup> Assuming the same percentage for petty misdemeanants and violators, we estimate that there are approximately 115 male inmates at OCCC serving sentences of a year or less. Sentencing two-thirds, or 75, of those low and very low-level offenders to community based program instead of incarceration would reduce the jail population significantly and reduce the likelihood of reoffending.

Reducing the use of short jail sentences can be an effective public safety strategy. The State should expand the availability of evidence-based alternatives to longer jail sentences and use risk and need assessments instruments to match defendants with appropriate programs.

## **6. The Mentally Ill Should Not Be Housed In Jails**

Nationwide, well over half of all jail inmates have symptoms of a serious mental illness<sup>68</sup>, and there is no reason to believe that the percentage is any lower in Hawaii.<sup>69</sup> When Task Force members visited OCCC in November, 2015, there were 97 prisoners in the mental health and combined mental health/medical modules. Hand lettered signs over two of the cells read “Jane Doe” indicating that neither the police nor prison officials had been able to identify the occupants, one of whom was dancing about wildly while pulling on her hair. The other Jane Doe was lying on the floor of the cell in what appeared to be a catatonic state.

Anyone who has spent time with the mentally ill knows that they suffer from their disease as much as patients with physical illnesses:

Untreated or undertreated, mentally ill prisoners suffer painful symptoms. They rant and rave, babble incoherently or huddle silently in their cells. They talk to invisible companions and live in worlds constructed of hallucinations. They lash

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<sup>66</sup> See “Incarceration’s Front Door,” fn. 23 supra. p. 5

<sup>67</sup> Data from George King, PSD statistician, fn. \_ supra.

<sup>68</sup> Bureau of Justice Statistics, “Study Finds That More Than Half of All Jail and Prison Inmates Have Mental Health Problems,” September 6, 2006, available at <https://www.bjs.gov/content/pub/press/mhppjipr.cfm>

<sup>69</sup> See 2017 Interim Report, supra. fn. \_\_, p. 17 (72 percent of inmates who came through the Honolulu police cellblock in 2016 were mentally ill or under the influence of drugs.

out without provocation and often refuse to obey orders. They beat their heads against cell walls, cover themselves with feces, and self-mutilate until their bodies are riddled with scars. Many attempt suicide; some succeed.<sup>70</sup> [

When correctional officers are in charge of the mentally ill, things often go wrong. Nothing illustrates this better than the findings of the U.S. Department of Justice team that conducted an on-site inspection of OCCC in 2005.<sup>71</sup> They found, among other things that OCCC staff:

- Subjected detainees with mental illness to harmful methods of isolation, seclusion, and restraint.
- Used psychotropic medications as punishment.
- Used a practice it called “therapeutic lockdown” (“TLD”) to punish detainees by putting them in solitary confinement and denying them contact with mental health staff.
- Failed to assess and monitor suicide watch detainees in a timely manner. While in isolation and on suicide watch, detainees do not have sufficient contact with security and mental health staff to provide constitutionally-required care.
- Failed to provide detainees with constitutionally adequate mental health treatment or therapy programs and services.
- Failed to provide detainees adequate discharge services, increasing the likelihood of detainees being re-incarcerated.
- Failed to adequately assess detainee’s mental health needs or to provide them with adequate or needed treatment, therapies or services.
- Lacked adequate clinical leadership or organizational structures

These deplorable acts and conditions, which existed for years, were eventually addressed, but they illustrate the danger of putting mental care in the hands of correctional officials. Moreover, we note that PSD has recently terminated several mental health professionals, at least one of whom has suggested that conditions at OCCC are reverting to their previously

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<sup>70</sup> Jamie Fellner and Sasha Abramsky, “Prison’s No Place for The Mentally Ill”, Human Rights Watch, February 13, 2004, available at <https://www.hrw.org/legacy/english/docs/2004/02/13/usdom7467.htm>

<sup>71</sup> Letter, Wan J. Kim, Assistant Attorney General to Hon. Linda Lingle, March 14, 2007, available at [https://www.justice.gov/sites/default/files/crt/legacy/2010/12/15/oahu\\_center\\_findlet\\_3-14-07.pdf](https://www.justice.gov/sites/default/files/crt/legacy/2010/12/15/oahu_center_findlet_3-14-07.pdf)

unconstitutional state.<sup>72</sup> These allegations coincide with serious allegations about the lack of mental health services made by the Hawaii chapter of the ACLU in its complaint the U.S. Department Justice.<sup>73</sup>

The Vera Institute of Justice has noted that the prevalence of people with mental illness in jail is at odds with the design, operation, and resources in most jails.

Characterized by constant noise, bright lights, an ever-changing population, and an atmosphere of threat and violence, most jails are unlikely to offer any respite for people with mental illness. According to the latest available data, 83% of jail inmates with mental illness did not receive mental health care after admission. The lack of treatment in a chaotic environment contributes to a worsening state of illness and is a major reason why those with mental illness in jail are more likely to be placed in solitary confinement, either as punishment for breaking rules or for their own protection since they are also more likely to be victimized.

While most people with serious mental illness in jails, both men and women, enter jail charged with minor, nonviolent crimes, they end up staying in jail for longer periods of time. In Los Angeles, for example, Vera found that users of the Department of Mental Health's services on average spent more than twice as much time in custody than did the general custodial population--43 days and 18 days respectively.<sup>74</sup>

The Task Force strongly recommends that the mentally ill should not be placed in jails. They should be placed in a facility that is specifically designed to house the mentally ill, staffed by mental health professionals, and is not part of PSD.

### **G. PSD Has Not Engaged the Community in the Jail Planning Process In a Meaningful Way**

The first chapter of PSD and DAG's Progress Report to the 2016 Legislature on the new jail states that the two departments have worked with their consulting team to determine "the vision for the future of OCCC, the nature, scale, capacity and key features of the proposed facility, and the topics of importance and issues of concern regarding the future of OCCC."<sup>75</sup> That statement perfectly captures the problem with the planning process: Every important element of the jail was decided by PSD, DAGS and the Consulting Team - the Community was not involved at all. A project designed in this way has little chance of success because complex projects such as jails that impact many parts of the community must be developed in an open and

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<sup>72</sup> Lynn Kawano, "State Fires execs at OCCC as Jail's Care for Mentally Ill Declines," Hawaii News Now (July 6, 2017), available at <http://www.hawaiinewsnow.com/story/35829104/we-rocked-the-boat-state-fires-execs-at-occc-as-jails-care-for-mentally-ill-inmates-declines>.

<sup>73</sup> Letter, Mateo Caballero, ACLU Hawaii Legal Director to Vanita Gupta and Steven Rosenbaum, United States Department of Justice, January 6, 2017.

<sup>74</sup> Incarceration's Front Door, supra. fn. 23.

<sup>75</sup> PSD Progress Report, supra. fn. \_ p. 1.

collaborative manner that involves a wide range of community stakeholders. We made this point in our 2016 Interim Report.<sup>76</sup> It is so important that the basic principles are worth repeating. Here is what the authorities say about the importance of having a collaborative jail planning process:

■ Successful jurisdictions use a collaborative approach to planning that includes representation of all actors in the criminal justice system and the community including advocates, judges, administrators, legislators, prosecutors, the defense bar, correctional officers, program operators, and community members. The "buy in" from key stakeholders is *absolutely essential*.

■ Community participation in planning is important because the jail belongs to the community it serves; it is not solely the concern of the sheriff or director of corrections. The type of facility a community builds and the way it is used are as much a reflection of community values as they are of local, state, and federal laws. It is common for stakeholders such as victim advocates, business leaders, the clergy, educators, and elected officials to actively participate on the community advisory committee. Stakeholders who have overall responsibility for the jail, such as county [or state] commissioners and the sheriff should also be represented on the community advisory committee.

■ Affected groups must be on board to advance the new way of doing business, and to move forward despite barriers and setbacks. Engaging the community, the workforce, and other interested groups doesn't happen on its own. As motivation for change starts to build, conversations can begin with affected parties. Transparency and genuine opportunities for input by constituent's support engagement.

PSD has held a series of informational meeting in the community that include an opportunity for input and comments, but that is not collaboration:

Collaboration is working together toward a common purpose--sharing a vision, preparing a plan, and implementing the plan to achieve outcomes. It is standing behind that plan as a singular group when outcomes are not realized, regrouping and trying something anew. Collaboration means sharing the burden, the responsibility, and the consequences together as a system. One of the main defining characteristics that make the eight local criminal justice systems qualitatively different from many others throughout the country is their ability to collaborate at a systemic level--to put the greater good of the system and the principles of justice before all else with individual stakeholders adjusting policy and practice to support the overall vision.<sup>77</sup>

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<sup>76</sup> 2017 Interim Report, supra. note \_\_\_\_, pp. 19-21.

<sup>77</sup> Id. p. 20.

## **H. Designing Justice – Creating More Humane and Rehabilitative Jails**

*Basic human needs shape behavior. If a person's needs are not met, he or she is likely to break rules in order to fulfill those needs.*

*- Inmate Behavior Management Principles*

Although PDS's 2016 Report to the Legislature says that it has already determined "the vision, nature, scale, capacity, and key features of the new jail, they have not made that information public, except for capacity (1255 beds). The following are some important design issues that should be considered for any new jail:

### **■ Vision Statement**

A large percentage of the jail population is comprised of citizens who have not been convicted of a crime and are presumed innocent. They should not be treated as criminal because they are not criminals, and the design and operation of the new jail should reflect that fact. The jail design should be non-punitive and should respect the dignity of every person admitted to the facility. The vision, goals and objectives of the jail, as for all justice institutions, should be as stated in the Task Force's Vision Statement (see p. \_\_, *infra.*).

### **■ Capacity**

As noted above, the State should establish and expand "off ramps" such as LEAD to reduce the needed capacity for any new jail. The anticipated jail population should also be reduced by bail reform, better risk assessment instruments, improved case management, faster paperwork processing, reducing the HOPE probation population, shorter sentences, and moving the mentally ill to an appropriate non-carceral setting for treatment.

### **■ Clustered Housing and Direct Supervision**

Clustered housing refers to a design in which single cells of similarly classified inmates are arranged around central living area used for dining, case management, programs, and recreation.<sup>78</sup>

Direct supervision refers to a management/architectural design in which a corrections officer is stationed in the inmate housing area.<sup>79</sup> Clustered housing with direct supervision provides improved sightlines for officers and offers more options for

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<sup>78</sup> Independent Commission On New York City Criminal Justice and Incarceration Reform, "A More Just New York" (2017), p. 17, available at <http://www.ncsc.org/~media/C056A0513F0C4D34B779E875CBD2472B.ashx>

<sup>79</sup> *Id.*

managing the behavior of those in custody. By reducing the physical barriers between staff and inmates, direct supervision facilitates constant interaction, helping staff to strengthen communication with inmates and identify problems before they escalate. If properly implemented, this model can significantly reduce violence and costs.<sup>80</sup>

Direct supervision is now recognized a “best practice” by professional associations and accrediting organizations in corrections and has been shown to reduce violence and lower costs.<sup>81</sup>

### ■ Site Selection

How should the jail relate to the broader community? Should it be built in an isolated location to satisfy the NIMBY mentality? Or can a well-designed jail benefit the community of which it is a part?

New York city is exploring ways to reconnect jails to the urban environment and provide economic opportunities to nearby business such as markets, restaurants, and retail shops that can appeal to the many people who frequent the jail, such as lawyers, doctors, teachers, clergy, volunteers, service providers, members of the parole board, administrators, guards, social workers, police, sheriffs, and the families of prisoners.<sup>82</sup>

## I. Conclusion

PSD and DAGS have spent millions on the preliminary design and site selection for a new jail, but they have not focused on the most important elements of jail planning which are: (1) engaging the community in a meaningful way; (2) finding ways to reduce the jail population; and (3) designing a jail that meets the needs of the community and reflects its core values. Unless PSD, DAGS and their consultants change course quickly, we have no doubt that the new jail will have a flashy modern look, but will amount to nothing more than a repackaging of all the problems and bad ideas of the old jail, and like the old jail, it will create bad outcomes for the next half century or more.

There are many ways to reduce the jail population by focusing on various categories of inmates. Here is one example that reduces the jail population to less than 200 by FY 2026:

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<sup>80</sup> Richard Wener, “Effectiveness of the Direct Supervision System of Correctional Management, A Review of the Literature,” *Criminal Justice and Behavior*, Vol. 33, No. 3, June 2006, 392-410 available at [https://www.prearesourcecenter.org/sites/default/files/library/effectivenessofthedirectsupervision\\_systemofcorrectionaldesignandmanagementareviewofthe.pdf](https://www.prearesourcecenter.org/sites/default/files/library/effectivenessofthedirectsupervision_systemofcorrectionaldesignandmanagementareviewofthe.pdf)

<sup>81</sup> Id. at 1

<sup>82</sup> A More Just New York, fn. 56 supra.

Current OCCC Male Population .....	979
(Excluding Work Furlough Inmates)	
Reduction of 95% of pretrial detainees through bail reform and more efficient case processing <sup>83</sup> .....	- 472
<b>Subtotal</b>	<b>507</b>
Reduction through non-jail sanctions for HOPE probation violators .....	- 234
<b>Subtotal</b>	<b>273</b>
Reduction by housing mentally ill detainees in a forensic mental facility not operated by PSD .....	- 50
<b>Subtotal</b>	<b>223</b>
Reduction by using community based Alternatives to short sentences <sup>84</sup> .....	- 75
<b>Subtotal</b>	<b>148</b>
10 percent reduction based on PSD forecast of declining male inmate population <sup>85</sup> .....	- 15
Number of Bed Needed for New Jail in FY 2026 .....	<b>133</b>

Expanded LEAD diversion, fully implementing Justice Reinvestment recommendations, reducing jail length of stay, streamlining the pretrial process, expediting paperwork, and greater reliance on community based alternatives to incarceration would reduce the jail population even further.

A much smaller jail would save hundreds of millions in capital costs, millions more in annual operating costs, and would produce better outcomes such as a lower recidivism rate and a smaller prison population (which would save additional millions).

If a 1255 bed jail costs \$673 million (PSD’s highest projected cost), the cost per bed would be \$536,000. If the cost of the new jail is \$433 million (PSD’s lowest projected cost), the cost per bed would be \$345,000. The savings from building a 187-bed jail compared to a 1255 bed jail are shown on the following page.

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<sup>83</sup> This assumes that 5% of the current pretrial population would be denied release because they are deemed to be dangerous or a flight risk.

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<sup>85</sup> PSD forecasts a 10% reduction by FY 2026, from 1057 to 959. *2016 Progress Report*, Appendix A, p. 1.

■ **IF THE COST PER BED IS \$536,000**

1255 Bed Jail at \$536,000/bed	\$673 million
133 Bed Jail at \$536,000/bed	<u>\$ 71 million</u>
<b>SAVINGS</b>	<b>\$602 million</b>

■ **IF THE COST PER BED IS \$345,000**

1255 Bed Jail at \$345,000/bed	\$433 million
133 Bed Jail at \$345,000/bed	<u>\$ 45 million</u>
<b>SAVINGS</b>	<b>\$388 million</b>

## Chapter 3

### THE LEGISLATURE SHOULD CREATE AND FUND AN INDEPENDENT CORRECTIONAL OVERSIGHT AND IMPLEMENTATION COMMISSION

*The door is locked against the prisoner and he goes to live in a hidden world. If you were to enter that world you should be startled by what you see.*

- Justice Anthony Kennedy

#### A. Oversight

##### 1. **Independent Oversight Is Essential Because Jails and Prisons Are Closed Institutions and Are Not Subject to The Public Scrutiny That Applies to Most Other Institutions**

Jails and Prisons are closed institutions.<sup>86</sup> They are separated from the rest of society by massive walls or fences topped with concertina wire. Entry is limited to those who have been sent there by the courts and visitors who have been vetted and approved by prison administrators. Visitors have little contact with prisoners, and prisoners have little contact with visitors or the outside world. Visiting hours are limited. Telephone calls are limited. Reading material is limited. Mail is opened and read by prison officials. Cameras are not allowed. Society knows little about what happens behind prison walls. In a speech to the American Bar Association Justice Anthony Kennedy said that prisoners live “in a hidden world”.<sup>87</sup> Justice William Brennan called it “a shadow world . . . that few of us can imagine”.<sup>88</sup>

The closed nature of jails and prisons is precisely what makes oversight so important. Michelle Deitch, one of the nation’s leading expert in prison oversight, explains it this way:

Prisons and jails are closed institutions, both literally and symbolically, and they operate far away from public view. In such closed environments, abuse is more likely to occur and less likely to be discovered. Staff members and inmates with malicious intent often find they can act with impunity, while those with more benign objectives may find their plans thwarted by a lack of resources or an institutional culture that is unsupportive of their efforts or content with the status quo. Insular environments tend to put prisoners at risk of abuse, neglect, and poor conditions, and the lack of outside scrutiny provides no challenge to this treatment.<sup>89</sup>

For most of the country’s history, courts took a “hands off” approach to prison conditions

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<sup>86</sup> Michele Deitch & Michael B. Mushlin, “Let the Sunshine In: The ABA and Prison Oversight, in the State of Criminal Justice” 243 (2011), <http://digitalcommons.pace.edu/lawfaculty/983/>.

<sup>87</sup> Justice Anthony Kennedy, Remarks to the American Bar Association, (April 9, 2003).

<sup>88</sup> O’Lone v. Estate of Shabazz, 482 U. S. 342, 354-44 (1987) (Brennan, 1., dissenting).

<sup>89</sup> Michele Deitch, “The Need for Independent Prison Oversight in a Post-PLRA World,” Federal Sentencing Reporter, Vol. 24, No. 4, (2012) pp. 236-244.

and refused to hear the claims of prisoners, even when they were alleging serious violations of their constitutional rights. That changed in 1974 with *Wolff v. McDonnell* which held that “a prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime. There is no iron curtain drawn between the Constitution and the prisons of this country.”<sup>90</sup>

*Wolff* held sway for a time, but its influence gradually diminished as the Supreme Court and Congress limited the role of the judiciary in addressing prison conditions. One of the biggest setbacks to judicial oversight was the Prison Litigation Reform Act of 1995 (PLRA).<sup>91</sup> The PLRA limits the use of injunctive relief in prison cases, requires prisoners to exhaust administrative remedies and grievance appeals before filing suit, and limits the award of attorneys’ fees against the government when prisoners prevail in litigation.

Despite the PLRA, federal courts still play an important role in protecting prisoners’ rights, but experts caution that reliance on the courts for oversight would be a serious mistake because judges can only remedy problems once a constitutional violation is found; they are not in a position to prevent problems in the first place.<sup>92</sup>

## **B. The Basic Elements of Effective Oversight**

The idea behind oversight is that if prisons are to function as decent, safe and humane institutions, they must be transparent in their operation and accountable for the protection of prisoners.<sup>93</sup> The goal of effective oversight is, therefore, to ensure transparency and accountability.

One of the landmark documents in prison oversight is the American Bar Association’s (ABA’s) 2006 resolution calling on federal, state, and local governments to establish “public entities, independent of any correctional agency, to regularly monitor and publicly report on conditions in prisons, jails, and other correctional and detention facilities . . . in their jurisdictions.”<sup>94</sup> The resolution sets out the “key requirements” for effective oversight:

- Monitoring entities must be adequately funded and staffed;
- The head of the monitoring entity must be appointed for a fixed term by an elected official, confirmed by a legislative body, and be subject to removal only for cause;

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<sup>90</sup> *Wolff v. McDonald*, 418 U.S. 539, 555-556 (1974).

<sup>91</sup> 42 U.S.C. § 1997e

<sup>92</sup> Michael Mushlin and Michele Deitch, “Opening Up a Closed World: What Constitutes Effective Prison Oversight” 30 *Pace L. Rev.* 1383 (2010).

<sup>93</sup> *Id.*

<sup>94</sup> Criminal Justice Section of the American Bar Association, Report to the House of Delegates, (August 2008), available at

[https://www.americanbar.org/content/dam/aba/publishing/criminal\\_justice\\_section\\_newsletter/crimjust\\_policy\\_am08104b.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_policy_am08104b.authcheckdam.pdf)

- Correctional and other governmental officials must be required to cooperate fully and promptly with the monitoring entity;
- The monitoring entity must have broad and unhindered access correctional facilities, personnel, inmates, and records bearing on the facility's operations and conditions.
- Procedures must be in place to enable facility administrators, line staff, inmates, and others to communicate confidentially with the monitoring entity about the facility, and adequate safeguards must be established to protect those who communicate with the monitoring entity from retaliation or threats of retaliation for those comments.
- The reports disseminated by a monitoring entity should review and assess a facility's policies, processes, programs, and practices objectively and accurately.
- The monitoring entity's reports must be readily available to the public, including accessibility through the Internet, and must also be disseminated to the media, the legislature, and the jurisdiction's top elected officials.
- To guard against the risk that monitoring reports become meaningless pieces of paper, largely ignored by correctional officials, the following steps should be taken:
  - Facility administrators should be required to respond publicly to the reports and to develop and implement in a timely way action plans to correct identified problems;
  - Facility administrators should report to the public twice a year, recounting the progress that has been made in implementing the action plan;
  - There must be an administrative entity with the authority to enforce the above requirements so that problems identified in a monitoring report are addressed and resolved with dispatch;
  - Until a problem highlighted in a monitoring report is resolved, the monitoring entity should continue to assess and report on the problem and the progress made in solving it.

In 2010 the ABA House of Delegates approved the *ABA Standards on the Treatment of Prisoners*.<sup>95</sup> Standard 23-11.3 which, among other things, calls for an independent monitoring

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<sup>95</sup> American Bar Association (ABA) Standards for Criminal Justice, Third Edition, ABA Criminal Justice Standards Committee (2010-2011), available at

agency in each jurisdiction to “anticipate and detect systemic problems affecting prisoners, monitor issues of continuing concern, identify best practices within facilities, and make recommendations for improvement.”<sup>96</sup> The agencies should have authority to:

- (I) Examine every part of every correctional facility;
- (ii) Visit every correctional facility without prior notice;
- (iii) Conduct confidential interviews with prisoners and staff;
- (iv) Review all records, except that special procedures may be implemented for highly confidential information.<sup>97</sup>

ABA Standard 23-11.3 also states that correctional agencies should be required to respond in a public document to the findings of the monitoring agency, develop an action plan to address identified problems, and periodically document compliance with recommendations or explain noncompliance. The monitoring agency should continue to assess and report on previously identified problems and the progress made in resolving them until the problems are resolved.<sup>98</sup>

As the ABA standards indicate, there are many elements to effective oversight including inspection, regulation, investigation, reporting, and monitoring. The goal in all cases is transparency and accountability, both of which are important in all governmental endeavors, but particularly important, even critical, where an all-powerful institution has total control over the lives and well-being of citizens.<sup>99</sup> And while effective oversight is important for all prisoners, its importance is even greater when it comes to protecting the most vulnerable individuals in the prison system: prisoners in administrative segregation, subject to sexual assault, those with physical and mental disabilities, elderly prisoners, and prisoners with special medical needs.<sup>100</sup>

### **C. The Need for Independent Oversight in Hawaii**

The Office of the Ombudsman is authorized to investigate inmate complaints and recommend steps to resolve them. In FY 2015-2016 the Ombudsman received 2,706 complaints, of which 1,706, or 63%, were against the Department of Public Safety.<sup>101</sup> The Ombudsman declined 933 of the complaints, 96 were discontinued, 69 were assisted, 73 were substantiated,

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[https://www.americanbar.org/content/dam/aba/publications/criminal\\_justice\\_standards/Treatment\\_of\\_Prisoners.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/Treatment_of_Prisoners.authcheckdam.pdf)

<sup>96</sup> Id.

<sup>97</sup> Id. at \_\_\_

<sup>98</sup> Id. at \_\_\_

<sup>99</sup> Michele Deitch, “Special Populations and the Importance of Prison Oversight,” *American Journal of Criminal Law*, Vol. 37, Number 3 ( Summer 2010).

<sup>100</sup> See Special Populations and the Importance of Prison Oversight, fn. 72 supra.

<sup>101</sup> Office of the Ombudsman for the State of Hawaii, Report No. 47, (March 2017), p. 23, available at <https://ombudsman.hawaii.gov/wp-content/uploads/2013/08/Report-47-for-Internet2.pdf>

457 were not substantiated, and 78 were pending at the end of the report period.<sup>102</sup>

Despite its many good works, the Office of the Ombudsman is not a substitute for an independent correctional oversight commission. It is not specifically focused on correctional matters, it generally responds to complaints rather than exercising oversight and initiating investigations, and it is generally required to “maintain secrecy in respect to all matters and the identities of the complainants or witnesses” coming before it.<sup>103</sup>

Although independent oversight is a correctional “best practice” and as such should be an integral part of any correctional system, there have been public reports in the past two years that support our recommendation for strong, independent oversight, including the following:

■ **September 2017.** On September 30, 2017, three OCCC correctional officers were attacked by about 18 inmates who were angry and frustrated over long periods of lockdown due to staffing shortages. A veteran OCCC sergeant who asked to remain anonymous for fear of retaliation told Hawaii News Now “I’ve been involved now with the department for a while and I feel like it’s really gone down and the safety is being more and more jeopardized”. The news article also noted that OCCC, which was designed for 629 inmates, now houses upward of 1100 inmates.<sup>104</sup>

■ **January 2017.** On January 6, 2017, the American Civil Liberties Union of Hawaii (ACLU) filed a 28-page Complaint with the U.S. Department of Justice alleging unconstitutional conditions at Hawaii’s prisons. The complaint documents unsafe and unsanitary living conditions, overcrowding, “woefully inadequate” medical and psychiatric care, understaffing, and other clearly unconstitutional conditions.<sup>105</sup>

■ **February 2017.** The Honolulu Star-Advertiser reported that for two years in a row, guards committed more sexual assaults on inmates than inmates committed on each other.<sup>106</sup>

■ **March 2017.** On March 31, 2017, the Honolulu Star Advertiser reported that ten women at WCCC filed a federal lawsuit alleging that they were sexually

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<sup>102</sup> Id.

<sup>103</sup> Haw. Rev. Stat. §96-9(b) (19\_\_).

<sup>104</sup> Jobeth Devera, “Assault of guards at OCCC highlights unsafe conditions for staff,” Hawaii News Now (October 1, 2017) available at <http://www.hawaiinewsnow.com/story/36496076/lockdown-lifted-after-occc-inmates-assault-guards>

<sup>105</sup> Letter, Mateo Caballero, ACLU Hawaii Legal Director to Vanita Gupta and Steven Rosenbaum, Untied States Department of Justice (January 6, 2017).

<sup>106</sup> Kevin Dayton, “Staff abuse outnumbers inmates’ for second year,” Honolulu Star-Advertiser, (February 26, 2017) available at <https://www.pressreader.com/usa/honolulu-star-advertiser/20170226/281487866125775>

assaulted by both male and female guards. According to the lawsuit, the inmates were given food, makeup, crystal meth and special privileges for complying with sexual demands.<sup>107</sup>

■ **July 2017.** On July 16, 2017, a jury on Maui found a guard at the Maui Community Correctional Center guilty of second degree sexual assault and two counts of third degree sexual assault on an inmate. According to the victim, the guard threatened to take her work furlough privileges away from her if she did not agree to have sex with him.<sup>108</sup>

■ **July-October 2017.** In the four-month period from July to November, 2017, there were four suicides at Hawaii Correctional Facilities. In at least two cases, the prisoners who committed suicide had a history of mental illness and previous suicide attempts. One of the inmates was reportedly on suicide watch when he hung himself.<sup>109</sup>

#### **D. Implementing Prison Reform**

The need for a strong implementation component to the oversight commission is clearly evident from the way PSD responded to Act 149 (Twenty-Seventh Legislature 2014). The Act required PSD to establish “within the department” a reentry pilot project for nonviolent, low-risk drug offenders. The program was to have up to 100 participants and its effectiveness was to be evaluated with respect to participants’ arrest record, substance abuse problems, employment status, compliance with terms and conditions of release, housing status, and the availability of positive support groups. The program was to follow “evidence-based principles”, and data was to be collected by service providers and submitted to PSD every six months for evaluation purposes. PSD was required to submit an annual report of its findings and recommendations, including any proposed legislation, to the legislature no later than twenty days prior to the convening of the regular sessions of 2015 and 2016.

PSD’s report to the 2015 legislature had no findings and no recommendations. It simply said: “PSD is unable to provide findings and recommendations as the appropriated funds have not been released by the Department of Budget and Finance.”<sup>110</sup>

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<sup>107</sup> Leslie Fujimori, “Lawsuit alleges sexual assault, harassment, at women’s prison,” Honolulu Star-Advertiser (March 31, 2017) available at <https://www.pressreader.com/usa/honolulu-star-advertiser/20170331/281848643443680>

<sup>108</sup> Associate Press, “Jury finds former Maui prison guard guilty of sexual assault,” Honolulu Star-Advertiser (July 16, 2017) available at <http://www.staradvertiser.com/2017/07/16/breaking-news/jury-finds-former-maui-prison-guard-guilty-of-sexual-assault/>

<sup>109</sup> See Leila Fujimori, “Father questions prison’s suicide policy after inmate hangs herself in cell,” Honolulu Star-Advertiser (August 6, 2017).

<sup>110</sup> Department of Public Safety, “Report to the 2015 Legislature, Act 149 (SLH 2014), Reentry Project for Non-violent, Low Risk Drug Offenders,” (November, 2014) available at [https://dps.hawaii.gov/wp-content/uploads/2015/02/Act-149-Reentry-Pilot-Project\\_2014\\_FINAL.pdf](https://dps.hawaii.gov/wp-content/uploads/2015/02/Act-149-Reentry-Pilot-Project_2014_FINAL.pdf)

The report to the 2016 legislature was not much better. It said:

Since the last report to the Legislature, PSD has established the Reentry Office within the Corrections Division, and the recruitment of five civil service staff is currently underway. These include three program specialists, one supervisor, and one support position.

PSD has already implemented certain functions envisioned by Act 149 by assigning tasks to existing staff, for example, the liaison with the Crime Victims Compensation Commission and the Interagency Council On Intermediate Sanctions. The Department is firmly committed to developing, coordinating, and monitoring the necessary functions to carry out the purposes of the Act.<sup>111</sup>

Once again, there were no findings and no recommendations for proposed legislation.

There was no report to the 2017 legislature.

Reentry is a complex and often difficult transition for offenders, their families, and the community. It is well known that former offenders are “likely to struggle with substance abuse, lack of adequate education and job skills, limited housing options, and mental health issues.”<sup>112</sup> Congress recognized this by passing the Second Chance Act of 2007 (SCA) which provides federal grants for programs that support research and evaluation of reentry programs.<sup>113</sup>

The Hawaii legislature is to be commended for passing Act 149 and seeking evidence based programs to assist offenders and reduce recidivism. Unfortunately, PSD and DAGS did not follow-through on the legislature’s good intentions, and the community has suffered by not having data on which to base new programs or improve existing ones. PSD’s response to Act 149 highlights why the State needs an independent commission to ensure that any prison reform measures that the Task Force recommends, and the legislature enacts into law, are faithfully and competently executed. This is particularly important because the Task Force is recommending a fundamental shift in the institutional culture of the Hawaii correctional system that will require exceptionally strong leadership and extensive retraining of correctional staff. To ensure that the transition to a rehabilitative system occurs in an orderly, timely, and sustainable manner, the oversight commission should monitor and oversee implementation of the new correctional model and report to the legislature on the progress that is being made by the Department of Public Safety so that we do not have a repeat of the Act 149 situation.

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<sup>111</sup> Department of Public Safety, “Report to the 2016 Legislature, Reentry Project for Non-violent, Low Risk Drug Offenders, Reentry Project for Non-violent, Low Risk Drug Offenders”, (December 2015) available at <https://dps.hawaii.gov/wp-content/uploads/2015/12/5-Act-149-SLH-2014-Reentry-Pilot-Project.pdf>

<sup>112</sup> Offender Reentry, National Institute of Justice (February 25, 2015 available at <https://www.nij.gov/topics/corrections/reentry/Pages/welcome.aspx>

<sup>113</sup> Pub. L. 110-199, codified at 42 U.S.C. § 17531.

## Chapter 4

### **THE LEGISLATURE SHOULD APPOINT A WORKING GROUP TO PLAN AND DESIGN AN ACADEMY TO TRAIN CORRECTIONAL WORKERS AND CONDUCT RESEARCH ON BEST PRACTICES**

#### **A. Training Correctional Staff**

As we noted in our 2017 Interim Report, the lack of standardized training for those involved in Hawaii's correctional system is problematic.<sup>114</sup> An untrained or poorly trained work force can lead to an unsafe workplace, low morale, and an inefficient workforce. The State has an affirmative duty to provide professional development for all correctional staff, including correctional officers and administrators, parole officers, probation officers, case managers, pretrial and intake services officers, judges and judiciary staff. Enhanced training at all levels is particularly important if, as we recommend, Hawaii is to transition from a punitive to a rehabilitative correctional model.

Most of the western states, including Arizona, Colorado, Idaho, New Mexico, Oregon, Utah, and Wyoming, have training academies that could serve as possible models for Hawaii. Hawaii could also learn much about training correctional workers from Norway, which has one of the best academies in Europe.

The academy we envision would provide training for employees at all levels of the correctional system. It would include basic training for new employees, and continuing education for those already working in the correctional system. The training curriculum would include a wide array of subjects including correctional philosophy, psychology, law, officer safety, mental health and addiction issues, public health and disease control, implementation of a state-wide rehabilitative strategy, civil and human rights, and related matters.

#### **B. Research and Evaluation**

We also envision that the academy would be responsible for creating and maintaining a performance management system and assisting in the transition to a rehabilitative correctional model and evidenced based programs (EBP).

Models for the academy's implementation support efforts can be found in Washington State, which created an Institute for Public Policy (WSIPP), and Pennsylvania which developed a policy-driven Commission on Crime and Delinquency (PCCD). The support and implementation side of the academy would, among other things:

- Develop data collection systems and collect relevant data
- Conduct program evaluations
- Measure program and policy outcomes
- Recommend evidence based programs and policies
- Conduct cost/benefit analysis
- Enhance accountability and transparency

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<sup>114</sup> 2017 Interim Report, p. 17.

- Report on progress to the legislature, funding sources, and community stakeholders
- Provide guidance on best practices and promising practices
- Develop staff manuals and training curricula
- Report on studies, findings, and reports that appear in the correctional literature
- Evaluate and improve risk assessment and classification instruments
- Assist in the transition from a punitive to a rehabilitative system

The Task Force believes that developing details of the academy and its cost requires specialized skill beyond those we possess, and therefore we recommend the creation of a working group to do detailed planning for the academy and draft proposed legislation for its creation, staffing and funding. The working group should include, at a minimum: PSD, Adult Probation, the Hawaii Paroling Authority, criminal court judges, the University of Hawaii Research and Evaluation in Public Safety (REPS), and community organizations that advocate for prisoners and that provide services to those involved in the correctional system.

## **7. CONCLUSION**

In addition to the six recommendations the Task Force made in its 2017 Interim Report, we recommend the following:

1. Enact legislation adopting the Task Force's vision statement, guiding principles, goals and objectives for Hawaii's justice system.
2. Require the Department of Public Safety to work collaboratively with stakeholders and the broader community to develop a strategy, along the lines recommended in this report, to reduce the projected jail population to around 150 to 200 beds, and reconsider the siting for the smaller facility with priority being given to a site near Oahu's two courthouses.
3. Appoint a working group to plan and design an academy to train correctional workers at all levels.
4. Create and fund an independent oversight and implementation commission.