



The Judiciary, State of Hawai‘i

**Testimony to the Senate Committee on Public Safety, Intergovernmental,
and Military Affairs**

Senator Clarence K. Nishihara, Chair
Senator Glenn Wakai, Vice-Chair

Tuesday, February 5, 2019, 1:15 p.m.
State Capitol, Conference Room 229

WRITTEN TESTIMONY ONLY

By

Shirley M. Kawamura

Deputy Chief Judge, Criminal Administrative Judge, Circuit Court of the First Circuit
Reporter, Criminal Pretrial Task Force

Bill No. and Title: Senate Bill No. 1540, Relating to Corrections.

Purpose: Senate Bill No. 1540 amends Section 353-10 of the Hawaii Revised Statutes to require intake service centers to conduct pretrial risk assessments and prepare bail reports within two, instead of three, working days; require bail reports to include a complete copy of the pretrial risk assessment, including, among other requirements, a written explanation of administrative scoring overrides; require the pretrial risk assessment to include the defendant’s financial circumstances and risk of violence or harm to any person and the general public; and require the pretrial risk assessment tool and procedures to be reviewed every five years and the review findings publicly reported.

Judiciary’s Position:

The Judiciary respectfully supports Senate Bill No. 1540, which adopts the recommendations of the Criminal Pretrial Practices Task Force.

Pursuant to House Concurrent Resolution No. 134, H. D. 1, Regular Session of 2017, Chief Justice Mark E. Recktenwald established the instant Criminal Pretrial Practices Task Force to examine and recommend legislation to reform Hawai‘i’s criminal pretrial system.



The Task Force embarked on its yearlong journey in August 2017. It began with an in-depth study of the history of bail and the three major generations of American bail reform of the 1960s, 1980s, and the last decade. The Task Force members researched the legal framework underlying current practices, which are firmly rooted in our most basic constitutional principles of presumption of innocence, due process, equal protection, the right to counsel, the right to confrontation and that in America, liberty is the norm and detention is the very limited exception. We invited national experts and delved into the latest research and evidence-based principles and learned from other jurisdictions where pretrial reforms are well underway. We reviewed previous studies conducted in our state, engaged with community experts and heard the views of our local stakeholders. We visited our cellblocks, jails, Intake Service Center (ISC) offices and arraignment courts in an effort to investigate and present an unbridled view of our criminal pretrial process.

The recommendations set forth in the report seek to improve our current practices, with the goal of achieving a more just and fair pretrial release and detention system, maximizing defendants' release, court appearance and protecting community safety. With these goals in mind, the Task Force submitted a total of twenty-five recommendations. The following five recommendations pertain to this bill.

- (1) Conduct risk-assessments and prepare bail reports within two (2) working days of the defendant's admission to a county correctional center.** For felony defendants who are arrested and charged via complaint and preliminary hearing, this two (2) day requirement is key. When a defendant is arrested, Hawai'i Rules of Penal Procedure Rule 5(c)(3) requires the district court to conduct a preliminary hearing within two days after the defendant's initial appearance. Requiring risk assessments and bail reports to be completed in two, rather than three, days would enable bail to be addressed at the earliest phases of the pretrial process, including at felony preliminary hearings. The current three day requirement for risk assessments (not bail reports) forgoes this opportunity to address bail early on. Felony defendants charged by way of preliminary hearing are relegated to wait until arraignment and plea in circuit court, which occurs generally 10 days later, for an opportunity to address bail and release. Requiring both risk assessments and bail reports to be available one day sooner will make relevant information available earlier in the process and provide a meaningful opportunity for courts to adjudicate a defendant's release or detention.
- (2) Inquire and report on the defendant's financial circumstances.** Federal courts have held that a defendant's financial circumstances and possible alternative release conditions must be considered prior to detention. Hawaii's statutes also instruct all officers setting bail to "consider [not only] the punishment to be inflicted on conviction, [but also] the pecuniary circumstances of the party accused." Courts must be provided with information regarding the defendant's financial circumstances when addressing bail.



- (3) **Evaluate the defendant's risk of violence.** The current risk-assessment tool, ORAS-PAT does not evaluate the defendant's risk of violence. While risk of non-appearance and recidivism remain critical components to an informed decision concerning pretrial release or detention, it is imperative that any evidence-based assessment also address risk of violence. Decisions to release or detain must take into account whether the defendant is a danger to a complainant or the community.
- (4) **Include the fully executed pretrial risk assessment as part of the bail report.** ISC and correctional center staff who administer the ORAS-PAT are allowed to employ overrides under current regulations, and these overrides frequently have the effect of increasing the restrictiveness of the release recommendations. To increase transparency, ISC should provide to judges and the parties, as part of the bail report, the completed risk assessment, including the score and written explanations of any overrides applied.
- (5) **Periodically review and the further validate the risk-assessment tool to evaluate the effectiveness of the tool and the procedures associated with its administration at least every 5 years. The findings of any such review should be publically reported.** In 2012, Hawai'i joined the ranks of these other states and began using a validated risk-assessment tool, the ORAS-PAT and as required by HRS § 353-10. The ORAS-PAT was validated in 2009 in Ohio where it originated, and also here in Hawai'i in 2014. Regular validation studies of the ORAS-PAT or any other tool utilized to conduct pretrial risk assessment is vital to ensure Hawai'i is using a reliable tool and process. Pre-trial risk assessments, including the ORAS-PAT, are primarily designed to provide an objective assessment of a defendant's likelihood of failure to appear or reoffend upon pre-trial release.

The recommendations above cannot be sustained or achieved by ISC without sufficient additional resources and personnel to carry out its mission. The Judiciary respectfully requests that the legislature give serious consideration to ISC's anticipated request for additional resources required to accomplish these new mandates.

The Judiciary fully supports passage of Senate Bill No. 1540 in so far as it adopts the recommendations of the Criminal Pretrial Task Force.

Thank you for the opportunity to submit testimony.