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**STATE OF HAWAII
HAWAII CORRECTIONAL SYSTEM OVERSIGHT COMMISSION**

January 3, 2022

The Honorable Sylvia Luke, Chair
House Committee on Finance

The Honorable Ty J.K. Cullen, Vice Chair
House Committee on Finance

The Honorable Donovan M. Dela Cruz, Chair
Senate Committee on Ways and Means

The Honorable Gilbert S.C. Keith-Agaran, Vice Chair
Senate Committee on Ways and Means

Dear Chair Luke, Vice Chair Cullen, Chair Dela Cruz, Vice Chair Keith-Agaran, and
Members of the Committees:

We, the members of the Hawaii Correctional Systems Oversight Commission, continue to be concerned about the planning and development of a new Oahu Community Correctional Center (OCCC) on Oahu. We find a replacement facility is much needed but disagree with the size and scope of the new facility as promoted by the Department of Public Safety and Department of Accounting and General Services.

For the past two years the plans for the OCCC replacement have been an agenda item during our monthly meetings and is an item that always generates considerable questions and discussion among those who regularly attend. Most share the concerns of the Commissioners.

A regular attendee is local attorney Robert K. Merce, the vice-chair of the House Concurrent Resolution 85 Task Force on Prison Reform and principal author of the group's final report to the 2019 Legislature. During our December 2021 meeting Mr. Merce presented a monograph he authored, entitled *Getting It Right: Better Ideas for a New Jail*, in which he argues the new jail planning process was flawed from the beginning. We agree with his findings and ask that the Hawaii State Legislature consider the matters so well-articulated in Mr. Merce's document (attached with the permission of the author). Our notes and comments are below.

HAWAII CORRECTIONAL SYSTEMS OVERSIGHT COMMISSION
NOTES AND COMMENTS ON
GETTING IT RIGHT: BETTER IDEAS FOR A NEW JAIL
BY ROBERT MERCE, ESQ.

The Hawaii Corrections Systems Oversight Commission (the “Commission”) concurs with the conclusions and recommendations offered by Robert Merce in his paper, “Getting It Right”, as presented to the Commission on December 16, 2021. Merce argues that the State should stop “issuing an RFP for the new jail (Oahu Community Correctional Center, or OCCC), and start planning a jail that we can afford and that reflects our values.” [p. 22]

The Commission continues to believe that a new OCCC is needed. OCCC is overcrowded and poorly designed and has been poorly maintained for decades. It has served the community beyond its useful life. We commend the Department of Public Safety for its focus on providing improved living conditions for inmates in its custody and working conditions for the employees who work in correctional facilities. However, we are disappointed by the manner in which the proposed new OCCC has been planned, and the Department’s lack of response to the recommendations of members of the community, including this Commission. We are concerned that the planned facility will be significantly larger and cost far more than is necessary, and that it will perpetuate a punitive model of our criminal justice system. Therefore, we agree with Merce that the State of Hawaii stop the planned issuance of a Request for Qualifications and a Request for Proposals to build the new OCCC.

Merce’s argument for stopping the planning is compelling:

The new jail will be a financial disaster and produce bad outcomes for decades, but it doesn’t have to be that way. If we work together we can build a jail that will make our community safer at a fraction of the cost of the jail now being planned. Working together we can build an innovative and transformative jail that will address the inequities of our criminal justice system, save lives, and meet the ever-evolving needs of our community. [p. 2]

The Commission agrees that there needs to be a more careful examination of “the policies and practices driving the jail population and address them as part of a comprehensive plan to manage both the jail population and the larger justice system more effectively and efficiently.” [p. 3]

The Commission’s Prior Recommendation

At its December 17, 2020, meeting, this Commission recommended that the State pause its planning for the new OCCC and establish a community advisory group to help explore policies, practices and programs that can provide alternatives to detention in a

secure jail. As Merce illustrates, several other jurisdictions in the United States have been able to reduce their jail populations after engaging in such a process. Before committing to a project that was estimated to cost over \$500,000,000 before the COVID pandemic, Hawaii needs to embark on a similar process that actively involves a broad range of stakeholders, including community agencies that provide health services (mental health, substance use disorders, medical support), housing, and employment; formerly incarcerated individuals; representatives of cultural groups that reflect the justice-involved population; victim advocates; persons with knowledge and expertise in the various aspects of the criminal justice system; and agencies directly involved with the criminal justice system. Such broad representation is necessary.

The Need for a Collaborative Process: The National Institute of Corrections advises:

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.

The collaboration needs to be with the broader Oahu community. OCCC detains individuals from the entire island, so the relevant community for planning the new OCCC must be Oahu-wide. Our community's policies in mental health, substance abuse, housing and other areas have had a major impact on the justice system. Decision makers from these areas need to be at the table. In Hawaii, there is strong interplay between probation and parole and correctional facilities. There needs to be collaboration among these entities. The courts, the prosecutors and the defense bar need to work together to examine processes that can contribute to jail crowding.

Concerns Relating to the Number of Planned Pre-Release Beds

"Oahu Community Correctional Center Pre-Final Forecast Report" of June 15, 2021 (OCCC Forecast), projects a need for 911 detention beds and 358 pre-release beds in 2032, for a total of 1269 beds at the redeveloped OCCC, if current policies and practices remain in place.. It is also our understanding that the 96-bed Laumaka facility will be retained. To justify the need for this large number of new pre-release beds the authors state, "Housing the re-entry population on Oahu has long been constrained by capacity limitations at the Waiawa Correctional Facility and Module 20 at OCCC. Simply put, the number of candidates for the re-entry program exceed the number of available beds". [p. 4]

This finding is inconsistent with the data. Hawaii's correctional system features two minimum security facilities that should play a prominent role in preparing inmates for reentry. For many months before the onset of the pandemic, both of these facilities - the Waiawa Correctional Facility and the Kulani Correctional Facility - have been and continue to be substantially underutilized. On December 15, 2021, Waiawa's head

count was 182, or 46% below its operating capacity of 334. Kulani's population was only 104, or 48% below its operating capacity. On the same day, OCCC held only 74 Sentenced Felons and 4 Parole Violators, which we presume would be the primary target groups for pre-release programming. If there were a robust reentry program, we would expect that the 96 beds at Laumaka facility would operate near capacity. We believe that further exploration is needed to determine if these repressed headcounts are reflective of the actual need for reentry beds or reflect issues in the reentry process utilized by the Department.¹

We fully support pre-release programming, as it is an essential element of the correctional process. However, the data indicates that housing for the re-entry population has not been constrained by bed capacity. It can be concluded that there is either an over-capacity of minimum or community beds, or that they have not been sufficiently utilized. Either way, it would seem difficult to justify 358 additional pre-release beds.

The Long-Term Operating Costs Must Be Carefully Examined

Commitment to the construction of a new OCCC is a commitment to decades of operating costs. The following must be considered:

- Operating costs are driven by design. OCCC has a high per capita cost because of its poor design. The design drives the number of Adult Correctional Officer (ACO) posts that must be filled three shifts per day, 365 days per year. Often these posts must be filled by ACOs working overtime. We don't know what the design of the new facility will be like, so we don't know how many posts will be required in the new OCCC.
- The per capita cost will not be significantly reduced just if the population is reduced. The relationship between posts and inmates is significantly less than 1:1. Because the number of posts is a primary driver, a reduction in population will not cause a noticeable reduction in costs unless the reduction is significant enough to warrant the closure of entire housing units, thus eliminating corresponding posts.
- Third, the question of lease rent is critical. Generally, construction in Hawaii is funded through GO bonds. Bonds issued by entities like State governments (assuming a good bond rating) attract more attractive interest rates than privately issued bonds. We may have to pay a premium if we opt for private financing through a P3 contract. The real issue, however, is that we will have to pay for the lease rent through the Department's operating funds. We don't know how much this will be, though we know it will be expensive, and we don't know for how long. Will it be twenty years? Thirty? What's the impact on the Department during this period? Moreover, will the P3 contract include a maintenance agreement? The State has a poor track record with facility maintenance., so a maintenance agreement makes sense. However, we can then expect to add to the expense.

¹ It is noted that while there were a combined 250 unused beds at Waiawa and Kulani, 1114 inmates were housed in a contract facility in Arizona. PSD pays the contractor on a set rate per inmate/day.

The Department's Own Reports Show that Reforms Will Impact the Size of the New OCCC

The OCCC Forecast included projections of the potential impacts of some specific reforms, as noted on page 5:

The analysis also indicated that **there are opportunities to reduce the OCCC average daily population**. Using a combination of offense, case status, and classification data, the findings suggest that there are four main segments of the population that may be reduced, ultimately resulting in a possible ADP reduction of 235 based on 2019 data.

Our analysis also provides indications that there are other opportunities to reduce the OCCC population. As of this writing, the Hawaii legislature is considering legislation to reduce or eliminate monetary bail (SB1260).² While the exact impact of SB1260 on future populations is unclear, such legislation is a good first step toward reducing the future OCCC population level. Clearly, the intent of the bill is to divert defendants from detention along very similar lines to what we employed in our diversion analysis. If this piece of legislation (or one like it) were to become law, future public policy initiatives should focus on expanding the reach of the legislation to also include certain low-level non-violent felonies as well as technical probation violations. This would mirror the approach we used in our diversion analyses. **Unless population reduction (such as the diversion estimates that we have detailed) can be implemented through policy and legal reforms, the new OCCC will still be a large facility with a large detention and pre-release population.**

Moreover, we note that it is critically important for the system to ensure that bail/risk information is available to all parties as early as possible in the judicial process in order to speed up case processing beyond the improvements we have noted in our analysis. **Such a practice would establish a strong foundation for a more robust pretrial services approach to divert and monitor appropriate defendants in the future, further suppressing correctional populations.** [p. 41- 42]

(Emphases added.)

These conclusions - from the State's own consultant - supports the need for a full exploration of policies and practices that can reduce the projected OCCC population without unduly risking community safety. Such an endeavor requires the participation of a broad range of community stakeholders.

² Senate Bill 1260, Relating to Criminal Pretrial Reform, was introduced in the 2021 Session. It passed Third Reading in both houses and was referred to conference committee. SB 1260, SD1, HD1, will carry over to the 2022 legislative session.

Conclusions and Recommendations

The Hawaii Corrections Systems Oversight Commission affirms its position that the planning for the new OCCC should be paused and that an Advisory Committee be convened to review and, if necessary, revise the planning that has been done to date, and to actively participate in the planning process going forward.

We appreciate your attention to these matters and are available to discuss our position with members of the Committees and their staff.

Sincerely,

A handwritten signature in black ink, appearing to read 'M. Patterson', with a long horizontal flourish extending to the right.

Mark K. Patterson, Chair
Correctional System Oversight Commission

- c: The Honorable Scott Saiki, Speaker of the House
- The Honorable Ronald D. Kouchi, President of the Senate
- The Honorable Takashi Ohno, Chair, House Committee on Corrections, Military, & Veterans
- The Honorable Clarence K. Nishihara, Chair, Senate Committee on Public Safety, Intergovernmental, and Military Affairs
- The Honorable David Y. Ige, Governor
- The Honorable Mark Recktenwald, Chief Justice
- The Honorable Carmen "Hulu" Lindsey, Chair, Office of Hawaiian Affairs
- Max Otani, Public Safety Director